Procedure No.: PS/00270/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and

based on the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) dated March 23, 2019

filed a claim with the Spanish Agency for Data Protection against

Vodafone Spain, S.A.U. with NIF A80907397 (hereinafter, the claimed), in its

in writing, states that he is the owner of several telephone lines contracted with the

reclaimed.

On the other hand, he received an email from the telephone operator for a

purchase you had made. However, when consulting his personal area, he verified that

had been formalized on March 10, 2019, a portability contract, whose owner

it was a third party, without their knowledge, signature or consent. In said contract

your data appeared as the new owner.

He adds that he appeared in the business of the claimed person in the Bahía shopping center

South, on the 12th of the same month and year they proceeded to cancel it.

The claimant provides a copy of the complaint filed with the Commissioner for

Police of San Fernando (Cádiz) dated March 12, 2019, sheet of

claims and fraudulent contract.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant, the Subdirectorate 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:
This Agency transferred this claim to the respondent by means
electronic, granting a period of one month for its response and it is recorded as

date of acceptance by said operator on May 13, 2019. After said
deadline has not answered the requirement of this body.
For this reason, this claim is admitted for processing by
fraudulent contracting without the entity having responded to the Spanish Agency
Data Protection.
THIRD: On September 25, 2019, the Director of the Spanish Agency
of Data Protection agreed to initiate sanctioning procedure to the claimed, with
in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the
Common Administrative Procedure of Public Administrations (hereinafter,
LPACAP), for the alleged infringement of Article 6 of the RGPD, typified in Article
83.5 of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated "that the claimant denounces that Vodafone had allowed the execution of a portability contract in its name of a telephone line owned by a third party, without their knowledge or consent. The new contract included your personal data as the new owner of the line.

Vodafone, first of all, wants to state that after receiving the request of information E/03915/2019, Vodafone analyzed the claim and verified that the The same had been resolved two days after the request for discharge that took place on 10 March 2019, despite not having responded to the aforementioned request for information within the period conferred for it.

We understand that these events have occurred due to an error in the management of the discharge produced in the store. Error that was immediately corrected. In no case is caused by a fraudulent registration derived from identity theft.

In this sense, it is relevant to highlight the repeal of article 130 of Law 30/1992, of November 26, on the Legal Regime of Public Administrations and the Common Administrative Procedure. Its substitution by article 28.1 of the Law 40/2015 of October 1, on the Legal Regime of the Public Sector eliminates the mention of the "simple non-observance" making the rule "nullum poena sine culpa" prevail.

The foregoing comes only to highlight the lack of room for the responsibility without fault, principle that governs or must govern in the administrative field sanctioning, because to the extent that it is a manifestation of "ius puniendi" of the State, It is inadmissible in our legal system a liability regime no fault

In this sense, it indicates Judgment of the Constitutional Court number 219/1988, and this for being inadmissible a system of strict liability or without fault as

it also comes to point out Judgment 246/1991. I cannot be penalized

represented for infraction of article 6.1. of the RGPD, without reference to the

subjective element of the type, not proving fraud, guilt, or negligence.

Additionally, taking into account the special nature of penalizing law

that determines the impossibility of imposing sanctions without taking into account the will

of the acting subject or the factors that may have determined the breach of a

legal obligation, this part maintains the inadmissibility of the imposition of sanctions

some.

Thus, the Supreme Court in Judgment of December 21, 1998 (RJ1998/10226)

(Recourse of Appeal 9074/1991), January 27, 1996 (RJ 1996\926) (Recourse of

Appeal 640/1992) and January 20, 1997 (RJ 1997\257) (Appeal

2689/1992)". The Supreme Court also points out in a Judgment of July 20,

1990, Ar. 6163,

Well, as can be seen, in the behavior described there is no

intentionality, neither by way of intent, nor by way of guilt. Therefore, do not

If there is any guilt, it is totally inadmissible to impose a sanction

any to my client, as long as one of the essential requirements of the

Sanctioning Administrative Law.

For all these reasons, neither represented understands that what is appropriate is for the AEPD to agree on the

dismissal of this file and the file of the proceedings since the

facts have occurred without any intention on the part of my client and

It seems that due to some kind of error. Subsidiarily and in the event that

Despite the explanations provided above, the Agency understood that my

represented is deserving of a sanction for the commission of an infringement of art.

6.1. of the RGPD, the amount of said sanction must be moderate, imposing in its

minimum amount, taking into account the following circumstances set out in art.

83.2 of the GDPR:

It is requested, therefore, to agree: The dismissal of the file, with the consequent

record of proceedings. Subsidiarily and in the event that despite the

explanations previously provided, the Agency understands that my client is

deserving of a sanction for the commission of an infraction of article 6.1 of the

RGPD, the amount of said sanction must be moderated, imposing its amount

minimum".

FIFTH: On October 25, 2019, the practice period for

evidence, remembering: a).- to consider reproduced for evidentiary purposes the claim

filed by the claimant and his documentation, the documents obtained and

generated that are part of file E/03915/2019 and b).- consider reproduced

evidentiary effects, the allegations to the initiation agreement of PS/00270/2019,

presented by the accused entity.

