Procedure No.: PS/00275/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and

based on the following

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated March 12, 2019

filed a claim with the Spanish Agency for Data Protection, it was

directed against VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (hereinafter, the

claimed), in which it states that the operator sends your invoices with your data

personal to your neighbor's home. On the one hand, they appear on the letterhead of the letter

the latter's data (full name and address), but the invoice corresponds to the

name, ID, address, etc., of the claimant.

With the written claim, provide a copy of the letter sent by the claimed party.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant, the Subdirectorate General for Inspection of

Data 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:

This Agency transferred this claim to the respondent by means

electronic, granting a period of one month for its response and it is recorded as

date of acceptance by him on May 20, 2019. After this period has elapsed, no

responded to the request made by this body.

For this reason, this claim is admitted for processing in

regarding the security measures adopted, and without the entity having given

response to the Spanish Data Protection Agency.

THIRD: On September 26, 2019, the Director of the Spanish Agency

of Data Protection agreed to initiate sanctioning procedure to the claimed, with

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for the alleged infringement of article 5.1 f) of the RGPD, typified in the

Article 83.5 a) of the RGPD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

arguments by means of a document dated October 11, 2019, it formulated in summary the

following allegations; “The claimant affirms in her complaint that Vodafone sends its

invoices to the address of your neighbor, appearing on the letterhead of the letter the data of your

neighbor, but in the invoice the data of her.

The AEPD includes in the Start Agreement that my client has not answered

to the request for information that was notified.

Vodafone, first of all, wants to state that after receiving the request

of information E/5008/2019, Vodafone analyzed the claim and began the procedures

necessary to solve the problem that had been brought to our attention.

It was verified that, indeed, in the claimant's contract, the address that she

had consigned was already his correct, with the floor 3ºC, but indeed

We verified that under the same client ID there was a card that contains both the

data of the complainant as well as those of her neighbor.

From this we deduce that there has been a crossing of data data that the data of your

neighbor do not appear in any documentary support related to the claimant. In

concrete, it is possible that the facts have had for some problem in the migration

data contained in one system to a different system.

In this sense, it is relevant to highlight the repeal of article 130 of the Law

30/1992, of November 26, on the Legal Regime of Public Administrations and

of the Common Administrative Procedure. Its replacement by article 28.1 of the Law

40/2015 of October 1, on the Legal Regime of the Public Sector eliminates the mention of

the "simple non-observance" making the rule "nullum poena sine culpa" prevail.

The foregoing comes only to highlight the lack of room for the

responsibility without fault, principle that governs or must govern in the administrative field

sanctioning, because to the extent that it is a manifestation of "ius puniendi" of the State,

It is inadmissible in our legal system a liability regime

no fault

In this sense, it indicates Judgment of the Constitutional Court number 219/1988, and this

for being inadmissible a system of strict liability or without fault as

it also comes to point out Judgment 246/1991. I cannot be penalized

represented for infraction of article 6.1. of the RGPD, without reference to the

subjective element of the type, not proving fraud, guilt, or negligence.

Additionally, taking into account the special nature of penalizing law

that determines the impossibility of imposing sanctions without taking into account the will

of the acting subject or the factors that may have determined the breach of a

legal obligation, this part maintains the inadmissibility of the imposition of sanctions

some.

Thus, the Supreme Court in Judgment of December 21, 1998 (RJ1998/10226)

(Recourse of Appeal 9074/1991), January 27, 1996 (RJ 1996\926) (Recourse of

Appeal 640/1992) and January 20, 1997 (RJ 1997\257) (Appeal

2689/1992)". The Supreme Court also points out in a Judgment of July 20,

1990, Ar. 6163,

Well, as can be seen, in the behavior described there is no

intentionality, neither by way of intent, nor by way of guilt. Therefore, do not

If there is any guilt, it is totally inadmissible to impose a sanction

any to my client, as long as one of the essential requirements of the

Sanctioning Administrative Law.

For all these reasons, neither represented understands that what is appropriate is for the AEPD to agree on the

dismissal of this file and the file of the proceedings since the

facts have occurred without any intention on the part of my client and

It seems that due to some kind of error. Subsidiarily and in the event that

Despite the explanations provided above, the Agency understood that my

represented is deserving of a sanction for the commission of an infringement of art.

6.1. of the RGPD, the amount of said sanction must be moderate, imposing in its minimum amount, taking into account the following circumstances set out in art. 83.2 of the GDPR:

It is requested, therefore, to agree: The dismissal of the file, with the consequent record of proceedings. Subsidiarily and in the event that despite the explanations previously provided, the Agency understands that my client is deserving of a sanction for the commission of an infraction of article 6.1 of the RGPD, the amount of said sanction must be moderated, imposing its amount minimal".

FIFTH: On October 28, 2019, the practice period for evidence, remembering: a).- to consider reproduced for evidentiary purposes the claim filed by the claimant and his documentation, the documents obtained and generated that are part of file E/05008/2019 and b).- consider reproduced evidentiary effects, the allegations to the initiation agreement of PS/00275/2019, presented by the accused entity.

