

□ Procedure No.: PS/00135/2021

RESOLUTION R/00387/2021 TERMINATION OF THE PROCEDURE FOR PAYMENT
VOLUNTEER

In sanctioning procedure PS/00135/2021, instructed by the Spanish Agency for
Data Protection to TELEFÓNICA DE ESPAÑA, S.A.U., given the complaint
presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On April 14, 2021, the Director of the Spanish Agency for
Data Protection agreed to initiate a sanctioning procedure against TELEFÓNICA DE
SPAIN, S.A.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00135/2021

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: D.A.A.A. (hereinafter, the claimant) dated February 26, 2020
filed a claim with the Spanish Data Protection Agency. The
claim is directed against TELEFÓNICA DE ESPAÑA, S.A.U. with NIF A82018474
(hereinafter, the claimed).

The reasons on which the claim is based are that your data has been used to
hire a Movistar Fusion service from March 19, 2019 until October
of the same year, when the line is terminated due to non-payment.

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On the other hand, it indicates that it has been included in the information files

loan for unrecognized debt.

That it has nothing to do with the contracted service or with the address of

installation of these services.

Likewise, you do not know how the debt collection company has located you since

the number ***PHONE.1.

Relevant documentation provided by the claimant:

-Copy of police report dated February 19, 2020 where it is stated that:

a. That the events occurred on 03/18/2019

b. That on 02/13/2020 he received a call from the number ***TELEPHONE.1

identifying itself as ISFG consultancy claiming a debt of

*** AMOUNT.1 euros with Movistar.

c. That the claimant states that he is not a client of Movistar, which is why

who showed up at a Movistar office where they informed him that indeed

there was a debt in his name corresponding to five invoices dated

05/04/2019, 06/04/2019, 07/04/2019, 08/04/2019, 09/04/2019.

d. That in the Movistar office they have been able to verify that, although the invoices

They appear in your name and your DNI appears, the address that appears in them is

that of ***ADDRESS.1, address that is totally unknown by the

claimant.

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and. That they must have used your data and that at no time has it lost or

Your ID has been stolen.

-Copy of Certificate of Registration of the City Council of DAIMUS signed in date 02/24/2020 where the name, surnames and DNI number of the claimant and the address ***ADDRESS.2.

-Copy of Movistar Fusion invoices with invoice dates 05/04/2019, 06/04/2019, 07/04/2019, 08/04/2019, 09/04/2019 respectively and where it is stated:

a. The first period of consumption is from March 18, 2019 to April 17, 2019 and the last consumption period is from July 18 to August 17.

a. The fixed line ***TELEPHONE.2 and the mobile line ***TELEPHONE.3

c. The identification data of the claimant, DNI, and address

***ADDRESS 1.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant and 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 found that the responsible for the treatment is the claimed.

In addition, the following extremes are noted:

On 12/30/2020, TELEFÓNICA DE ESPAÑA, S.A.U. sends to this Agency the following information and statements:

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That the contracting of the services took place on March 20, 2019

1.

through the telephone channel on 1004.

That the contracted lines were the fixed line ***TELÉFONO.2 and the lines two.

mobile phones ***PHONE.3 and ***PHONE.4.

3.

That it has not been possible to locate a copy of the recording of the contract done. That for this reason the contracted services were withdrawn and proceeded to cancel all invoices issued.

4..

That the security measures they had implemented in the 1004 in the time of hiring, focused on verifying the identity of the person contracting party for new hires are:

a.

Check the age of majority.

Your identification through your name, surname, number and type of

b.

identification document.

c.

d.

and.

Limit the number of registrations to 5 with the same identification.

Limit the number of hires at the same mailing address to 5.

Check on previously contracted debt.

Verification of the postal address through a tool

F.

internal address verification.

g.

Verification at the address identified by the client of the data

provided by him at discharge through the display of the document of

identity to the installer.

That there is no record in their systems of a copy of the documentation collected for the

5.

verification of the identity of the claimant, reason for which the withdrawal was made

of the contracted services, as well as the cancellation of all invoices issued.

6.

That during 2020 the following measures have been implemented:

a.

On the phone channel.

Referral to the face-to-face channel of those sensitive operations that advise

an additional identification of the client (eg Registration, mobile portability and

SIM card duplicates)

Referral to the online channel for personal data modification operations and

to a specialized Back Office the requests for change of owner and change of means of contact for movistar.es credentials.

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b.

In the face-to-face channel.

An additional penalty has been established for the entire face-to-face channel for each management carried out and documented incorrectly by a commercial.

