

□ Procedure No.: PS/00077/2020

938-300320

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 October 4, 2019

filed a claim with the Spanish Data Protection Agency.

The claim is directed against Xfera Móviles, S.A. with NIF A82528548 (in
later, the claimed one).

The claimant states that on October 1, 2019 he received a call
allegedly from Movistar, in which they transmit that "they have released a new
platform for pensioners called MásMóvil and which would mean an important
discount on what you pay.

It adds that it can be deduced from the foregoing that they know all their
personal data, the numbers of your four telephone lines contracted with
Movistar, ADSL, address, your two bank accounts to pay bills
telephone.

Precisely, they tell him that Movistar is going to call him to provide him with a
code, after which you will be asked for it.

Thus, he filed a claim with Movistar, in his response he

They state that it is a fraud, that MásMóvil is posing as Movistar,
enter the landline phone number in the client's personal area and click forgot
password, then Movistar calls and provides the customer with a new password and the

The client, in turn, provides it to MásMóvil to access their data.

SECOND: In accordance with article 65.4 of the LOPDGDD, which has provided for a mechanism prior to the admission to processing of the claims that are formulated before the AEPD, consisting of transferring them to the Data Protection Delegates designated by those responsible or in charge of the treatment, for the purposes foreseen in article 37 of the aforementioned rule, or to these when they were not designated, it was given transfer of the claim to the claimed entity so that it proceeded to its analysis and respond to the complaining party and to this Agency within a month.

As a result of this process:

1st.-

Telefónica Móviles España, S.A.U. states to this Agency, dated December 20, 2019, that they are not aware that they have made the relative calls to the offer mentioned by the claimant.

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2nd.-

Within the framework of file E/10551/2019, by means of a document signed on November 18, 2019, the claim was transferred to the respondent requesting within a month to provide information on the facts set forth in the claim and detail the measures adopted to avoid that in the future similar situations occur. The writing was notified to the claimed electronically being the date of acceptance of the notification the 20th day of the same month and year, as as evidenced by the certificate issued by the FNMT that is in the file.

After the period granted to the respondent without having responded to the

request for information, in accordance with the provisions of article 65.2 of the Law Organic 3/2018, on Data Protection and Guarantee of Digital Rights (LOPDGDD), on 03/03/2020, the agreement for admission to processing of the this claim.

THIRD: On June 8, 2020, 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 in which, in summary, it states that it does not have the information indicated by the claimant in its databases, nor the capacity to have it if not facilitates the claimant.

They add that they have been able to verify that the line from which they make the calls is not is a number assigned to the claimed, so the person responsible for having made such a call, and therefore, the person in charge of the treatment and of the infraction, will be the client who has been assigned said numbering and therefore there are indications of fraud.

FIFTH: On July 10, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigative actions, E/10551/2019, as well as the documents provided by the claimant.

PROVEN FACTS

1º On October 4, 2019, the claimant states that on the 1st of the same month and year receives a call presumably from Movistar, from which it follows

that they know all your personal data. However, Movistar tells him that it is a fraud.

On the other hand, it indicates that the calling line pretends to be the called party.

2º On June 29, 2020, the respondent states that they have been able to verify that the line from which the calls are made is not a number assigned to the claimed, so the person responsible for having made such a call, and therefore, the

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responsible for the treatment and the infraction, will be the client who has assigned said numbering and therefore there are indications of fraud.

3º In the documentation provided by the claimed party, it is stated that he is not the holder of the calling line.

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 arts. 47 and 48.1 of the LOPDPGDD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

Law 39/2015, of Common Administrative Procedure of the Administrations

(LPACAP) establishes in its article 89.1 that "the termination of the

procedure, with filing of the actions, without the need to formulate

of the proposed resolution, when in the instruction of the procedure it is stated

I declare that any of the following circumstances exist:

a) The non-existence of the facts that could constitute the infraction”.

III

The defendant is imputed the commission of an infraction for violation of Article 6 of the RGPD, “Legality of the treatment”, which indicates in its section 1 the cases in which the processing of third party data is considered lawful:

“1. The treatment will only be lawful if at least one of the following is met conditions:

a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;

(...)”

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

“5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the
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global total annual turnover of the previous financial year, opting for the largest amount:

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

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.”

IV

In the case at hand, it has been proven that the person claimed is not the calling line owner.

It is known that the call received by the claimant is not a number assigned to the claimed party, so it is not responsible for having made the same.

Considering the aforementioned precepts and others of general application,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE sanctioning procedure PS/00077/2020, instructed to

XFERA MÓVILES, S.A., with NIF A82528548, for having proven that it is not the owner of the calling line.

SECOND: NOTIFY this resolution to XFERA MÓVILES, S.A., with NIF A82528548.

THIRD: In accordance with the provisions of article 50 of the LOPDPGDD, 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 LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

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

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

contentious-administrative appeal before the Contentious-Administrative Chamber of the

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

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

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Contentious-administrative jurisdiction, within a period of two months from the

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

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

[web/](https://sedeagpd.gob.es/sede-electronica-web/)], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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