

936-031219

□ Procedure No.: PS/00168/2020

RESOLUTION R/00335/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00168/2020, 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, 2020, 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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Procedure No.: PS/00168/2020

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

claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (in

later, the claimed one).

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The reasons on which your claim is based are that after making the deletion of your personal data in 2015, you continued to receive advertising SMS messages on your mobile line (**PHONE.1).

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant, the Subdirector General for Inspection of Data proceeded to carry out preliminary investigation actions for the clarification of the facts in question, by virtue of the investigative powers granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

In addition, the following extremes are noted:

On April 15, 2020, the respondent states that after carrying out the timely investigations into what happened, have proceeded to send a letter to the claimant, informing him of the procedures that have been carried out by Vodafone in response to your claim (attach a copy of the letter sent).

They add that the claimant's data is correctly suppressed in its computer systems related to the management of customer data, in by virtue of the request to exercise the right to cancel them made by him in May 2015. The reason why he would have been able to receive the SMS messages it could have been because your personal data would have been visible in their systems

of customer data management, or there had been some type of error in the claimed when managing the cancellation of such data.

On the other hand, they point out that the main reason is that said number has been been using both by collaborating agents and Vodafone employees being a simple number to remember and quick to write, therefore, a number "dummy", how to use in certain activities and processes.

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Finally, it indicates that the respondent has implemented a series of actions in order to avoid the improper use of the aforementioned number (which are detailed), among them that truthful and up-to-date information must be included in the client files, which They cannot invent data or use others that they consider implausible that they can belong to a client as occurs with the aforementioned number. There have been a series of blockages in the system that prevent, for these purposes, the use of said numeration.

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;

(...)"

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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 global total annual turnover of the previous financial year, opting for the largest amount:

a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in it and, in

particularly the following:

(...)

a) The processing of personal data 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 recognized said error and has indicated as one of the causes

that motivated the sending of the SMS to the claimant is that said number has been

used both by collaborating agents and by Vodafone employees when

be a simple number to remember and quick to write, therefore, a number

"dummy", how to use in certain activities and processes.

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

the processing of the claimant's data.

IV

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;

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 dealing with an unintentional negligent action, but

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identified significant (article 83.2 b).

Basic personal identifiers (name, a number of

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

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Any offense previously committed (article 83.2 e).

- 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.

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 RGD.

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Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against VODAFONE ESPAÑA, S.A.U.,

with NIF A80907397, for the alleged violation of article 6 of the RGD

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

2. APPOINT D.B.B.B. as instructor. and as secretary to Ms. C.C.C.,

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 Vodafone España, S.A.U., with NIF
A80907397, granting a hearing period of ten business days for
formulate the allegations and present the evidence that it deems appropriate. In
your brief of allegations must provide your NIF and the procedure number
listed at the top of this document.

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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 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 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

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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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: On July 16, 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

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By virtue of the powers that article 58.2 of the RGD 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 www.aepd.es

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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/00168/2020, 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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