SIXTH: On November 29, 2019, it was issued and notified on December

the same year to Vodafone the Resolution Proposal, for alleged infringement of article

6.1 of the RGPD, typified in article 83.5 of the RGPD, proposing a fine of

€75,000.

Vodafone presented arguments to the Resolution Proposal, stating

which is reiterated in the allegations already made to the Home Agreement.

PROVEN FACTS

From the information and documentation provided by the parties in this procedure,

prove the following facts:

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1º On March 23, 2019, the claimant files a claim before

the Spanish Agency for Data Protection, stating that the claimed

had formalized a portability contract on March 10, 2019, at its

name of a telephone line owned by a third party, without your knowledge,

no consent. The new contract contained their personal data

staff as the new owner of the line.

2º The Spanish Data Protection Agency transferred this

claim to the claimed by electronic means, granting a term of

one month for its answer and it appears as the date of acceptance by said

operator on May 13, 2019. After this period, he did not answer the

aforementioned requirement.

3º The claimant filed a complaint with the Police Station of San

Fernando (Cádiz) on March 12, 2019, claim sheet before the Board

of Andalusia and fraudulent contract.

4th On October 9, 2019, the respondent acknowledges not having

answered the request for information, and that on March 12,

2019, two days later said line was terminated.

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 as established in art. 47 of the Organic Law 3/2018, of

December 5, Protection of Personal Data and guarantee of rights

(hereinafter LOPDGDD), the Director of the Spanish Agency for

Data Protection is competent to resolve this procedure.

II

The defendant is imputed the commission of 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

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

the largest amount:

1. 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."

III

The documentation in the file offers clear indications that the

claimed violated article 6 of the RGPD, since the aforementioned entity tried to

unlawfully the personal data of the claimant, as there is no consent

for the treatment of your personal data, materialized in that when consulting your area

staff verified that on March 10, 2019, a contract of

portability, whose owner was a third party, without their knowledge or consent. In

said contract contained his data as the new owner and the data of the third party (name,

DNI and contact telephone number), had requested portability as a change of

ownership from his old Orange company to the account owned by the

claimant at Vodafone.

The Contentious-Administrative Chamber of the National High Court, in

similar assumptions has considered that when the owner of the data denies the

consent bears the burden of proof on the person who asserts 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. Thus, the SAN of

05/31/2006 (Rec. 539/2004), Fourth Law Basis.

The claimant provided, among other documents, a complaint before the Commissioner for

Police of San Fernando (Cádiz) dated March 12, 2019, sheet of

claims before the Junta de Andalucía and fraudulent contract.

On the other hand, it should be noted that the respondent acknowledges not having

responded to the request for information from this Agency.

In short, it should be noted that respect for the principle of legality of data

requires proof that the owner of the data consented to the processing of

personal data and display a reasonable diligence essential

to prove that point. Failure to act in this way would result in emptying the content of the

legality principle.

III

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

observe the provisions of articles 83.1 and 83.2 of the RGPD, precepts that

point out:

"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 treatment of

personal information.

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 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 precepts transcribed, in order to set the amount of the sanction of

fine to be imposed in the present case for the infraction typified in article 83.5.a) of the

RGPD for which the claimant is responsible, the following are considered concurrent

factors:

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The intentionality or negligence in the infringement. In the present case we are

before unintentional negligent action (paragraph b).

- The data controller has NOT taken, as far as is known,

no measure to mitigate the damages suffered by the interested parties

(section c).

- The data controller has NOT exercised, up to now,

no cooperation with the supervisory authority in order to remedy

infringement and mitigate the possible adverse effects of the infringement (paragraph

F).

The categories of personal data affected by the infringement,

The data processed in this case, are of a markedly personal nature and therefore

person identifiers (section g).

The way in which the supervisory authority became aware of the infringement.

In this case, through a complaint filed by the claimant (section h).

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In accordance with the precepts indicated, and without prejudice to what results from the

instruction of the procedure, in order to set the amount of the sanction to be imposed in

the present case, it is considered appropriate to graduate the sanction to be imposed in accordance

with the following criteria established in article 76.2 of the LOPDGDD:

The link between the activity of the offender and the performance of treatment of

personal data, (section b).

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The balance of the circumstances contemplated in article 83.2 of the RGPD,

with respect to the infraction committed by violating the provisions of article 6.1 of the

RGPD allows to set a penalty of 75,000 euros (sixty-five thousand euros),

considered as "very serious", for the purposes of prescription of the same, in the 72.1.a of

the LOPDGDD.

v

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for a

violation of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine

€75,000.00 (euros).

SECOND: NOTIFY this resolution to VODAFONE ESPAÑA, S.A.U.

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise,

it will be collected during the executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

In accordance with the provisions of article 50 of the LOPDPGDD, 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 in accordance with art. 48.6 of the

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal 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.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP, may provisionally suspend the firm resolution in administrative proceedings if the The interested party expresses his intention to file a contentious-administrative appeal. If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

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