

Procedure No.: PS/00205/2019

RESOLUTION R/00356/2019 TERMINATION OF THE PROCEDURE BY  
VOLUNTARY PAYMENT

In sanctioning procedure PS/00205/2019, 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 June 24, 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:

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935-160419

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 December 28,

2018 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 one).

The reasons on which the claim is based are the following: that the claimed

has sent an SMS to a third party containing a link that leads to a

"Purchase Summary" of the claimant, displaying their data.

He adds that he has become aware of these facts because they have sent him a

e-mail explaining what happened, indicating that your telephone line is associated with the

claimant information. After informing the defendant of the facts,  
communicate that the aforementioned telephone line does not appear in its files that said person  
is not a client, without having received an explanation in this regard.

And, among other things, attach the following documentation:

- Email dated December 3, 2018, sent to the claimant  
by a third person where they indicate that an SMS has arrived on their mobile  
informing you of a registration of the claimant in Vodafone on November 23  
of 2018, which he has not done. The email is on the purchase receipt.  
. Claimant's purchase summary, sent to third party.

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SECOND: In view of the facts denounced and the documents provided by  
the claimant, the General Subdirectorate for Data Inspection requests information from the  
claimed, by means of a letter dated February 19, 2019, with the date of acceptance  
by electronic means on February 21 of the same year, without the aforementioned entity having  
provided the requested information.

THIRD: From the documentation provided by the claimant, it appears that

Next:

It is stated that the claimed party has sent an SMS to a third party in which there is a  
link that leads to a "Purchase Summary" of the claimant, displaying their  
data.

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 facts denounced are specified in the disclosure of the data of the claimant to a third party through an SMS sent by the claimed party, which would be a violation of the principle of confidentiality.

Said treatment could constitute a violation of article article

5, Principles related to the treatment, of the RGPD that establishes that:

"1. The personal data will be:

(...)

f) treated in such a way as to ensure adequate security of the personal data, including protection against unauthorized or unlawful processing and against its loss, destruction or accidental damage, through the application of measures appropriate technical or organizational ("integrity and confidentiality").

(...)"

Article 5, Duty of confidentiality, of the new Organic Law 3/2018, of 5 December, Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), states that:

"1. Those responsible and in charge of data processing as well as all people who intervene in any phase of this will be subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

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2. The general obligation indicated in the previous section will be complementary of the duties of professional secrecy in accordance with its regulations applicable.

3. The obligations established in the previous sections will remain even when the relationship of the obligor with the person in charge or person in charge had ended of the treatment”.

On the other hand, article 83.5 a) of the RGPD, considers that the infringement of “the basic principles for processing, including conditions for consent in accordance with articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned GDPR, “with administrative fines of €20,000,000 maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The regulation of infractions in the LOPDGDD is more precise in terms of the situations that give rise to an infringement and their consideration, so that it is much easier to know the limitation period of that infraction (that is, if it is considered mild, serious or very serious) and in view of the administrative sanction to be imposed for its non-compliance.

The LOPDGDD in its article 72, for prescription purposes, states that they are:

“Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that 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 offers clear indications that the claimed violated article 5 of the RGPD, principles related to treatment, in relation to article 5 of the LOPGDD, duty of confidentiality, when disclosing to a third party the personal data of the claimant through an SMS sent by the reclaimed.

The claimant has provided the email sent to her by a third party in the containing a link that leads to a summary of the claimant's purchase, visualizing said third party their data, having knowledge of the facts because that person sent you an email explaining what happened, indicating that your phone line is associated with the data of the claimant.

The duty of confidentiality, previously the duty of secrecy, must understood that its purpose is to prevent leaks of data not consented to by their owners.

Therefore, this duty of confidentiality is an obligation that falls not only to the person in charge and in charge of the treatment but to everyone who intervenes in any phase of the treatment and complementary to the duty of professional secrecy.

