

☐ Procedure No.: PS/00385/2019

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 November 6, 2018

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 reasons on which the claim is based are that on the 5th of

November 2018 when accessing your client area through the address

www.llamaya.com and when wanting to make inquiries about your telephone line

***TELEFONO.1 observes that their customer data has changed while their line is

associated with a third party being able to access its data (name, telephone,

home). The DNI that appears is still yours, as well as the bank account.

That he contacted the company Llamaya through the number 2376

explaining what happened and that when he carried out the portability everything was correct and

they open the incidence nº ***INCIDENCIA.1. The company confirms that it appears

that the line is in your name, but also in someone else's name.

And, among other things, attach the following documentation:

☐ Line contract with the previous company.

Invoice of the line with the previous company.

☐

SECOND: In view of the facts denounced in the claim, of the

documents provided by the claimant and the facts and documents of which

this Agency has been informed, the General Subdirectorate of Inspection of Data 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 Organic Law 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:

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On December 17, 2018, the complaint was transferred to XFERA

MOBILES, S.A. in the actions with reference E/10136/2018. The notification figure delivered with acknowledgment date December 27, 2018. Not received reply.

On April 1, 2019, these proceedings begin.

On April 9, 2019, the complainant sends this Agency the following information:

1. States that the company Llamaya solved the error and put the line in his name after which he ported to his current operator O2.
2. Provide a Llamaya invoice where your line appears and the name, surnames and

address of the third person.

3. Provides a screenshot of the Llamaya client area where the personal data (name, surname and address) of the third person.

4. Provide invoice with your new O2 operator.

On May 10, 2019, XFERA MÓVILES, S.A. sends to this Agency the

Next information:

1. They state that as soon as they became aware of the incident, they adopted the measures at its disposal to prevent any malicious action, as well as to protect your client.

Provide a printed copy of the email addressed to the complainant containing the following statements:

That they are interested in resolving the incidence and knowing the

a)

possible causes of it.

That the data of the possible contracted line have been modified

b)

fraudulently and are working on adopting the measures timely in order to resolve the incident.

c)

that this circumstance does not occur in the future.

That new internal measures have been adopted in order to

1. They point out that what happened is still fully unknown and therefore they cannot expose the causes that have originated the incidence. But, in view of the known data, have suspicions of malicious action on the part of a third.

They indicate that they have opened an incident ***INCIDENCIA.1, which will remain

subject to the result of the judicial activities that are followed when presenting the facts communicated criminal appearance.

two.

3. And lastly, they state that actions are being taken internally timely in order to implement new training measures, including external advice, in order to reinforce the precautions that are must be adopted by all the personnel of this operator involved in the

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corresponding commercial processes, in order to avoid or, at least, make it difficult malicious actions of third parties with special attention to attempts of impersonation.

On July 1, 2019, XFERA MÓVILES, S.A. sends to this Agency the

Next information:

1. Provides the same answer, already sent to this Agency, dated 10 May 2019.

2. States that the client is currently unsubscribed from the 12th of November 2018.

Provide a screenshot with the deactivation date.

1. States that the data of the other holder is no longer detected in the data of the client.

2. Provide a document referring to the complainant with, among others, the following data:

a. Name and surnames, DNI, postal address, email, date of birth, contact phone.

b.

***TELEPHONE 1.

Contracted product stating the contract number and the line

THIRD: On November 19, 2019, the Director of the Agency

Spanish Data Protection agreed to initiate sanctioning procedure to the

claimed, in accordance with the provisions of articles 63 and 64 of Law 39/2015, of

October 1, of the Common Administrative Procedure of the Administrations

(hereinafter, LPACAP), for the alleged violation of Article 5.1.f) of the

RGPD, typified in Article 83.5 of the RGPD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

allegations in which, in summary, it stated that: "it is agreed to communicate the

antecedents corresponding to this sanctioning file. Consider

as sufficient the explanations given and, in its reason, file this

sanctioning procedure and subsidiarily: Understand that it is appropriate to weigh,

for the attenuation of the sanction, two new mitigating factors of the categories

included in letters c) and K) of article 83.2 of the RGPD".

