 Procedure No.: PS/00415/2019

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 September 20,

2018 filed a claim with the Spanish Data Protection Agency. The

claim is directed against XFERA MÓVILES, S.A. with NIF A82528548 (hereinafter,

the claimed one).

The claimant states that he has not been a client of the claimed company since the month of

September 2017 and for this reason, filed two claims with the Office

Municipal Consumer Information Office of the Vinaròs City Council, both being

favorable.

Later, in September 2018, he received emails from

the one claimed, in which a recovery company claims the debt generated from

fraudulently since July 2018.

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

 Response received at the Municipal Consumer Information Office (in

hereinafter, OMIC) dated March 12, 2018 from the claimed

corresponding to the claim made in March 2018 informed that

the claim has been accepted and the telephone line has been unsubscribed with

date March 3, 2018. Likewise, the corresponding payments are made

to periods not enjoyed.

 Claim made before the OMIC dated May 8, 2018 showing

your disagreement indicating (i) that as of this date your data continues to be active in the

company and requesting their deletion and (ii) that no

reimbursement AB0086485 as reported by the respondent in her response dated 12

March 2018.

 Response received at the OMIC dated June 28, 2018 from

of the claim stating that the credit AB0086485 had not been entered

because it was offset against an existing debt pending payment. Add that

a credit corresponding to the invoice has also been entered

MC181742695 and that as soon as the debt is completely cancelled, the

your company details.

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 Notification dated September 7, 2018 from the claimed

requiring payment of an invoice amounting to €XX.XX and informing the

claimant that their data could be reported to the solvency files

equity and credit.

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 Subdirectorate 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:

 With the notification date of June 28, 2019, within the framework of the file E00413/2019, a request was made to the respondent to inform on the aspects expressed by the claimant, stating as date of acceptance on the same date without having given an answer to said request.

 Within the file E/07400/2018, with notification date 17 of October 2018, the claim was transferred to the respondent. Without having received in this Agency a reply to said transfer, it was granted with notification date of November 29, 2018 new term for the presentation of claims. On both occasions it has not been received in this Agency response by the claimed.

For this reason, this claim is admitted for processing by process the claimant's data without legitimacy without the entity having responded to the Spanish Data Protection Agency.

THIRD: On November 28, 2019, the Director of the Spanish Agency of Data Protection agreed to initiate sanctioning procedure to the claimed, 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 party complained against submitted a written allegations in which, in summary, it stated that: "there was a contract between the claimant and is administered in such a way that it had the legitimacy of contractual compliance in accordance with the provisions of article 6 where it deals of the legality of the treatment.

That is why the performance of this administration was at all times adjusted to legality insofar as it carried out the pertinent management operations of accordance with the vicissitudes produced in the course of a contract in force.

That the competent body agrees to the completion of the file without sanction, or where appropriate, incorporating the mitigating factors in the appropriate assessment corresponding.

FIFTH: On January 10, 2020, the test practice period began, remembering: 1. Consider reproduced for evidentiary purposes the complaint filed by the claimant and her documentation, the documents obtained and generated that are part of the file and 2. Consider reproduced for evidentiary purposes, the allegations to the initiation agreement of PS/00415/2019, presented by the entity reported.

SIXTH: On February 5, 2020, it was issued and notified on the 7th of the same month and year to Xfera Móviles the Resolution Proposal, for alleged infringement of article 6.1 of the RGPD, typified in article 83.5 a) of the RGPD, proposing a fine of €75,000.

Xfera Móviles did not present arguments to the Resolution Proposal.

PROVEN FACTS

FIRST.- It is stated that the claimant is not a client of the claimed company since the month of September 2017 and for this reason, filed two claims with the Office Municipal Consumer Information Office of the Vinaròs City Council, both being favorable.

SECOND.- In the month of September 2018, he received emails from the claimed, in which a collection company claims the debt generated from fraudulently since July 2018.

THIRD.- Response received at the Municipal Consumer Information Office (hereinafter, OMIC) dated March 12, 2018 from the claimed corresponding to the claim made in March 2018 informed that it has been The claim has been accepted and the telephone line has been canceled on the 3rd of March 2018. Likewise, the payments corresponding to the periods not enjoyed.

