

□ Procedure No.: PS/00433/2020

RESOLUTION R/00065/2021 TERMINATION OF THE PROCEDURE FOR PAYMENT
VOLUNTEER

In sanctioning procedure PS/00433/2020, instructed by the Spanish Agency for
Data Protection to XFERA MÓVILES, S.A., given the complaint filed by
A.A.A., and based on the following,

BACKGROUND

FIRST: On January 20, 2021, the Director of the Spanish Agency for
Data Protection agreed to initiate a sanctioning procedure against XFERA MÓVILES,
S.A. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00433/2020

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency and in
based on the following:

BACKGROUND

FIRST: The Spanish Agency for Data Protection proceeded to open the
guardianship of law, TD/00169/2019, having knowledge of the following facts:

On January 9, 2019, D. A.A.A. (hereinafter the claimant) exercised
right of access against XFERA MÓVILES, S.A with NIF A82528548 (in what
successively, the claimed one), without your request having received the answer legally
established.

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The claimant provided various documentation related to the claim raised before this Agency and on the exercise of the exercised right and indicates that the claimed refuses to provide the recordings that were made when carrying out the registration of portability, as well as the cancellation of the contracting of the services. Transferred the claim and being notified on February 28 and May 17 of 2019, did not present arguments.

SECOND: The Director of the Spanish Agency for Data Protection, issued on 23 of September 2019 resolution of legal guardianship TD/00169/2019, proceeding to ESTIMATE the claim made by D. A.A.A. and urge the entity XFERA MÓVILES, S.A with NIF A82528548 so that, within ten business days following notification of this resolution, send the claimant certification stating that you have complied with the right of access exercised for this one. The actions carried out as a result of this Resolution must be communicated to this Agency within the same period. The breach of this resolution could lead to the commission of the offense considered in article 72.1.m) of the LOPDGDD, which will be sanctioned, in accordance with art. 58.2 GDPR. Said agreement was notified to the respondent on October 15, 2019.

THIRD: With dates January 8, 2020 and November 17, 2020, received in this Agency two separate writings of the claimant in which he states that Once the terms granted to the defendant had elapsed, it failed to comply with the aforementioned resolution.

FOURTH: It is recorded that, on February 18, 2020, XFERA was requested again MÓVILES, S.A., compliance with the aforementioned resolution, as evidenced by the practice of notification through postal services. Confirming delivered the notification to the claimed on February 20, 2020.

After the term granted for compliance with the aforementioned has elapsed

Resolution, compliance is not recorded in this Agency.

FACTS:

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SOLE: The entity XFERA MÓVILES, S.A. has not sent the claimant certification

in which it is stated that he has attended to the right of access exercised by him,

Despite the legal protection resolution TD/00169/2019 issued by the Director of the Spanish Data Protection Agency.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of Regulation (EU) 2016/679, of the

European Parliament and of the Council, of April 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, in

hereinafter RGPD) recognizes each control authority and, as established in the

Articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Protection

of Personal Data and Guarantee of Digital Rights (hereinafter LOPDGDD),

The Director of the Spanish Agency for Data Protection is competent to initiate 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.

(...)

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i) impose an administrative fine under article 83, in addition to or instead of

the measures mentioned in this section, depending on the circumstances of the case

particular.

III

The RGPD deals in its article 58 with the powers of each authority of

control. Section 1.a) provides:

"1. Each supervisory authority will have all investigative powers

listed below:

a) order the person in charge and the person in charge of the treatment and, where appropriate, the

representative of the person in charge or the person in charge, who provide any information

required for the performance of its functions.

The infraction for which the responsible entity IBERIA is held responsible, is
is typified in article 83 of the RGD that, under the heading "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 20,000,000 Euros 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:

e) non-compliance with a resolution or a temporary or definitive limitation
of the treatment or the suspension of the data flows by the authority of
control under Article 58(2) or failing to provide access in breach
of article 58, section 1."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the
Digital Rights (LOPDGDD) in its article 72.1 m), 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
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particularly the following:

(...)

m) Failure to comply with the resolutions issued by the protection authority

data controller in exercise of the powers conferred by article 58.2

of Regulation (EU) 2016/679.”

