

Procedure No.: PS/00149/2019

938-0419

## RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/00149/2019, instructed by the Spanish Agency for Data Protection, to the entity XFERA MÓVILES S.A., with NIF A82528548, (in hereinafter, "the claimed entity"), having regard to the complaint filed by Ms. A.A.A., (in hereinafter, "the claimant"), and based on the following,

### BACKGROUND

FIRST: On 06/14/18, the claim was received by this Agency filed by the claimant, in which she stated, among others, that: "I am a client of the Mas Móvil company since 04/07/18 for fixed line, two mobile lines and fiber optic at my home in Puebla del Río (Seville). last May 23 I receive an email with a contract and SMS with fiber installation date, where I am informed of the new hiring in a Valladolid address of fixed line, mobile and fiber optic. I put in contact with said company that after informing him what happened I cancel the hiring. A few days later, on May 29, they send me again a email with the contract and SMS of information for the installation of the fiber, where He informed me again about contracting the same services at the same address from Valladolid. Contact again with the company and manage the cancellation of the contract. I demand that they answer me in writing what has happened and why it is due to two Sometimes they send me a contract that I have not made. In the contracts, they come my personal data: name and surname, date of birth, ID, phone number contact and email. But they do not correspond to my data: the installation address of the fiber, landline and mobile phone that are carried and bank account number for domiciliation of receipts". The following documentation is provided, among others:

- a) Copy of the Contract made on 05/23/18, of the mobile line \*\*\*TELÉFONO.1 and the general conditions of the same without signing in the "client signature" area.
- b) Copy of the Contract made on 05/29/18, of the mobile line \*\*\*TELÉFONO.2 and the general conditions of the same without signing in the "client signature" area.
- c) Copy of the complaint filed with the Civil Guard on 05/25/18, where indicate the facts stated above.

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter, RGPD).

Thus, on 07/26/18, an information request was addressed to the entity XFERA. The Support Service for Electronic Notifications and Enabled Electronic Address certifies that said requirement was notified on 08/01/18.

THIRD: Dated 12/13/18, not having received any type of information or documentation by the claimed entity, this Agency reiterates the request to the entity. The Electronic Notifications Support service and

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2/9

Authorized Electronic Address certifies that said requirement was notified on 12/23/18.

FOURTH: On 04/01/19, since this Agency did not record any response to the two claims for information made to the entity, it is appropriate to admit

process this claim.

FIFTH: On 04/10/19, the Director of the Spanish Agency for the Protection of Data agreed to initiate sanctioning proceedings against the claimed entity, by virtue of the powers established in article 58.2 of the RGPD and in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights (LOPDGDD), for the infringement of the articles 5 and 6) of the RGPD typified in article 83.5.a) of the RGPD and considered very serious, for prescription purposes, in 72.1.a and b) of the LOPDGDD, setting a initial penalty of 60,000 euros (sixty thousand euros). All this arguing that:

“It has been verified that the claimant is a client of the Mas Móvil company since 04/07/18 of various services, with address at \*\*\*ADDRESS.1. Last 05/23/18, received an email with a contract and an SMS, indicating the date of installation of new landline and mobile telephony services, but at an address in Valladolid. Put in contact with the company, the hiring is cancelled, but a few days later, the 05/29/18, Mas Móvil sent a new email and an SMS of information, from the contracting the same services and at the same address in Valladolid. put in contact once again with the company to cancel the contract again requests the new supposedly fraudulent contracts. In the indicated contracts The personal data, contact telephone number and email come, but they do not correspond, the installation address, telephone number and bank account number for domiciliation of receipts”.

SIXTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of dated 05/09/19, made, in summary, the following allegations:

“Inform the Spanish Data Protection Agency that, for the aforementioned facts, there is an open criminal court case, which is communicates to the opportune effects so that the suspension of the or

of the files in progress while the criminal case is resolved.

The simple account of the facts that suppose the reason for this procedure endorse the participation of third parties, that is, outside the company and its customers in good faith, with malicious intent and intent to take advantage improperly from the good faith of others. This implies of itself that this administered must also be considered as a victim and, for this reason, also, as injured in the open criminal proceeding.”

SEVENTH: On 05/28/19, the test practice period began, remembering: a).- to consider reproduced for evidentiary purposes the complaint filed by the complainant and her documentation, the documents obtained and generated that are part of file E/4631/2018 and b).- consider reproduced for purposes evidence, the allegations to the initiation agreement of PS/00149/2019, presented by the reported entity.