FIFTH: On December 13, 2019, the instructor of the procedure

agreed to open a period of practice tests, taking into account

incorporated the previous investigation actions, E/02806/2019, as well as the

documents provided by the respondent, and the documentation that they

accompanies.

On December 12, 2019, a copy of the file was sent to the

reclaimed.

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SIXTH: On January 10, 2020, it was issued and notified on the same date to the claimed the Resolution Proposal, for alleged infraction of article 5.1.f) of the RGPD, typified in article 83.5 of the RGPD, proposing a fine of €30,000.

Xfera Móviles 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 proceeding and of the documentation in the file, the following have been accredited:

PROVEN FACTS

FIRST:

On November 6, 2018, the claimant files claim before the Spanish Agency for Data Protection, stating that the November 5, 2018 when accessing your client area through the address www.llamaya.com and when wanting to make inquiries about your telephone line ***TELEFONO.1 observes that their customer data has changed while their line is associated with a third party, being able to access their data (name, telephone, home). The DNI that appears is still yours, as well as the bank account.

The company confirms that it appears to them that the line is in your name, but also in the name of another person.

SECOND: Llamaya invoice where your line appears and the name, surnames and address of the third person. Screenshot of the client area

Llamaya where the personal data appears (name, surnames and address of the

third person).

FOUNDATIONS OF LAW

Yo

The Director of the Agency is competent to resolve this procedure.

Spanish Data Protection, in accordance with the provisions of art. 58.2

of the RGPD and in art. 47 and 48.1 of LOPDGDD.

II

The defendant is imputed the commission of an infraction for violation of Article

5.1.f) of the RGPD, which states that:

"1. The personal data will be:

(...)

f) processed in such a way as to ensure adequate security of the data

including protection against unauthorized or unlawful processing and

against loss, destruction or accidental damage, through the application of

appropriate technical or organizational measures ("integrity and confidentiality").

(...)"

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Article 5, Duty of confidentiality, of the new Organic Law 3/2018, of 5

of December, of Protection of Personal Data and guarantee of the rights

(hereinafter LOPDGDD), states that:

"1. Those responsible and in charge of data processing as well as all

people who intervene in any phase of this will be subject to the duty of

confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section will be complementary of the duties of professional secrecy in accordance with its applicable regulations.

3. The obligations established in the previous sections will be maintained even when the relationship of the obligor with the person in charge or treatment manager”.

On the other hand, article 83.5 a) of the RGPD, considers that the infringement of “the basic principles for treatment, including conditions for treatment consent under articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the aforementioned article 83 of the aforementioned RGPD, “with fines administrative fees of €20,000,000 maximum or, in the case of a company, of an amount equivalent to a maximum of 4% of the total annual turnover of the previous financial year, opting for the highest amount.

The regulation of infractions in the LOPDGDD is more precise in terms of the situations that give rise to an infraction and its consideration, so that it is much easier to know the limitation period of that infraction (that is, if it is considered mild, serious or very serious) and with regard to the administrative sanction impose for non-compliance.

The LOPDGDD in its article 72, for prescription purposes, states that they are:

“Infringements considered very serious:

1. Based on the provisions of article 83.5 of 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:

a) The processing of personal data violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679.

(...)"

III

The documentation in the file offers clear indications that the claimed violated article 5 of the RGPD, principles related to treatment, in relation to article 5 of the LOPGDD, duty of confidentiality, by disclosing to the claimant the personal data of a third party, when entering your customer account.

The claimant has provided an invoice from Llamaya where his line and name appear, surnames and address of the third person and screenshot of the area of Llamaya client where the personal data appears (name, surnames and address) of the third person.

The duty of confidentiality, previously the duty of secrecy, must be understood which is intended to prevent leaks of data not consented to by their owners.

