

936-031219

□ Procedure No.: PS/00198/2020

RESOLUTION R/00399/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00198/2020, instructed by the Agency

Spanish Data Protection Agency to TELEFÓNICA MÓVILES ESPAÑA, S.A.U., in view of the complaint filed by A.A.A., and based on the following,

BACKGROUND

FIRST: On July 13, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against TELEFÓNICA

MOBILE SPAIN, S.A.U. (hereinafter, the claimed party), by means of the Agreement

transcribe:

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Procedure No.: PS/00198/2020

935-200320

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data and based on the following:

FACTS

FIRST: D.A.A.A. (hereinafter, the claimant) dated December 29, 2019

filed a claim with the Spanish Data Protection Agency. The

The claim is directed against Telefónica Móviles España, S.A.U. with NIF A78923125

(hereinafter, the claimed).

The claimant states that Movistar has been using its mobile line since 2015

(***TELEFONO.1), to carry out tests, to train its employees and also

makes unauthorized access to your customer file, and even in stores and telephone service, so he shows his disagreement with the series of SMS received on your line, which do not correspond to you.

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In addition, he states that since October he has received a total of 534 calls from the number (1002) which he has had to block, since they are harassment by the claimed one.

Provides as proof of your claim, the SMS received and the calls from the 1002.

SECOND: In accordance with article 65.4 of the LOPGDD, which has provided for a mechanism prior to the admission to processing of the claims that are formulated before the AEPD, consisting of transferring them to the Data Protection Delegates designated by those responsible or in charge of the treatment, for the purposes foreseen in article 37 of the aforementioned rule, or to these when they were not designated, it was given transfer of the claim to the claimed entity so that it proceeded to its analysis and respond to the complaining party and to this Agency within a month.

As a result of this procedure, on June 11, 2020, the claimed states that he is proceeding to send a letter to the claimant through the address of his email and inform you that they have taken new measures, remaining blocking said numbering for internal purposes of the object that cannot be used, as well as for communication campaigns.

A copy of the letter sent to the claimant is attached.

On the other hand, it indicates that the claimant exercised his right of access, which was answered by letter on April 10, 2017.

Next, they explain that they have analyzed the detail of the SMS that as evidence the complainant and observe that, although measures had been taken with these numbers, currently they have been strengthened and have adopted new measures, always trying to eradicate the problem that exists with your numeration.

Of course, they point out that you cannot prevent other senders from sending communications to the line object of the claim. However, they have implemented

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different developments that avoid the manual introduction of the aforementioned line by commercial agents and/or third parties, once again reinforcing the blocking of any SMS from the different systems and platforms that issue messages related to any business area in the Movistar environment. It is for that have implemented measures since 2014 in order to prevent the treatment unauthorized use of the claimant's personal data.

In this regard, in May 2016 they published a statement on the tool of information available to the different agents that attend the 1004

called "Eclipse" in the business segment to which the

claimant with the warning not to use the aforementioned line to make tests or as contact data. In July 2017, it published the same statement for the segment

residential, and in June 2018 it reinforced the operation through the coordinators of

customer service centers.

In any case, they point out that they have implemented new measures regarding the cited number object of the claim:

1.- They have modified the entry of OOSS (Service Orders), so in

If any field is left blank due to lack of information, it will not be possible to include the mentioned numbering.

2.- They have also modified the OOSS in "flight" with the same previous criteria and currently said modification is already executed.

3.- From logistics they have in turn proceeded to inhibit said numbering, for any communication of a failure, not being able in any case to include it as contact number.

4.- They have once again reviewed all the measures adopted and have introduced an informative message that is included in the fronts in case an attempt is made enter this number by mistake.

"This phone belongs to a real customer, its misuse is prohibited"

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THIRD: The result of the transfer process initiated in the previous Fact does not made it possible to understand the claims of the claimant satisfied. Consequently, with dated June 19, 2020, for the purposes provided in article 64.2 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection agreed to admit for processing the claim filed.

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 defendant is accused of committing an infraction for violation of the Article 6 of the RGPD, "Legality of the treatment", which indicates 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 at least one of the following is met 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 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 section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the
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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 particular the following:

(...)

a) 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.”

III

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it carried out the treatment of the personal data of the claimant without having any legitimacy to do so.

The respondent has acknowledged said error and has indicated that they have analyzed the detail of the SMS provided by the claimant as evidence and state that although measures had been taken with these numbers, currently the measures have been strengthened. themselves and have adopted new measures, always trying to eradicate the problem that exists with its numbering.

However, and this is essential, the defendant does not prove the legitimacy to the processing of the claimant's data.

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The determination of the sanction to be imposed in this case requires observe the provisions of articles 83.1 and 83.2 of the RGPD, precepts that, respectively, provide the following:

“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;

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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.” (The underlining is from the AEPD)

In order to specify the amount of the sanction to be imposed on the one claimed by violation of article 83.5.a) of the RGPD, it is essential to examine and assess whether the circumstances described in article 83.2 of the RGPD concur and if they intervene mitigating or aggravating the responsibility of the responsible entity.

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 be imposed in the present case, the party claimed is considered responsible for an infringement typified in article 83.5.a) of the RGPD, in an initial assessment, concurrent the following factors.

As aggravating the following:

- In the present case we are facing a negligent action on significant data that allow the identification of a person (article 83.2 b).
- Basic personal identifiers are affected (name, a number of identification, the line identifier) (article 83.2 g).
- Section k), in relation to article 76.2 of Organic Law 3/2018, in which frames as an aggravating circumstance the continuous nature of the infraction attributed to the claimed.
- 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).

This is why it is considered appropriate to adjust the sanction to be imposed on the person claimed and set it at the amount of €75,000 for the infringement of article 6 of the RGPD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

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HE REMEMBERS:

1.

START SANCTION PROCEDURE against TELEFÓNICA MÓVILES

ESPAÑA, S.A.U., with NIF A78923125, for the alleged infringement of article 6

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

2. 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

what is established in articles 23 and 24 of Law 40/2015, of October 1, of

Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the

claim filed by the claimant and its attached documentation, the

information requirements that the General Subdirectorate of Inspection of

Data sent to the entity claimed in the preliminary investigation phase and its

respective acknowledgments of receipt.

4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1

bre, of the Common Administrative Procedure of the Public Administrations,

the corresponding sanction would be 75,000 euros (seventy-five thousand

euros), without prejudice to what results from the instruction.

5. NOTIFY this agreement to TELEFÓNICA MÓVILES ESPAÑA, S.A.U.,

with NIF A78923125, granting a hearing period of ten business days

to formulate the allegations and present the evidence that it deems appropriate.

nients. In your brief of allegations you must provide your NIF and the number of

procedure 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).

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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 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

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 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

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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 August 7, 2020, the claimant 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.

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

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. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified 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

each. The aforementioned reductions must be determined in the notification of

initiation of the procedure and its effectiveness will be conditioned to the withdrawal or

Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased regulations.

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00198/2020, of

in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to TELEFÓNICA MÓVILES 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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