EIGHTH: On 08/07/19, the sanctioning resolution proposal is notified

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3/9

consisting in that by the Director of the Spanish Agency for the Protection of Data is sanctioned to the entity claimed for infraction of articles 5 and 6) of the RGPD, typified as very serious, for prescription purposes, in article 72.1.a and b) of the LOPDGDD, with a fine of 60,000 euros (sixty thousand euros), in accordance with the provisions of article 83.5.a) of the aforementioned RGPD, substantiating it, essentially, that: “XFERA MÓVILES, in its allegations, acknowledges the existence of an unauthorized use of the claimant's personal data, acknowledging

implicitly its responsibility in the infraction committed.

On the other hand, indicate that, if possible cases of

"falsehood or fraud" by using the personal data of the claimant to

commit a crime, it must be noted that no document has been provided that

test the state in which they are, currently the alleged

Preliminary Judicial Proceedings, if they have given rise to the processing of the corresponding

Judicial procedure or if, on the contrary, the dismissal has been agreed. The

entity claimed is only limited to indicating in its pleadings that "there is cause

judicial open" requesting the suspension of the administrative procedure.

Article 31.1 of Law 40/2015, on the Legal Regime of the Public Sector (RJSP)

which establishes: "Acts that have been criminal or

administratively, in cases where the identity of the subject, fact and

basis". Well, in this case, there is no triple identity, of subject, fact and

foundation, between the administrative infraction that is valued in this file

sanctioning party and the possible criminal infraction that could derive from the Proceedings

Prior practiced by a jurisdictional body (which is not the case, since it has not been

proven that there are prior proceedings). This, because the offending subject is obviously

would not be the same – with respect to breaches of the RGPD, the entity responsible is

claimed, XFERA MÓVILES SA, insofar as the criminally responsible for a possible

crime of usurpation of marital status or fraud would be the third that would have been done

go through the claimant.

Nor would the legal basis be the same: while the legal right protected by

the RGPD is the fundamental right to the protection of personal data, the good

legal that is protected in the criminal types whose commission is investigated would be the state

civil and patrimony, respectively. In this sense, it is very illuminating

Judgment of the National Court of 04/27/12 (rec. 78/2010).

NINTH: Once the proposed resolution has been notified, the entity complained against presents allegations to the proposed resolution, in the period granted for this purpose, based essentially on the following:

“Preliminarily, and expressing our opposition to the arguments collected by the Motion for a Resolution, we reiterate ourselves in the allegations expressed in our previous document presented before the Start Agreement, considering them reproduced in their entirety.

- Open criminal case.

This party has communicated the existence of an open criminal court case in order to that the suspension of the file(s) in progress be agreed upon as long as

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4/9

resolve the criminal case because in art. 31.1 of Law 40/2015, on the Regime

Juridical of the Public Sector (RSJP) that establishes: "They will not be able to sanction the facts that have been penal or administrative, in the cases in which identity of subject, fact or basis is appreciated".

It should be clarified that this part has not implicitly recognized in the allegations presented that he is responsible for the infraction committed, as well as how to add that these alleged administrative infractions do have

in relation to the criminal offenses committed, both in terms of the commission of the

The former is a consequence of the commission of crimes by third parties.

That this party, therefore, must be considered together with the claimant victim and harmed in the criminal procedure against third parties outside of

bad faith From the facts it can be deduced that XFERA has carried out a processing of data in good faith, ignoring the existence of contracting fraudulent, not being able to commit an administrative infraction without knowing that was processing data obtained by third parties and with malicious intent.

These facts must be judged only by criminal means, because XFERA one of the injured parties, finally being the victim of the commission of a administrative infraction that has not been carried out as a result of a usurpation of identity.

- Concurrence of the 'non bis in idem' principle.

In reiteration of the aforementioned art. 31.1 of the RSJP, the administrative procedure concurring a criminal procedure as long as when the identity of the subject, fact or foundation is appreciated. In this case, the following occurs:

Identity of subjects: the claimant and the defendant are victims and subjects harmed by the crimes of fraud and usurpation of marital status, against a foreign third party. Until the criminal case is resolved, they will not be able to determine who is the administrative offender.

Identity of facts: the facts that bring cause are simultaneous, they suppose the illegal processing of data as a necessary consequence for the commission of the crimes of fraud and usurpation of marital status by a third party. At our defence, we must add that the motion for a resolution does not mention why there is no identity of facts, because the identity of the facts is clear.

