

936-031219

□ Procedure No.: PS/00008/2020

RESOLUTION R/00166/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00008/2020, instructed by the Agency

Spanish Data Protection Agency to OLIVEROS USTRELL, S.L., given the complaint

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

BACKGROUND

FIRST: On February 13, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against OLIVEROS

USTRELL, S.L. (hereinafter, the claimed party), through the Agreement that is transcribed:

<<

Procedure No.: PS/00008/2020

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 February 25, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against Oliveros Ustrell, S.L., with NIF B62884721 (hereinafter, the

claimed).

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The grounds on which your claim is based are that you received a message from Vodafone Spain, S.A.U. (hereinafter Vodafone) thanking you for a purchase that you do not recognize, made in a physical store of which you were a customer.

Thus, check through the application for mobile devices of

Vodafone that a contracted portability was carried out in your name and with your data banking.

Well, at the store he asks for the contract that he supposedly signed, but

They deny it and recognize that it is a habitual practice that they carry out: they buy prepaid Lycamobile cards and carry out portability to customers of their store. In

As soon as they are aware of these facts, they cancel the cover line.

On the other hand, it states that the events took place on ***DATE.1

And, among other things, it provides the following documentation:

☐ Vodafone service contract for portability of the number ***TELÉFONO.1 from Lycamobile.

☐ Copy of the claim form filled out by the claimant in which claims that (i) your identity has been supplanted, (ii) your data has been processed personal and bank accounts at your convenience and (iii) have made a contract at your name without your consent.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant and the facts and documents of which he has had knowledge of this Agency, the Subdirector General for Data Inspection 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:

The background information is the following:

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On April 10, 2019, within file E/04042/2019, it was
transfers the claim to the claimed party via the Notific@ service requesting (i) the
decision adopted regarding this claim, (ii) in the event of exercise of
the rights regulated in articles 15 to 22 of the RGPD, accreditation of the
response provided to the claimant, (iii) report on the causes that have motivated the
incident that gave rise to the claim, (iv) report on the measures adopted
to prevent similar incidents from occurring, implementation dates and controls
carried out to verify its effectiveness and (v) any other that it considers relevant.
The notification is automatically rejected after 10 days have elapsed without
have been accessed.

On April 22, 2019, within file E/04042/2019, it was
reiterates the transfer of the claim to the claimed one through the postal services
which is returned with the result “Returned to Origin by Unknown on 04/24/2019”.

With the signing date of August 19, 2019, it is agreed to admit for processing the claim filed by the claimant against OLIVEROS USTRELL, S.L.

☐ Made a request for information to the respondent about (i) consent of the interested party for the processing of personal data and banks in carrying out the portability contract, (ii) a copy of the contract original made in store, and (iii) report on the causes that have motivated the incident that gave rise to the claim, dated October 9, 2019 is received in this Agency, with registration number 047698/2019, letter of allegations forwarded by the respondent stating that she does not have any documentation related to the data of the related operation with the claimant, and that this is because the operations were carried out by a employee who left the company unaware of his current whereabouts and without it being possible for them to recover from said operation by any means.

☐ Made a request for information to Vodafone on the hiring of unsigned portability and on the ported telephone number, dated November 11, 2019 is received in this Agency, with registration number 054686/2019, letter sent by the operator stating that the portability are formalized by means of a contract signed by the client in a that the contract model includes the signature fields necessary for the previous client authorizes the change of owner and the new client authorizes the portability. The contract can be signed digitally or manually:

- When the digital signature option is chosen, the contract signed by the client dumps directly into "Docuweb". The system should not advance if it is missing one of the 2 signatures in the portability and change boxes.

- When the manual signature option is chosen, the order advances in any case and

The store is obliged to keep an original copy of the contract signed by

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the client and to send this copy to "Docout" for safekeeping. "Docout" reviews

if the contract arrives at your office and informs us otherwise.

As for the ported number, they report that it was discharged from the 26

from February 2019 until February 28, 2019, the date on which the application was processed.

final drop.

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

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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:

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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 particular 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 it carried out the treatment of the personal data of the claimant without their consent. The personal data of the claimant were incorporated into the company's information systems, without has accredited that he had his consent for the collection and treatment later of your personal data.

Based on the foregoing, in the case analyzed, it remains in questioned the diligence used by the respondent to identify the person who contracted on behalf of the claimant.

The Contentious-Administrative Chamber of the National High Court, in assumptions such as the one presented here, has considered that when the owner of the data denies the hiring, the burden of proof corresponds to those who affirm their existence, and the third-party data controller must collect and

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keep the necessary documentation to prove the consent of the holder.

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

Well, it follows that the claimant received a portability message and,

in the contract obtained through the mobile application of Vodafone customers provided by the claimant, all the spaces destined for the signatures of the blank clients.

On the other hand, according to Vodafone, it is mandatory that the store retain these contracts, but the respondent states that for reasons beyond their control, they has documentation on the portability indicated in the claim. Exists evidence, in the contract provided by the claimant, that the contract of portability in the physical store of the claimed party and that the contract is without signatures.

Although the company states that portability does not occur if there is no any of the signatures, the contract obtained by the claimant through the application for Vodafone mobiles contains all the spaces intended for the signatures of the blank headlines.

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

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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

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or indirectly, through infringement.”

Regarding section k) of article 83.2 of the RGD, 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 delegate.
- 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:

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The intentionality or negligence in the infringement (article 83.2 b).

Basic personal identifiers are affected (name, data

-

bank accounts, the line identifier) (article 83.2 g).

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 €10,000 for the infringement of article 6.1 of the RGPD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

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HE REMEMBERS:

1.

START A SANCTION PROCEDURE against Oliveros Ustrell, S.L., with

NIF B62884721, for the alleged infringement of article 6.1. GDPR

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

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 the provisions of articles 23 and 24 of Law 40/2015, of 1

October, of the 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 claimed entity 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 1

October, of the Common Administrative Procedure of the Administrations

Public, the sanction that could correspond would be 10,000 euros (ten

thousand euros), without prejudice to what results from the instruction.

5. NOTIFY this agreement to Oliveros Ustrell, S.L., with NIF

B62884721, granting a hearing period of ten business days to

to formulate the allegations and present the evidence that it considers

convenient. In your statement of allegations you must provide your NIF and the procedure number that appears in the heading 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

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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 8,000 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 8,000 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 6,000 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, 8,000 euros or 6,000 euros, you must make it effective through your deposit in account number ES00 0000 0000 0000 0000 0000 opened in the name of the Spanish Data Protection Agency at Banco CAIXABANK, 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

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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 March 9, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 6,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

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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 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/00008/2020, of
in accordance with the provisions of article 85 of the LPACAP.

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SECOND: NOTIFY this resolution to OLIVEROS USTRELL, S.L..

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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