FOURTH.- Claim filed with the OMIC dated May 8, 2018 showing your disagreement indicating (i) that as of this date your data is still active in the company and requesting their deletion and (ii) that it has not been carried out reimbursement AB0086485 as reported by the respondent in its response dated 12 March 2018.

FIFTH.- Response received at the OMIC dated June 28, 2018 from the claimed one stating that the payment AB0086485 had not been entered because it was offset against an existing debt pending payment. Add

that a credit corresponding to the invoice has also been entered

MC181742695 and that as soon as the debt is completely cancelled, your data will be deleted

of the company.

SIXTH.- Notification dated September 7, 2018 from the

claimed requesting the payment of an invoice amounting to €XX.XX and informing the

claimant that their data could be reported to the solvency files

equity and credit.

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 the art. 47 and 48.1 of LOPDGDD.

II

The defendant is accused of committing an infraction for violation of the

Article 6 of the RGPD, "Legality of the treatment", which indicates 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 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

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."

III

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 legitimation. The personal data of the claimant were incorporated into the company's information systems, without any accredited that he had his consent for the collection and treatment later of your personal data.

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 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.

The personal data of the claimant were registered in the files of the claimed and were treated for the issuance of emails. In consequently, has carried out a treatment of personal data without having accredited that it has the consent of the latter for its treatment, nor that have the legal authorization to do so.

However, and this is essential, the defendant does not prove legal standing 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 who 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.

Well, with respect to the facts that are the subject of this claim,

We must point out that the defendant, despite the repeated requests she received from the

AEPD to explain the facts on which it deals, never responded or

provided any evidence that would allow estimating that the treatment of the data of the

claimant had been legitimate.

It is clear that June 28, October 17 and November 29, 2018

requested information from the respondent entity. However, no reply was received.

some.

The lack of diligence displayed by the entity in complying with the

obligations imposed by the personal data protection regulations

it is therefore evident. Diligent compliance with the principle of legality in the treatment

of third-party data requires that the data controller be in a position

to prove it (principle of proactive responsibility).

IV

In accordance with the provisions of the RGPD in its art. 83.1 and 83.2, when deciding the

imposition of an administrative fine and its amount in each individual case will be

taking into account the aggravating and mitigating factors 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, 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

or indirectly, through 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 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."

Consequently, the following have been taken into account as aggravating factors:

- The duration of the illegitimate treatment of the data of the affected person carried out by the

claimed (article 83.2.a, of the RGPD).

- The lack of cooperation with the AEPD in order to remedy the infraction and mitigate its

effects (article 83.2.f, of the RGPD).

- The evident link between the business activity of the defendant and the

processing of personal data of clients or third parties (article 83.2.k, of the RGPD in

relation to article 76.2.b of the LOPDGDD).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with

Regarding the infraction committed by violating the provisions of article 6, it allows setting a

sanction of 75,000 euros (seventy-five thousand euros), typified as "very serious", for

of prescription thereof, in article 72.1.b) of the LOPDGDD.

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

graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

:

FIRST: IMPOSE XFERA MÓVILES, S.A. with NIF A82528548, for an infringement of the Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €75,000.00 (seventy-five thousand euros).

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

THIRD: Warn the sanctioned person that he must make the imposed sanction effective once that this resolution is enforceable, in accordance with the provisions of art. 98.1.b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (hereinafter LPACAP), within the established voluntary payment period in art. 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 December 17, by entering, indicating the NIF of the sanctioned person and the number of the procedure that appears at the top of this document, 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. Otherwise, it will proceed to its collection in period executive.

Received the notification and once executed, if the date of execution is between the days 1 and 15 of each month, both inclusive, the term to make the voluntary payment will be until the 20th day of the following month or immediately after, and if it is between the days 16th and last of each month, both inclusive, the payment term will be until the 5th of the second following or immediately following business month.

In accordance with the provisions of article 50 of the LOPDPGDD, 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 period of one month from the day following the notification of this resolution or directly contentious appeal before the Contentious-Administrative Chamber of the National High Court, with 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 two months from the day following the notification of this act, according to the provisions of 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, it may be precautionary suspension of the firm decision in administrative proceedings if the interested party expresses its intention to file a contentious-administrative appeal. If this is the case, the The interested party must formally communicate this fact in writing addressed to the Agency Spanish Data Protection, presenting it through the Electronic Registry of 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 were not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of this resolution, it would end the suspension precautionary

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