

□ File No.: PS/00557/2021

RESOLUTION OF TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

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

BACKGROUND

FIRST: On November 29, 2021, 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
transcribe:

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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 September 17
2020 filed a claim with the Spanish Data Protection Agency. The
claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (in
hereinafter, the claimed party or Vodafone). The grounds on which the claim is based
are the following.

The complaining party states that, on September 10, 2020, he received a call
from a Vodafone commercial manager, on your landline number ***TELEFONO.1,
offering you a promotion of said company, in a campaign to recover
old clients.

Thus, the claimant agrees to port her mobile phone lines. act followed another Vodafone manager calls you and provides you with a WhatsApp number, to confirm their adherence to the offer and the claimant proceeds to send a copy of their DNI and the bank account number, leaving the installation of Vodafone pending.

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Later, on September 14, 2020, after receiving a message from his company telephone, where it was indicated that they would proceed to unsubscribe, he writes a message to the WhatsApp number, being the same disconnected or out of coverage, so who called various Vodafone numbers and thus managed to cancel the contract. Without However, minutes later he receives a call on his mobile ***TELEFONO.2 from salesperson who initially contacted her, berating her for canceling the offer and threatening it. After hanging up, he continued calling him through different numbers ***PHONE.3, ***PHONE.4, ***PHONE.5 and ***PHONE.6.

They later called her daughter posing as the claimant and scared her saying that the claimant had had a serious accident.

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.

THIRD: On February 15, 2021, the Director of the Spanish Agency for

Data Protection agreed to admit for processing the claim presented by the party claimant.

FOURTH: The General Subdirectorate for Data Inspection proceeded to carry out of previous investigative actions to clarify the facts in matter, by virtue of the investigative powers granted to the authorities of control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of Data Protection, hereinafter RGPD), and in accordance with the provisions of the Title VII, Chapter I, Second Section, of the LOPDGDD, having knowledge of the following ends:

On May 10, 2021, Vodafone sends this Agency the following information and demonstrations:

1.

On the one hand, they state that they have verified that the portability order was never managed, subsequently receiving a request for cancellation of the claimant that was attended by Vodafone and processed at the same time.

two.

They point out that, regarding the treatment of the agent, they have identified the entity responsible for hiring the agent who managed said claim and report that Vodafone has terminated the service provision contract that the parties had signed by burofax issued on January 29, 2021.

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3.

They provide a letter sent to the claimant, in which they inform her that her portability was canceled immediately and they have terminated the contract with the entity responsible for the agent who assisted you and who provided services to Vodafone

Subsequently, on July 27, 2021, Vodafone states the following:

That the subcontracted company that employs the identified agent is Axadil

1.

Phone S.L.

Provide a copy of contracts signed and dated March 20, 2020 with said entity where it is stated that Axadil Phone S.L. acts as data processor.

What is in the contract:

As the duration of the contract “[...] from October 1,

a.

2019 until March 31, 2020 without prejudice to the duration established by the annexes to it. After that term, this contract will be extended automatically for one (1) additional year, that is, until April 1, 2021[...].

“14.4. In accordance with the provisions of the Commercial Code, the AGENT

b.

must keep each and every one of the books, correspondence, documentation and supporting documents, relating to its activity and accounting for a period of, to least six (6) years, without prejudice to the obligations assumed by the AGENT in compliance with the Data Protection legislation in force in each moment. VODAFONE or an audit firm designated by VODAFONE will be empowered to examine such documents at any time, provided that mediate a notice of at least forty-eight (48) hours in advance and the Examination takes place during normal office hours. The AGENT must provide such performance by enabling a space for this purpose in their offices or supplying the

documentation that is required. In particular, the AGENT must keep your copy of the contracts signed by the Clients (both of the contracts of registration in the electronic communications service as well as in the Contracts of Permanence) as well as a copy of the supporting documentation of the identity of the clients.[...]"

c.

"14.6. The AGENT will only process the data collected from the Client with the purpose of carrying out the object of this contract, applying the measures of security adequate and defined in the LOPD and in the RLOPD. The AGENT will treat the data in accordance with the instructions of VODAFONE and will not use them for a purpose other than that established in this contract.

14.7. In accordance with what is stated in article 12 of the LOPD, it will not be considered communication or transfer of data the access by the AGENT to the Customer data, since said access, and the corresponding treatment, is necessary to perform the provision of the contracted service.

That is why, for all purposes, the AGENT will be considered as

"in charge of the treatment" of the VODAFONE data and, accordingly,

It is expressly established that the AGENT will only process the data of the Customers in accordance with the instructions of VODAFONE, which will not apply or

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Also stated in the contract:

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will be used for a purpose other than that which appears in the agreement between the parties, nor the

will communicate, not even for its conservation, to other people. VODAFONE to all effects will be considered responsible for the file to which the AGENT have access as a result of the provision of the service object of this contract. The AGENT will be considered the person in charge of the treatment, having to formalize the standard data processing agreement that is attached as Annex III, through which its obligations in this matter are collected. The AGENT shall hold VODAFONE harmless from any damage arising from the breach by the AGENT or its third-party collaborators of any of the obligations set forth in this clause or in the annexes of this contract, and in particular for any sanction imposed by the Spanish Data Protection Agency.”