SIXTH: Dated November 29, 2019, issued and notified on December 3 of the same year to Vodafone the Resolution Proposal, for presumed infraction of the article 5.1.f) of the RGPD, typified in article 83.5 of the RGPD, proposing a €50,000 fine.

Vodafone presented arguments to the Resolution Proposal, stating which is reiterated in the allegations already made to the Home Agreement.

Of the actions carried out in this procedure, of the information and documentation presented by the parties, the following have been accredited:

PROVEN FACTS

From the information and documentation provided by the parties in this procedure, prove the following facts:

1º On March 12, 2019, the claimant files a claim before

the Spanish Agency for Data Protection, stating that the operator

send your invoices with your personal data to your neighbor's address. By a

part, the data of the latter appear on the letterhead of the letter (full name and

address), but the invoice corresponds to the name, DNI, address, etc., of the

claimant.

2º The AEPD transferred the claim, stating as the date of

acceptance on May 20, 2019, and without the entity having responded to

the AEPD.

3º Dated on October 11, 2019, the entity claimed in the period of

allegations, states that the facts are the result of a specific error, that in the

Currently, this error has been corrected and the data from the

neighbor of the claimant. Provide screenshot with corrected data.

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and as established in arts. 47 and 48.1 of the LOPDGDD, the

Director of the Spanish Data Protection Agency is competent to resolve

this procedure.

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II

The defendant is imputed the commission of an infraction for violation of the

Article 5.1.f) of the RGPD, which states that:

"1. The personal data will be:

(…)

f) Treated in such a way as to guarantee adequate security of the

personal data, including protection against unauthorized or unlawful processing

against its loss, destruction or accidental damage, through the application of measures

appropriate technical or organizational

The infringement of article 5.1.f) of the RGPD, for which the

entity VODAFONE, is typified in article 83 of the aforementioned legal text

that, under the heading "General conditions for the imposition of fines

administrative", says:

"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:
a)
The processing of personal data violating the principles and guarantees
established in article 5 of Regulation (EU) 2016/679."
III
The documentation in the file shows that the defendant violated
the principle of confidentiality.
It is important to note that the claimant has provided a copy of the letterhead of
the letter in which the details of your neighbor appear (full name and address), but
the invoice corresponds to the name, DNI, address, etc., of the claimant.
Therefore, there is no doubt, given the regulation that violates the duty of secrecy of the
article 5.1.f) of the RGPD. It does not comply with security measures that give rise to
breach of confidentiality article 5 LOPDGDD.
IV
In order to determine the administrative fine that should be imposed in the matter that
We are dealing with it is mandatory to abide by the provisions of articles 83.1 and 83.2 of the
RGPD, provisions that establish:
"Each control authority will guarantee that the imposition of fines
administrative actions under this article for violations of this
Regulation indicated in sections 4, 9 and 6 are in each individual case
effective, proportionate and dissuasive."
"Administrative fines will be imposed, depending on the circumstances of
each individual case, in addition to or as a substitute for the measures contemplated in the

Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

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

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

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

case, to what extent;

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

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

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

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

certificates approved in accordance with article 42, and

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

case, such as financial benefits realized or losses avoided, direct

or indirectly, through infringement."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

"Sanctions and corrective measures", 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 after the commission

of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of

data.

h) The submission by the person in charge or person in charge, with

voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any

interested."

In accordance with the precepts transcribed, in order to determine the amount of the

fine to be imposed on the defendant as responsible for an offense classified in the

article 83.5.a) of the RGPD, it is estimated that the following factors concur:

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Only two people have been affected by the conduct of the defendant.

The damage caused to those affected by breach of the confidentiality of their data

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cannot be considered significant.

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The lack of diligence shown by the respondent can be classified as significant.

There is an obvious link between the processing of personal data and

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the activity carried out by the respondent.

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The defendant is considered a large company.

In order to set the amount of the penalty to be imposed in this case,

considers that it is appropriate to graduate the sanction to be imposed in accordance with the

following criteria established in article 76.2 of the LOPDGDD:

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Linking the activity of the offender with the performance of treatments

of personal data, (section b).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with

Regarding the infraction committed by violating the provisions of article 5.1.f) of the

RGPD allows to set a penalty of 50,000 (fifty thousand euros), considered as

“very serious”, for prescription purposes, in 72.1. a) of the LOPDGDD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for a

infringement of Article 5.1.f) of the RGPD, typified in Article 83.5 of the RGPD, a

fine of €50,000.00 (fifty thousand euros).

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

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established 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 entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise,

it will be collected during the executive period.

Received the notification and once executed, if the date of execution is

is between the 1st and 15th of each month, both inclusive, the term to carry out the

voluntary payment will be until the 20th day of the following month or immediately after, and if

is between the 16th and last day of each month, both inclusive, the term of the

payment will be until the 5th of the second following month or immediately after.

In accordance with the provisions of article 50 of the LOPDGDD, the

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 in accordance with art.

48.6 of the LOPDGDD, 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

month from the day following the notification of this resolution or directly

contentious-administrative appeal 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.

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

LPACAP, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other

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

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

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

precautionary suspension.

Electronic Registration of

through the

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