

824-150719

☐ Procedure No. PS/00429/2019

RESOLUTION: R/00113/2020

In sanctioning procedure PS/00429/2019, instructed by the Spanish Agency for Data Protection to the entity VODAFONE ESPAÑA, S.A.U., given the complaint filed by A.A.A., and based on the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) on February 21, 2019 filed claim before the Spanish Data Protection Agency. The claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (hereinafter, the claimed one).

The claimant states that he contracted telephony services with the entity claimed as a new discharge.

Subsequently, he receives a series of text messages informing him of discharge in another operator and informing you that your order is in progress.

Thus, after making the pertinent inquiries, the claimant discovers that a worker at the Vodafone store pretended to be him, registering with another company and thus carry out portability by providing DNI and data without consent and forging your signature.

And, among other things, it provides the following documentation:

- ☐ Screenshot of received text messages.
- ☐ Copy of the delivery note for 1 package at the address ***ADDRESS.1 where it appears as recipient of the shipment A.A.A. and INTERBOX (LLAMAYA) appears as sender. The delivery note figure signed by A.A.A..

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to

carry out actions for its clarification, under the powers of investigation

granted to the control authorities in article 57.1 of Regulation (EU) 2016/679

(General Data Protection Regulation, hereinafter RGPD).

Thus, on April 10, 2019, the complaint was transferred to the party claimed.

in the actions with reference E/04041/2019. The notice is delivered dated

April 15, 2019. No reply received

Well, on September 17 of this year, the request for

information to the claimed party, in the proceedings with reference E/07681/2019. The

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notification is recorded delivered on the 18th of the same month and year, not having received response in this Agency.

THIRD: On December 3, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed entity, in

under the powers established in article 58.2 of the RGPD and in articles 47, 64.2 and

68.1 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and

Guarantee of Digital Rights (LOPDGDD), for the violation of article 6.1 of the RGPD

typified in article 83.5.a) of the RGPD.

FOURTH: Notified of the initiation agreement, the entity claimed, by means of a letter dated 26

December 2019, made, in summary, the following allegations:

“It should be noted, in the first place, that the factual assumption before which we find ourselves and

that affects Vodafone is the part of the portability of the claimant's unacknowledged line

which was managed by the teleshopping channel. In this sense, it is provided as a document

number 1 the recording of said hiring that, clearly, shows that for me represented the hiring was correct and had the appearance of certain and consented by the headline.

In this sense, it is relevant to highlight the repeal of article 130 of Law 30/1992, of 26 of November, on the Legal Regime of Public Administrations and the Procedure Common Administrative.

Again, we retract that my client understands that we are facing the lack of scope for liability without fault, a principle that governs or must govern in the sanctioning administrative.

It has been shown that Vodafone could not have been aware of the misuse by employee's part of the claimant's data, in addition to the fact that there is the recording that demonstrates that there was a hiring that exceeded the security requirements established for the teleshopping channel. Therefore, for Vodafone, we insist, this contracting had a legitimate appearance and had the consent of the owner. sample of diligence and lack of intent is the fact that my client at the same time that was aware of the situation, qualified the registration as fraud and terminated the service.

For all these reasons, agree: The dismissal of the file, with the consequent filing of the performances. Subsidiarily, impose a sanction on my client having taken into account account the AEPD for the determination of its amount, the alluded mitigating factors”.

FIFTH: On January 10, 2020, the test practice period began, remembering: 1. Consider reproduced for evidentiary purposes the complaint filed by the claimant and his documentation, the documents obtained and generated that are part of the file and 2. Consider reproduced for evidentiary purposes, the allegations to the agreement of beginning of PS/00429/2019, presented by the entity denounced.

SIXTH: On February 4, 2020, it was issued and notified on the 6th of the same month and year to Vodafone the Resolution Proposal, for alleged infringement of article 6 of the RGPD,

typified in article 83.5 of the RGD, proposing a fine of €60,000.

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Vodafone presented arguments to the Resolution Proposal, stating that it reiterates the allegations already made to the Home Agreement.

PROVEN FACTS

1º On February 21, 2019, the claimant states that he contracted the services of telephony with the entity claimed as a new registration.

Subsequently, he receives a series of text messages informing him of discharge in another operator and informing you that your order is in progress.

2º The claimant provides a screenshot of the text messages received and a copy delivery note of a package at the address *** ADDRESS.1 where it appears as recipient of the shipment A.A.A. and INTERBOX (LLAMAYA) appears as sender. the delivery note figure signed by A.A.A.

3rd It is recorded that on April 10, 2019, the complaint was transferred to the party claimed in the proceedings with reference E/04041/2019. The notice is delivered dated April 15, 2019. No reply received

4º On September 17 of this year, the request for information was sent again to the party claimed, in the proceedings with reference E/07681/2019. The notice consists delivered on the 18th of the same month and year, not having received a reply in this Agency.