On November 3, 2021, Vodafone sends this Agency the following information and demonstrations:

That the holders of the lines ***TELEFONO.3,
***PHONE.4,

1.

***TELEFONO.5 and ***TELEFONO.6 are respectively as of September 14, 2020: the first of the lines corresponds to the Customer Service for the Commercial Channel of Vodafone, the second to the Vodafone Collection Service, the third they do not know assigned to any Vodafone customer, and the last one corresponds to the Service of Vodafone surveys.

On the other hand, they state that the numbers assigned to the aforementioned two.

departments do not make business calls.

3.

Therefore, they indicate that masking techniques were used so that,

the managing subject, could pass himself off as Vodafone and thus make calls to the claimant.

On November 15, 2021, Vodafone states the following:

That from Vodafone they do not have registered information regarding the daughter of the

1.

claimant, nor are they aware of the relationship between the two.

They provide screenshots in relation to the data they have regarding

the claimant where there is no kinship data.

two.

That they cannot provide audits carried out to Axadil Phone S.L. because the

contract lasted from March 28, 2020 to January 2021, less than a year,

specifically, a total of 10 months.

On October 20, 2021, a request for information is sent to Axadil

Phone S.L. The notification is done electronically. According to this system of

notification, automatic rejection has occurred after ten days

natural from its availability.

On November 4, 2021, the request for information to Axadil Phone is reiterated

SL The notification is made by postal mail, and it is stated that it has been returned to

Origin by "Unknown" on the 12th of the same month and year.

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FOUNDATIONS OF LAW

Yo

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 General Data Protection Regulation deals in article 5 with the principles that must govern the processing of personal data and mentions among them that of "legality, 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 violation of article 6.1 of the RGPD is typified in article 83 of the RGPD that, under the heading "General conditions for the imposition of fines administrative", says:

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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 72.1.b) qualifies this infraction, for the purposes of prescription, as a very serious infraction.

The documentation in the file offers evidence that the party claimed violated article 6.1 of the RGPD, since at the end of the portability it did not should have continued to process the data of the complaining party.

Vodafone acknowledges the facts since I continue to process the data of the claimant after the cancellation of the portability, the agents of Vodafone used malpractice so that the claimant party will continue with the portability.

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).

In short, there is evidence in the file that the respondent tried the personal data of the claimant without legitimacy to do so. The behavior described

violates article 6.1. of the RGPD and is subsumable in the sanctioning type of the article

83.5.a, of the RGPD.

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:

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“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

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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 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 impose on the claimed entity 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 the following factors:

As aggravating factors:

-

The intentionality or negligence of the infringement (article 83.2.b, RGPD). Given that the claimed party at the end of the portability continued to treat the data of the claiming party.

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The evident link between the business activity of the respondent 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)

It is appropriate to graduate the sanctions to be imposed on the claimed party and set them in the amount of €70,000 for the infringement of article 83.5 a) RGPD and 72.1b) of the LOPDGDD.

Therefore, in accordance with the foregoing, by the Director of the Spanish Data Protection Agency.

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HE REMEMBERS:

FIRST: Start sanctioning procedure against VODAFONE ESPAÑA, S.A.U. with NIF A80907397, for the alleged infringement of article 6.1. of the RGPD typified in the article 83.5.a) of the aforementioned RGPD.

SECOND: APPOINT D. R.R.R. as instructor. and as secretary to Ms. S.S.S., indicating that any of them may be challenged, where appropriate, in accordance with the provisions established in articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime Public Sector Co (LRJSP).

THIRD: INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and his documentation, the documents obtained and generated by the General Subdirectorate for Data Inspection during the investigations phase.

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 70,000 euros (seventy thousand euros), without prejudice to what results from the instruction.

FIFTH: NOTIFY this agreement to VODAFONE ESPAÑA, S.A.U. with NIF A80907397 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.

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 the Article 64.2.f) of Law 39/2015, of October 1, on Administrative Procedure Common to Public Administrations (hereinafter, LPACAP).

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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 56,000 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 56,000 euros and its payment will imply the termination of the process.

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 42,000 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, 56,000 euros or 42,000 euros, you must do so

cash by depositing it in account number ES00 0000 0000 0000 0000 0000 opened

on behalf of the Spanish Agency for Data Protection 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.

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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 Agency for Data Protection.

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SECOND: On December 14, 2021, the claimed party has proceeded to payment of the sanction in the amount of 56,000 euros using one of the two reductions provided for in the Start Agreement transcribed above. Therefore, it has not acknowledgment of responsibility has been confirmed.

THIRD: The payment made entails the waiver of any action or resource in via against the sanction, in relation to the facts referred to in the Home Agreement.

FOUNDATIONS OF LAW

Yo

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.

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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."

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/00557/2021, of 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.

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