IV

In the case analyzed here, it has been proven that the claimant exercised your right of access to the defendant entity, your request did not get a response legally required.

Likewise, after the evidence obtained, it is clear that the party claimed did not did not comply with the right of access nor communicated to this Agency the actions carried out, the claimant exercised the right of access to some voice recordings against the claimed and this is denied unless they are requested by means of a claim filed with this Agency. Regarding the latter, it should be noted that address the right when it is exercised and not when a claim is filed with this Agency.

On the other hand, the claim was transferred to the respondent and she did not answer this Agency.

v

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.”

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“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 the financial benefits obtained or the

losses avoided, directly or indirectly, through the 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 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

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of personal data.

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 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 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

impose in the present case on the entity claimed as responsible for a

infringement typified in article 83.5.e) of the RGPD, in an initial assessment,

the following factors are considered concurrent:

- It has not obtained direct benefits (83.2 k) RGPD and 76.2.c) LOPDGDD).

Any previous infraction committed by the person in charge or in charge of the

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treatment (83.2 e, of the RGPD).

The lack of cooperation with the AEPD in order to remedy the infringement

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and mitigate its effects (article 83.2.f, of the RGPD).

It is appropriate to graduate the sanction to be imposed on the claimed party and set it at the amount of

€40,000 for the infringement of article 58.2 of the RGPD.

Therefore, in accordance with the foregoing, by the Director of the

Spanish Data Protection Agency, IT IS AGREED:

FIRST: START A PUNISHMENT PROCEDURE against XFERA MÓVILES, S.A.,

with NIF A82528548, for the alleged infringement of article 58.2 of the RGPD, typified

in art. 83.5 e) of the GDPR.

SECOND: ORDER XFERA MÓVILES, S.A., with NIF A82528548, in accordance

with the provisions of article 58.2 d) of the RGPD, so that within a period of one month

Proceed to send the claimant a certification stating that he has attended

the right of access exercised by it, despite the resolution of legal protection

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TD/00169/2019 issued by the Director of the Spanish Agency for the Protection of Data.

THIRD: APPOINT D. B.B.B. as instructor. and, as secretary, Ms. C.C.C.,

indicating that any of them may be challenged, as the case may be, in accordance with

established in articles 23 and 24 of Law 40/2015, of October 1, on the Regime

Legal Department of the Public Sector (LRJSP).

FOURTH: INCORPORATE to the disciplinary file, for evidentiary purposes, the

claim filed by the claimant and his documentation, the documents

obtained and generated by the General Subdirectorate for Data Inspection during the

investigation phase, as well as the report of previous Inspection actions.

FIFTH: THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1

October, of the Common Administrative Procedure of the Public Administrations, the

sanction that could correspond would be 40,000 euros, without prejudice to what

result of the instruction.

SIXTH: NOTIFY this agreement to XFERA MÓVILES, S.A., with NIF

A82528548, granting him a hearing period of ten business days to formulate

the allegations and present the evidence it deems appropriate. In his writing of

allegations you must provide your NIF and the procedure number that appears in the

header 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

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 this procedure, equivalent in this case to 8,000 euros. with the app

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of this reduction, the sanction would be established at 32,000 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, equivalent in this case to 8,000 euros. With the application of this reduction, the sanction would be established in 32,000 euros and its payment will imply the termination of the procedure.

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 In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 24,000 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 (32,000 euros or 24,000 euros), you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 0000 open to name of the Spanish Data Protection Agency at CAIXABANK Bank, S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the reason for the reduction of the amount to which welcomes

Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where appropriate, of the draft start-up agreement.

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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 January 28, 2021, the claimant has proceeded to pay the

SECOND

sanction in the amount of 24,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the 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:

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"1. Started a sanctioning procedure, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the appropriate sanction.

2. When the sanction is solely pecuniary in nature or it is possible to impose a pecuniary sanction and another of a non-pecuniary nature, but 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 with each other.

The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or resignation of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased regulations.

In accordance with the above, the Director of the Spanish Agency for the Protection of Data RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00433/2020, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to XFERA MÓVILES, S.A.

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

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

Against this resolution, which puts an end to the administrative procedure as prescribed by

the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative before the Contentious-administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-Administrative Jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

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