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In this sense, the National High Court ruled in a sentence of

01/18/02, in which Second Law Basis, stated: "The duty of secrecy professional that is incumbent on those responsible for automated files, ..., involves that the person in charge -in this case, the recurring banking entity- of the data stored -in this case, those associated with the complainant- may not reveal or give know their content having the "duty to keep them, obligations that will subsist even after ending their relations with the owner of the automated file or, in its case, with the person in charge of it... This duty of secrecy is essential in the today's increasingly complex societies, in which advances in technology place the person in areas of risk for the protection of fundamental rights, such as privacy or the right to data protection set out in article 18.4 of the EC. In effect, this precept contains an "institution to guarantee the rights to privacy and honor and the full enjoyment of the rights of citizens who, moreover, it is in itself a fundamental right or freedom, the right to freedom in the face of potential attacks on the dignity and freedom of the person from an illegitimate use of mechanized data processing (STC 292/2000) ..."

#### IV

In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

- "1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 5 and 6 are in each individual case effective, proportionate and dissuasive.
2. 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 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;

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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, 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.”

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, “Sanctions and corrective measures”, establishes that:

“two. In accordance with the provisions of article 83.2.k) of the 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 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 in the present case for the infringement typified in article 83.5.a) of the RGPD for which VODAFONE is held responsible, in an initial assessment, it is estimated concurrent the following factors:

The merely local scope of the treatment carried out by the entity claimed.

Only one person has been affected by the offending conduct.

There is no evidence that the entity had acted maliciously, although the performance reveals a lack of diligence.

The link between the activity of the offender and the performance of treatment of personal data number of people affected.

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The entity claimed is considered a large company.

Therefore, as stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1. INITIATE PUNISHMENT PROCEDURE against VODAFONE SPAIN, S.A.U., with NIF A80907397, for the alleged infringement of article 5.1.f) of the RGPD, sanctioned in accordance with the provisions of article 83.5.a) of the aforementioned RGPD.
2. APPOINT D. B.B.B. and Secretary to MRS. C.C.C., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of the

Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Sector

Public (LRJSP).

3. INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and her documentation, the documents obtained and generated by the General Subdirectorate of Damage Inspection during the investigation phase, all part of this administrative file.

4. 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 (LPACAP), and art. 127 letter b) of the RLOPD, the sanction that could correspond for the described infraction would be 50,000 euros (fifty thousand euros), without prejudice to what result of the instruction.

5. NOTIFY this Agreement to VODAFONE ESPAÑA, S.A.U., with NIF A80907397, expressly indicating their right to a hearing in the procedure and granting him a period of TEN WORKING DAYS to formulate the allegations and Propose the tests you consider appropriate. In his pleadings You must provide your NIF and the procedure number that appears in the header of this document.

Likewise, in accordance with articles 64.2.f) and 85 of the LPACAP, informs that, if it does not make allegations within the term of this initial agreement, the The same may be considered a resolution proposal.

You are also informed that, in accordance with the provisions of article 85.1 LPACAP, may acknowledge its responsibility within the term granted for the formulation of allegations to this initial agreement which will entail a reduction of 20% of the sanction to be imposed in the present procedure, equivalent in this case to 10,000 euros. With the application of this reduction, the sanction would be established at 40,000 euros, resolving the

procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of the present procedure, carry out the voluntary payment of the proposed sanction, in accordance with the provisions of article 85.2 LPACAP, which will mean a reduction of 20% of the amount of the same, equivalent in this case to 10,000 euros. With the application of this reduction, the penalty would be established at 40,000 euros and its payment will imply the termination of the procedure.

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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 30,000 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 (40,000 euros or 30,000 euros), in accordance with the provided for in article 85.2 referred to, we indicate that you must make it effective by your deposit in the restricted 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  
the date of the start-up agreement or, where applicable, 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 July 22, 2019, the respondent has proceeded to pay the  
sanction in the amount of 30,000 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.

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## 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 the Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), under the heading "Termination in sanctioning procedures" provides the

Next:

"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: DECLARE

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

the termination of procedure PS/00205/2019, of

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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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