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 Organic Law 3/2018, of December 5, of Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

II

The defendant is accused of committing an infraction for violation of article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the cases 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 his consent for the processing of his personal data for one or more specific purposes;
- b) the treatment is necessary for the execution of a contract in which the interested party

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is part of or for the application at the request of the latter of pre-contractual measures;

(...)"

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

"5. Violations of the following provisions will be sanctioned, in accordance with the section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, of an amount equivalent to a maximum of 4% of the total turnover annual global of the previous financial year, opting for the highest amount:

a) The basic principles for the treatment, including the conditions for the consent

treatment 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" states:

"1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679, considered very serious and will prescribe after three years 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 Regulation (EU) 2016/679.”

III

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, every time there was a fraud in the contracting, as well as in the request for the order that was made on behalf of the claimant without his consent.

The Administrative Litigation Chamber of the National High Court, in cases such as the one that arises here, has considered that when the owner of the data denies the hiring

The burden of proof corresponds to the person who affirms its existence, and the person responsible for the data processing of third parties collect and keep the necessary documentation to accredit the consent of the holder. We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

However, and this is essential, the respondent has not proven that the holder of the personal data object of treatment will give consent to the celebration of a contract with the claimed entity. He did not fulfill the inexcusable obligation imposed by the data protection regulations to prove that it collected and obtained the consent of the owner of the data for its treatment.

The respondent did not prove that the affected party gave his consent, nor did he provide any document or element of evidence that proves it, and did not display the minimum diligence required to verify that your interlocutor was indeed who he claimed to be.

Respect for the principle of legality, before the principle of consent, which is in the

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essence of the fundamental right to protection of personal data, requires that accredited evidence that the owner of the data consented or, at least, that the person responsible for the treatment displayed the essential diligence to prove that point. not to act like this -and if this is not required by this Agency, which is responsible for ensuring compliance with the regulations governing the right to protection of personal data- the result would be to empty the content of the principle of legality.

IV

In order to determine the administrative fine to be imposed, the following must be observed:

the provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

“Each control authority will guarantee that the imposition of administrative fines in accordance with this article for the infringements of this Regulation indicated in the 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 referred to in article 58, section 2, letters a) to h) and j). When deciding to impose an administrative fine and its amount In each individual case, due account shall be taken of:

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

such as the number of interested parties affected and the level of damages that

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 they have applied under

of articles 25 and 32;

e) any previous infringement 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 remedy the

infringement and mitigate the possible adverse effects of the infringement;

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 whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

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

previously 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 of

certification approved in accordance with article 42, and

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

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such as financial benefits obtained or losses avoided, directly or indirectly, through the 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, also may be taken into account:

- a) The continuing nature of the offence.
- 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 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) 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 precepts transcribed, in order to set the amount of the sanction of fine to be imposed in the present case for the infringement typified in article 83.5.a) of the RGPD for which the defendant is held responsible, the following factors are considered concurrent:

As aggravating criteria:

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The nature, seriousness and duration of the infraction, (section a).

The intent or negligence in the infringement (section b).

- For other previous infractions committed by the person in charge or the person in charge of the treatment (section e).

- Basic personal identifiers are affected (name, surnames, domicile) (section g).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with respect to the infraction committed by violating what is established in article 6 allows to set a sanction of 60,000 euros (sixty thousand euros), typified as "very serious", for the purposes of prescription of the same, in article 72.1.b) of the LOPDGDD.

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Considering the aforementioned precepts and others of general application,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for a violation of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €60,000.00 (sixty thousand euros).

SECOND: NOTIFY this resolution to VODAFONE ESPAÑA, S.A.U. with NIF A80907397.

THIRD: Warn the sanctioned person that he must make the imposed sanction effective once that this resolution is enforceable, in accordance with the provisions of art. 98.1.b) of

Law 39/2015, of October 1, of the Common Administrative Procedure of the

Public Administrations (hereinafter LPACAP), within the established voluntary payment period in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its income, indicating the NIF of the sanctioned and the procedure number that appears in the heading of this document, in restricted account number ES00 0000 0000 0000 0000 0000, opened in the name of the Spanish Agency for Data Protection in the Bank CAIXABANK, S.A. Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is between the days 1 and 15 of each month, both inclusive, the term to make the voluntary payment will be until on the 20th day of the following month or immediately after, and if it is between the 16th and last of each month, both inclusive, the payment term will be until the 5th of the second month next or immediately following business.

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

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

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of one month from the day

following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

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, in the

period of two months from the day following the notification of this act, as

provided for in article 46.1 of the aforementioned Law.

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

precautionary suspension of the firm decision in administrative proceedings if the interested party expresses

its intention to file a contentious-administrative appeal. If this is the case, the

The interested party must formally communicate this fact in writing addressed to the Agency

Spanish Data Protection, presenting it through the Electronic Registry of the

Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through one of the

remaining records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1.

You must also transfer to the Agency the documentation that proves the effective filing

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of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the day

following the notification of this resolution, it would end the suspension

precautionary

Sea Spain Marti

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