937-240719

 Procedure No.: PS/00426/2019

RESOLUTION R/00128/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00426/2019, instructed by the Agency

Spanish Data Protection Officer to VODAFONE ESPAÑA, S.A.U., given the complaint

presented by A.A.A., and based on the following,

BACKGROUND

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

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

SPAIN, S.A.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

<<

Procedure No.: PS/00426/2019

935-240719

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: Ms. A.A.A. (hereinafter, the claimant) dated June 25, 2019

filed a claim with the Spanish Data Protection Agency.

The claim is directed against Vodafone España, S.A.U. with NIF A80907397

(hereinafter, the claimed).

The claimant states that on June 5, 2019, she received a message from

text of the claimed in which it transmits that there has been a change in rate in

your phone contract.

Subsequently, in a second email dated June 17 of this year, it is

informed of the acquisition of a mobile phone terminal.

He adds that he did not process a rate change nor did he make any purchases. From here,

to contact customer service being informed that said day was carried out via

phone a change of tariff plan, and later the acquisition of a terminal of

mobile telephony, for which he requested the alleged recording. Now, it is not known to the

said operator no recording. To this claim, the following is added:

documentation:

• Messages received from the claimant informing about the rate change and the

terminal purchase

• Mail informing that the recording is not in its database.

• Complaint before the Valencia-Tránsitos police station.

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 the Regulation

(EU) 2016/79 (General Data Protection Regulation, hereinafter RGPD). A) Yes,

an informative request is directed to the claimed party.

THIRD: On November 20, 2019, the respondent sends to this Agency,

among others, the following information:

“A copy of the letter sent to Ms. A.A.A. is attached as document number 1.

informing you of the steps taken by my represented until the moment of

agree with your claim. Also, we apologize for the inconvenience

caused.

It has been verified that, in June 2019, the claimant was affected by a case of

fraud.

Ms. A.A.A.

has contracted with my representative the telephone line

***TELEPHONE 1. Until June 5, 2019, the rate contracted by the claimant

was the Mini Voice Mobile Plan with a 100% discount on the monthly fee for twelve

months, having improperly applied the 100% discount on the fee

for the entire duration of the contract, in total, for eight years.

On June 5, 2019, there is an interaction in the internal system between my

represented and Ms. A.A.A., to confirm the status of payments, where it is indicated

that the May 2019 invoice is up to date with payment, so there is only

the June 2019 invoice is pending, as can be verified in the screenshot

attached.

Likewise, we have verified that there is another interaction in the system that same day.

During this call, she is hired by Ms. A.A.A. the acquisition of a terminal

financed, so it is explained to him that he has to change his rate changes from being mini

voice, at the extra mobile rate.

On June 12, 2019, Ms. A.A.A. calls my representative indicating that no

recognizes the contracting of the new rate.

On June 17, the claimant states that she received notification of a request

of an IPhone XS terminal, which it does not recognize, and proceeds to its cancellation via

telephone.

On June 18, 2019, the claimant went to a physical store to pay

another shipment of an IPhone XS terminal that had been found to have been ordered in

your name, formalizing a permanence contract, but whose operation

did not know

On June 27, 2019, it is confirmed that the Fraud Department already

the necessary actions have been done in the request ***TELEFONO.2, so the

Fraudulent order is cancelled.

On July 8, 2019, Vodafone received the claim filed with the OMIC

of the City Council of Valencia.

The claimant is informed that she has no pending debts with my

represented, currently only has the mobile line ***TELEFONO.1 active

with a monthly fee of 32 euros per month.

From that moment, the claim of Ms. A.A.A. is limited to reverting to

register your old rate with a 100% discount on the fee, which is not

is in force and also does not allow to apply the 100% discount that was applied

previously, since this had a duration of one year and yet the

claimant has enjoyed it for eight consecutive years.

However, on July 8, 2019, from the physical store, payments are made to the

claimant for the amount of the monthly fee and for the amount charged for shipments

of the terminals: This is because today it is not possible to reapply the

mini voice rate that you had previously, with a 100% discount on the fees

monthly.

On August 6, 2019, a payment was made in favor of the claimant.