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Therefore, this duty of confidentiality is an obligation that falls not only to the person in charge and in charge of the treatment but to everyone who intervenes in any phase of the treatment and complementary to the duty of professional secrecy.

In this sense, the National Court pronounced itself in a sentence of 01/18/02, in which Second Law Foundation, stated: "The duty of secrecy professional that is incumbent on those responsible for automated files, ..., entails that the person in charge -in this case, the recurring banking entity- of the stored data -in this case, those associated with the complainant- cannot

reveal or make their content known, having the “duty to keep them, obligations that will subsist even after the end of their relations with the holder of the automated file or, where appropriate, with the person responsible for it... This

The duty of secrecy is essential in today's increasingly complex, in which advances in technology place the person in areas of risk for the protection of fundamental rights, such as privacy or right to the protection of the data that collects the article 18.4 of the CE. In

In effect, this precept contains an "institution to guarantee the rights to privacy and honor and the full enjoyment of the rights of citizens who,

Furthermore, it is in itself a fundamental right or freedom, the right to freedom from potential attacks on the dignity and freedom of the person from an illegitimate use of mechanized data processing (STC 292/2000)..."

Regarding what is alleged by the respondent, it is clear that in this specific case, acted contrary to the principle of confidentiality enshrined in article 5.1.f) of the RGPD, in relation to article 5 of the LOPDGDD, since the claimed disclosed to the claimant the personal data of a third party, upon entering your customer account.

IV

In accordance with the provisions of the RGPD in its articles 83.1 and 83.2, when deciding the imposition of an administrative fine and its amount in each individual case will take into account the aggravating and mitigating factors that are listed in the article indicated, as well as any other that may be applicable to the circumstances of the case:

“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.

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 administrative fine and its amount in each individual case will be duly consider:

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 interested parties affected and the level of damages that they have suffered;

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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, 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 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 the infringement”.

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, “Sanctions and corrective measures”, provides 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 personal data processing.
- c) The benefits obtained as a result of the commission of the infringement.
- 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

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assumptions in which there are controversies between those and any interested."

In accordance with the precepts transcribed, and for the purpose of setting the amount of the sanction of a fine to be imposed in the present case for the infraction typified in the article 83.5.a) of the RGPD for which the claimed party is responsible, they are estimated concurrent the following factors:

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

Only one person has been affected by the offending conduct.

There is no evidence that the entity had acted maliciously, although the performance reveals a lack of diligence.

Linking the activity of the offender with the performance of treatments of personal data number of people affected.

The entity claimed is considered a large company.

The balance of the circumstances contemplated in article 83.2 of the RGPD, with respect to the infraction committed by violating what is established in its article 5.1.f) of the RGPD allows a penalty of 30,000 (thirty thousand euros) to be set,

considered as "very serious", for purposes of prescription thereof, in 72.1.

a) of the LOPDGDD.

Therefore, in accordance with the applicable legislation and having assessed the criteria

of graduation of the sanctions whose existence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE XFERA MÓVILES, S.A. with NIF A82528548, for a

infringement of Article 5.1.f) of the RGPD, typified in Article 83.5 of the RGPD, a

fine of €30,000.00 (thirty thousand euros).

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

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

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 the

Law 58/2003, of December 17, through its entry, indicating the NIF of the

sanctioned and the number of the procedure that appears in the heading of this

document, in restricted account number ES00 0000 0000 0000 0000, open to

name of the Spanish Data Protection Agency at CAIXABANK Bank,

S.A. Otherwise, it will be collected in 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 of the following month or immediately after,

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and if it is between the 16th and last day of each month, both inclusive, the term of 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 Chamber-

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

in section 5 of the fourth additional provision of Law 29/1998, of July 13,

regulation of the Contentious-administrative Jurisdiction, within a period of two months to

count from the day following the notification of this act, as provided in the

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 one of the

remaining records 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 filing effectiveness of the contentious-administrative appeal. If the Agency did not have knowledge of the filing of the contentious-administrative appeal within the term of two months from the day following the notification of this resolution, would give by the end of the precautionary suspension.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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