Procedure No.: PS/00278/2019

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 April 3, 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). The grounds on which the claim is based are that it requested

the operator the deletion of your data, and they state: “that once the data has been analyzed,

facts described by the claimant does not maintain any active service in Vodafone, nor

amounts pending payment”.

Thus, I continue to receive communications from said entity.

Attach the following documentation to the claim:

- Respondent's response to the Secretary of State for the Society of the

Information and the Digital Agenda dated December 24, 2018.

- Emails received by the claimant from the respondent dated 28

November 2018, February 27 and March 28, 2019.

SECOND: After receiving the complaint, the Subdirectorate General for Inspection

of Data proceeded to carry out preliminary investigation actions for the

clarification of the reported facts, having knowledge of the following

ends:

On August 28, 2019, the respondent has sent to this Agency the

following information in relation to the facts denounced:

It states that: “due to a computer error in their systems, the email

The claimant's e-mail remained "hooked" and continued to appear in the file of

sending informative communications regarding electronic invoices issued by

Vodafone, this being the reason why it has received said communications”.

They point out that: "said error was solved, so the claimant will not return

to receive any communication related to electronic invoicing from Vodafone or

any other that has not previously consented”.

On the other hand, they provide a copy of the email that they have sent to the

claimant to inform him of the aspects indicated above.

THIRD: On October 4, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, 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 6.1 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 by means of a document dated October 16, 2019, it formulated in summary the

following allegations; "That as he answered the request of

information received from the Agency, the events were due to an error in the process of

deletion of data from our systems. All the data was actually

deleted from all company systems except for the email account

in the system for sending billing notices. That is, there was no intention

any on the part of my client in committing the events that occurred.

On the other hand, it is important to highlight that due to the fact that the claimant received

these notices does not mean that my client was billing him for any

service. That didn't happen. Sending billing notices is a process

automatic that is triggered a few days before the day of the month on which the cycle is completed

billing of a customer.

This error has already been corrected and the claimant was notified by mail.

email, which is attached.

In this sense, it is relevant to highlight the repeal of article 130 of the Law

30/1992, of November 26, on the Legal Regime of Public Administrations and

of the Common Administrative Procedure. Its replacement 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 minimal".

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/05024/2019 and b).- consider reproduced evidentiary effects, the allegations to the initiation agreement of PS/00278/2019, presented by the accused entity.

SIXTH: Dated November 29, 2019, issued and notified on December 3 of the same year to Vodafone the Resolution Proposal, for presumed infraction of the article 6.1 of the RGPD, typified in article 83.5 of the RGPD, proposing a €75,000 fine.

Vodafone presented arguments to the Resolution Proposal, stating which is reiterated in the allegations already made to the Home Agreement.

Of the actions carried out in this procedure, of the information and documentation presented by the parties, the following have been accredited:

PROVEN FACTS

Of the information and documentation provided by the parties in this procedure, the following facts are accredited:

1º On April 3, 2019, the claimant files a claim with the
Spanish Agency for Data Protection, stating that it requested the
deletion of your data, and they state: “that once the facts have been analyzed
described by the claimant does not maintain any active service in Vodafone, nor
amounts pending payment”. However, he continued to receive
communications from said entity.

2º Respondent's response to the Secretary of State for the Society of the
Information and the Digital Agenda dated December 24, 2018, where
state that the claimant does not maintain any active service in Vodafone,
amounts pending payment.

3º E-mails received by the claimant from the respondent dated 28
November 2018, February 27 and March 28, 2019.

4º Dated on October 16, 2019, the respondent contributes, in the period of
allegations, among others, email sent to the claimant, where
states: “We are contacting you regarding your claim
that has been transferred to us by the Spanish Data Protection Agency in
within file E/05024/2019. Through this letter,
We want to inform you that sending emails to your email account
email informing you that your electronic invoice is
is available, are due to a computer error since these
communications do not correspond to any service contrasted by you.
We have corrected this error in order to prevent you from receiving such emails again
electronics”.

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 arts. 47 and 48.1 of the LOPDGDD, the

Director of the Spanish Data Protection Agency 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;

(…)”

In article 4 of the RGPD, Definitions, in section 11, it states that:

“11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either through

a statement or a clear affirmative action, the processing of personal data that

concern him".

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates

that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of will

free, specific, informed and unequivocal by which he accepts, either through a

declaration or a clear affirmative action, the treatment of personal data that

concern.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to state

specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the

processing of personal data for purposes unrelated to the

maintenance, development or control of the contractual relationship".

The infringement is typified in article 83.5 a) of the RGPD, considers that the

Violation of "the basic principles for treatment, including the conditions for

consent under articles 5, 6, 7 and 9" is punishable, in accordance with the

"with fines

section 5 of the aforementioned article 83 of the aforementioned Regulation,

administrative fees of €20,000,000 maximum or, in the case of a company, a

amount equivalent to a maximum of 4% of the total global annual turnover of the

previous financial year, opting for the highest amount.

On the other hand, the LOPDGDD for prescription purposes states in its article 72:

“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:

(…)

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 processing of your personal data, materialized in the referral to your

email address communications originating in

“vodafone@corp.vodafone.es” and whose subject is “you already have your invoice available

electronics".

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 has provided, among other documents, a copy of the answer to Vodafone to the Secretary of State for the Information Society and Agenda Digital, in which they state, "once the facts described by the claimant, who does not maintain any active service in Vodafone, nor amounts pending payment", not having authorized said entity to use your email electronically, as recognized by the claimant himself.

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.

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

such as the number of interested parties affected and the level of damages that

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 whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

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

related 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 obtained or losses avoided, directly 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.

commission of the offence.

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

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 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:

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

claimed.

Only one person has been affected by the offending conduct.

The damage caused to the claimant since he had to file a complaint

before the Secretary of State for the Information Society and the Digital Agenda and

there were several occasions on which he addressed the entity to inform it of the

facts without taking any decision.

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.

The entity claimed is considered a large company.

In accordance with the precepts indicated, in order to set the amount of the

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

impose 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

Regarding 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.

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 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine

€75,000.00 (seventy-five thousand 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

is between the 1st and 15th of each month, both inclusive, the term to carry out the

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

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

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

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 in accordance with art.

48.6 of the LOPDGDD, 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 period of

month 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, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

Electronic Registration of

through the

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