The protected legal rights are the fundamental right to the protection of the data, which must be infringed in order to finally commit a crime against the patrimonial legal asset. While it is true that acting against the fundamental right to data protection can only be against a

natural person, this offense has been a means for the commission of the ultimate goal of third parties in bad faith, for the commission of a crime against property for both natural and legal persons.

- Lastly, the suspension of the administrative procedure is requested, until

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5/9

that the criminal process is resolved or subsidiarily, propose the imposition to my represented from a sanction for minor infractions in its minimum degree”.

From the documentation and information presented by the parties in this process, it has been verified that:

#### PROVEN FACTS

a)

The claimant has been a client of the Mas Móvil company since 04/07/18, for several services, with address at \*\*\*ADDRESS.1.

b) On 05/23/18, you received an email with a contract and an SMS, where the indicated the date of installation of new fixed and mobile telephony services of the entity, but at an address in Valladolid.

c) Contact with the Mas Móvil company, the contract is cancelled, but a few days later, on 05/29/18, Mas Móvil sent a new email again and an SMS of information, of contracting the same services and in the same address in Valladolid.

d) Contact once again with the company to re-register the contracting, the new supposedly fraudulent contracts are requested. In



they come with personal data, contact telephone number and email, but not applicable, the address of installation, the telephone number and number of bank account for direct debit receipts.

e) The respondent entity recognizes the participation of third parties (existence of fraud), with malicious intent and intent to take undue advantage of the good faith of others, also considering themselves a victim and harmed.

f) The entity claimed alleges that the facts are in legal proceedings open.

## FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 04/27/2016, regarding the Protection of Natural Persons with regard to the Processing of Personal Data and the Free Circulation of these Data (General Data Protection Regulation, hereinafter RGPD) recognizes each Control Authority and, as established in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights (hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to initiate and resolve this procedure.

The entity complained against has submitted arguments to the proposed resolution reiterating the same arguments set forth in the allegations presented to the initiation of the file. However, it is necessary to point out again that:

II

a.- When the entity claimed affirms in the allegations presented on the date 05/09/19, that “due to the aforementioned facts, there is an open criminal court case, which is communicates to the opportune effects so that the suspension of the or of the

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6/9

ongoing files while the criminal case is resolved”, he is acknowledging implicitly the existence of non-consensual treatment of personal data of the claimant by the entity XFERA MÓVILES.

b.- The processing of personal data without the consent of the affected party is administratively sanctioned, (art. 5 and 6 of the RGPD). This administrative infraction It has nothing to do with the alleged fraud reported by the entity in criminal proceedings. Us we are referring to two clearly differentiated spheres of the legal system.

c.- Although the entity alleges that it has reported the facts in criminal proceedings, it must be indicate that, neither in the allegations at the initiation of the file, presented on 05/09/19, nor in the allegations to the proposed resolution, presented on 08/23/19, The entity has presented no evidence. No document has been provided test the state in which they are, currently the alleged

Preliminary Judicial Proceedings, if they have given rise to the processing of the corresponding Judicial procedure or if, on the contrary, the dismissal has been agreed. The entity claimed is only limited to indicating in its pleadings that "there is cause judicial open" requesting the suspension of the administrative procedure.

d.- Article 31.1 of Law 40/2015, on the Legal Regime of the Public Sector (RJSP) that establishes: "Acts that have been criminal or administratively, in cases where the identity of the subject, fact and basis". Well, in this case, there is no triple identity, of subject, fact and foundation, between the administrative infraction that is valued in this file

sanctioning party and the possible criminal infraction that could derive from the Proceedings

Prior practiced by a jurisdictional body (which is not the case, since it has not been proven that there are prior proceedings):

- It is obvious that the offending subject would not be the same: regarding the infractions administrative regulations (RGPD) the person responsible for the infraction is the entity claimed, XFERA MÓVILES SA and regarding the criminal liability of a possible crime of usurpation of marital status or fraud would be the third party would have posed as the claimant.
- The legal basis would be the same.
- The legal asset protected by the RGPD is the fundamental right to protection of personal data, while the legal asset that is protected in criminal types would be marital status and assets.

In this sense, the Judgment of the National High Court of 04/27/12 (rec. 78/2010).