Weekly publication of a report detailing, store by store, certain sensitive operations to check if it is carried out correctly or not the client identification.

Verification call for authorized persons, which consists of making a prior control call to the line on which certain sensitive operations, so that the owner customer can authorize or not such operation before execution.

7.

That in 2020 work has been done on the development of a system of customer authentication via OTP to reinforce the level of identification of its customers. That this system is being implemented progressively.

8.

That in 2021 they are working on the development of a digital Onboarding of its clients that allows them to have their verified digital identity registered and

biometric authentication.

9.

That in relation to the causes that have motivated the incidence, it states that confirmed that the facts were compatible with a possible impersonation of identity and that all the actions were carried out to regularize the situation proceeding to cancel the debt and request the exclusion of the claimant from the asset insolvency files in which it had been included

That a letter addressed to the claimant has been sent to his email address

10.

electronically and provide a copy of the letter dated July 3, 2020.

It provides a screenshot of its systems where the postal address of the eleven.

claimant at Street ***ADDRESS.1.

Provides a copy of the letters addressed to the claimant at the address that appears in his

12.

systems claiming the debt. It provides shipping certificates and no return.

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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

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 provision 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", 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 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 of the RGPD that, under the heading "General conditions for the imposition of administrative fines", states:

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

with section 2, with administrative fines of a maximum of 20,000,000 Eur or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the largest amount:

a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9.”

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, 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:

(...)

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.”

It must be taken into account that the documentation in the file offers evidence that the claimed party violated article 6.1 of the RGD, since processed the personal data of the claimant without legitimacy to do so.

Well, the defendant recognizes the possible identity theft in a contracting carried out in channel 1004. However, it states that it does not have the recording nor is there in their systems a copy of the documentation collected for the verification of the claimant's identity.

Likewise, they indicate that they have canceled the debt and requested the exclusion of the insolvency files, and that they have adopted a series of measures aimed at improving

the identity verification system, some applied already in the year 2020, and

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others in development.

The lack of diligence displayed by the entity in complying with the

obligations imposed by the personal data protection regulations

it is therefore evident. Diligent compliance with the principle of legality in the treatment

of third-party data requires that the data controller be in a position

to prove it (principle of proactive responsibility).

III

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

visions 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;

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

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

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

case, to what extent;

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

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

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

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

certificates approved in accordance with article 42, and

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

case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.”

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

Article 76, "Sanctions and corrective measures", provides:

“two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of 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 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) 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 transcribed precepts, and without prejudice to what may result of the instruction of the procedure, in order to set the amount of the sanction of fine to be imposed on the defendant as responsible for an infraction typified in the article 83.5.a) of the RGPD, in an initial assessment, they are estimated to be concurrent in the present case, as aggravating factors, the following factors:

- The duration of the illegitimate treatment of the data of the affected party carried out by the

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claimed (article 83.2. a) of the RGPD).

- The intentionality or negligence of the infringement (art.83.2. b) of the RGPD).

- Basic personal identifiers are affected (personal data

and banking (art.83.2. g) of the RGPD).

- The evident link between the business activity of the defendant and the

processing of personal data of clients or third parties (article 83.2.k, of the

RGPD in relation to article 76.2.b, of the LOPDGDD)

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: START A SANCTIONING PROCEDURE against TELEFÓNICA DE

SPAIN, S.A.U. with NIF A82018474, for the alleged violation of article 6.1. of

RGPD typified in article 83.5.a) of the aforementioned RGPD.

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

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, on the Regime

Legal Department of the Public Sector (LRJSP).

THIRD: INCORPORATE to the disciplinary file, for evidentiary purposes, the

claim filed by the claimant and her documentation, the documents

obtained and generated by the General Subdirectorate for Data Inspection.

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, the

sanction that could correspond would be 75,000 euros (seventy-five thousand euros), without prejudice to what results from the instruction.

FIFTH: NOTIFY this agreement to TELEFÓNICA DE ESPAÑA, S.A.U. with NIF A82018474, granting a hearing period of ten business days for formulate the allegations and present the evidence that it deems appropriate. In its

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Allegation brief must provide your NIF and the procedure number that appears 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 established at 60,000 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 60,000 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 45,000 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

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indicated above, 60,000 euros or 45,000 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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: On May 17, 2021, the respondent has proceeded to pay the

SECOND

sanction in the amount of 45,000 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

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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, 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.

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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/00135/2021, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to TELEFÓNICA DE 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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