This is because the measure that is being taken for now to address the

claim of Ms. A.A.A. is to open a request for the next cycle to review the invoice and,

to verify that the incident has not yet been resolved, pay the monthly fee

that the claimant improperly assumed due to the fraud suffered. Therefore, it must

apply the calculation based on the rate that the claimant had registered with

prior to the case of fraud, this being the mini voice rate with a discount of

100% on monthly installments”

FOURTH: In view of the facts denounced, in accordance with the evidence of

that is available, the Data Inspection of this Spanish Agency for the Protection of

Data considers that the treatment of personal data that is carried out by the

claimed, does not meet the conditions imposed by the regulations on the protection of

data, for which the opening of this sanctioning procedure proceeds.

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

Article 58 of the RGPD, “Powers of Attorney”, says:

“2 Each supervisory authority shall have all of the following powers

corrections listed below:

(…)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period.

(…)

i) impose an administrative fine in accordance with article 83, in addition to or instead of the

measures mentioned in this section, depending on the circumstances of the case

particular

(…)”

III

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 in relation to the

interested party (<<legality, loyalty and transparency>>);"

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 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 infraction for which the claimed entity is held responsible is

typified in article 83 of the RGPD that, under the heading "General conditions for

the imposition of administrative fines", states:

"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

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."

IV

The documentation in the file offers evidence that the

claimed, violated article 6.1 of the RGPD, since the claimed party admits in its

letter dated November 20, 2019, which is a case of fraud, given that the

The claimant did not process a rate change nor did he make any purchase, that is, there was

fraudulent hiring.

In short, the respondent does not explain how said contracting took place.

fraudulent, does not even provide the recording of it.

The Administrative Litigation Chamber of the National High Court, in cases

like the one presented here, has considered that when the owner of the data denies

contracting corresponds the burden of proof to who affirms its existence

the person responsible for the processing of third-party data must collect and keep the

documentation necessary to prove the consent of the holder. We quote, for

all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

Consequently, it has carried out a processing of personal data without

has accredited that it has the consent of the same for its treatment, nor

that has the legal authorization to do so.

However, and this is essential, the defendant does not prove legal standing to

the processing of the claimant's data.

In short, the respondent has not provided a document or evidence

one that shows that the entity, in such a situation, would have deployed the

minimum diligence required to verify that your interlocutor was indeed the one who

claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right

of protection of personal data requires that it be accredited that the

responsible for the treatment displayed the essential diligence to prove that

extreme. Failure to act in this way -and this Agency, who is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal character - the result would be to empty the content of the principle of legality.

v

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

provisions 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;

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 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 led to the commission of

the infringement.

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 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 dealing with an unintentional negligent action, but

-

identified significant (article 83.2 b).

Basic personal identifiers (name, a number of

-

identification, the line identifier) (article 83.2 g).

At the same time, section c) of article 83.2 must be pointed out, the measures taken

by the person in charge or in charge of the treatment to alleviate the damages caused

(proceeded to manage the cancellation of the services and the payment of the invoiced amounts).

This is why it is considered appropriate to graduate the sanction to be imposed on the person claimed and

set it at the amount of 30,000 euros (thirty thousand euros) for the infringement of article 6.1 a) of the

RGPD., considered as very serious, for the purposes of prescription of the same, in the article

71.1 b) of the LOPDGDD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

11/15

1.

Initiate Penalty Procedure against Vodafone España, S.A.U., with NIF

A80907397, for the alleged infringement of article 6.1. of the RGPD typified in

Article 83.5.a) of the aforementioned RGPD.

2. Appoint D.C.C.C. as instructor. and as secretary to Ms. D.D.D.,

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 into the disciplinary file, for evidentiary purposes, the claim

filed by the claimant and its attached documentation, the requirements

information that the General Subdirectorate of Data Inspection sent to the

entity claimed in the preliminary investigation phase and their respective acknowledgments

Of receipt.

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

of the Common Administrative Procedure of Public Administrations, the

sanction that could correspond would be 30,000 euros (thirty thousand euros), without

prejudice to what results from the instruction.

5. Notify this agreement to Vodafone España, S.A.U., with NIF

A80907397, 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).

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 24,000 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 24,000 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 18,000 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, 24,000 euros or 18,000 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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SECOND: On February 18, 2020, the respondent has proceeded to pay the sanction in the amount of 24,000 euros making use of one of the two reductions provided for in the Start Agreement transcribed above. Therefore, there is no accredited acknowledgment of responsibility.

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

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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. 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/00426/2019, 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, 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 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

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

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