The joint assessment of the documentary evidence in the procedure brings to knowledge of the AEPD a vision of the performance of the claimed entity, which has reflected in the facts declared proven.

III

The entity XFERA MÓVILES S.A., is the legal entity responsible for said facts. Circumscribed liability, for reasons of competence related to the article 5.1.a) of the RGPD, which establishes that: "personal data will be treated in

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lawful, loyal and transparent manner in relation to the interested party". In addition to violating also article 6.1.a) of the aforementioned RGPD where it is indicated that: "the treatment only It will be lawful if the interested party gave their consent for the processing of their data. personal for a specific purpose.

For its part, article 72.1.a and b) of the LOPDGDD considers it "very serious" if the treatment of personal data, "violates the principles and guarantees established in article 5 of the RGPD" or if it is carried out, "without the concurrence of any of the conditions of legality established in article 6 of the RGPD", respectively.

Sections 1) and 2), of article 58 of the RGPD, list, respectively, the investigative and corrective powers that the supervisory authority may provide to the effect, mentioning in point 1.d), that of: "notifying the person in charge or in charge of the treatment of alleged infringements of these Regulations" and in 2.i), that of: "impose an administrative fine under article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case."

This infraction can be sanctioned with a maximum fine of €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 of greater amount, in accordance with article 83.5.a) of the RGPD.

#### IV

On the other hand, and after the evidence obtained in the preliminary investigation phase and throughout throughout the instruction of the procedure, it is appropriate in this case to attend to what is stipulated in article 83.2 of the RGPD, in order to set the amount of the penalty to be imposed:

As aggravating criteria:

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The nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation; since once repaired the possible fraud, on 05/26/18, it was reproduced again a few days later, on 05/29/18; (section a).

Any previous infraction committed by the person in charge or the person in charge of the treatment, as there are precedents of infractions of the same nature by part of the claimed company (paragraph e).

The way in which the control authority became aware of the infraction; to the be aware of a claim filed with this Agency (section h).

- Other aggravating factors applicable to the circumstances of the case; Not having answered the claimed company, to the two requirements made from this Agency, on 07/26/18 notified to the entity on 08/01/18 and the request sent on 12/13/19, notified to the entity on 12/23/18, (section k).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with Regarding the infraction committed by violating the provisions of articles 5 and 6, allows setting a penalty of 60,000 euros (sixty thousand euros), typified as "very

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8/9

serious", for the purpose of prescription of the same, in 72.1. a and b) of the LOPDGDD.

In view of the aforementioned precepts and others of general application, the Director of the Agency Spanish Data Protection RESOLVES:

FIRST: IMPOSE the entity XFERA MÓVILES S.A. a penalty of 60,000

euros (sixty thousand euros), for the infringement of articles 5.1.a) and 6.1.a) of the RGD.

SECOND: NOTIFY this resolution to the entity XFERA MOVILES S.A.

according to art. 77.2 of the RGD, and INFORM the claimant about the result of the claim.

In accordance with the provisions of article 50 of the LOPDGD, this

Resolution will be made public once it has been notified to the interested parties.

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

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

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

Common to Public Administrations, within the voluntary payment period indicated in the

Article 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 17

December, by depositing it in the restricted account number ES00 0000 0000 0000

0000 0000, opened in the name of the Spanish Agency for Data Protection in the

Bank CAIXABANK, S.A. or otherwise, it will be collected in

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 section 2 of article 37 of the LOPD, in the

wording given by article 82 of Law 62/2003, of December 30, on measures

fiscal, administrative and social order, this Resolution will be made public, once

Once it has been notified to the interested parties. The publication will be made in accordance with

provided for in Instruction 1/2004, of December 22, of the Spanish Agency for

Data Protection on the publication of its Resolutions and in accordance with the provided in article 116 of the regulations for the development of the LOPD approved by the Royal Decree 1720/2007, of December 21.

Against this resolution, which puts an end to the administrative procedure (article 48.2 of the LOPD), and in accordance with the provisions of articles 112 and 123 of Law 39/2015, of 1/10, of the Common Administrative Procedure of the Public Administrations, 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 13/07, regulating the

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9/9

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 legal text.

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 of the Electronic Registry of the Agency [<https://sedeagpd.gob.es/sede-electronicaweb/>],

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

that proves the effective filing of the contentious-administrative appeal. If the

Agency was not aware of the filing of the contentious appeal-

within a period of two months from the day following the notification of the

This resolution would terminate the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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