

936-031219

□ Procedure No.: PS/00033/2020

RESOLUTION R/00241/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00033/2020, instructed by the Agency

Spanish Data Protection Agency to XFERA MÓVILES, S.A., given the complaint

presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On March 12, 2020, 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/00033/2020

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data and based on the following

FACTS

FIRST: A.A.A. (hereinafter, the claimant) dated September 26, 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 reasons on which the claim is based are the receipt of SMS from

said entity claimed notifying the non-payment/suspension of the service of another

client.

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The claim was forwarded to the responsible entity, which has not submitted a written claims within the specified period.

SECOND: Upon receipt of the claim, the Subdirector General for Data Inspection proceeded to carry out the following actions:

On November 11, 2019, the claim was transferred to the entity claimed.

presented by the claimant, for its analysis as well as for it to inform this Agency as to whether the claimant had been contacted, and the decision taken in this regard to resolve the situation.

The respondent has not responded to any of the requests made by the Spanish Data Protection Agency.

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 according to what is established in articles 47 and 48 of the LOPDGDD, the Director of The Spanish Agency for Data Protection is competent to initiate and resolve this procedure.

II

Article 6.1 of the RGPD establishes the assumptions that allow the legalization of the treatment of personal data.

Article 5 of the RGPD establishes that personal data will be:

“a) processed in a lawful, loyal and transparent manner in relation to the interested party ("legality, loyalty and transparency");

b) collected for specific, explicit and legitimate purposes, and will not be processed subsequently in a manner incompatible with those purposes; according to article 89, section 1, further processing of personal data for archiving purposes in the interest public, scientific and historical research purposes or statistical purposes shall not be considered incompatible with the original purposes ("purpose limitation");

c) adequate, pertinent and limited to what is necessary in relation to the purposes for those that are processed ("data minimization");

d) accurate and, if necessary, updated; all measures will be taken reasonable for the erasure or rectification without delay of the personal data that is inaccurate with respect to the purposes for which they are processed ("accuracy");

e) maintained in a way that allows the identification of the interested parties during no longer than is necessary for the purposes of processing the personal data; the personal data may be kept for longer periods as long as they are processed exclusively for archival purposes in the public interest, scientific research purposes or historical or statistical purposes, in accordance with article 89, paragraph 1, without prejudice to the application of the appropriate technical and organizational measures imposed by this Regulation in order to protect the rights and freedoms of the interested party ("limitation of the term of conservation");

f) processed in such a way as to ensure adequate security of the data including protection against unauthorized or unlawful processing and against their accidental loss, destruction or damage, through the application of technical measures or

appropriate organizational measures ("integrity and confidentiality").

The controller will be responsible for compliance with the provisions in section 1 and able to demonstrate it ("proactive responsibility")."

III

According to the evidence currently available

agreement to initiate the sanctioning procedure, and without prejudice to what results from the

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instruction, it is considered that XFERA MÓVILES, S.A. has sent an SMS to the claimant communicating the non-payment/suspension of the service of another client.

Thus, the known facts could constitute an infraction,

attributable to the claimed, for violation of article 5 of the RGPD, which establishes that "the personal data will be processed in such a way as to ensure adequate security

of personal data, including protection against unauthorized or unlawful processing and against its loss, destruction or accidental damage, through the application of measures appropriate technical or organizational ("integrity and confidentiality").

The controller will be responsible for compliance with the provisions in section 1 and able to demonstrate it ("proactive responsibility")."

IV

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 volume

of total annual global business of the previous financial year, opting for the one with the highest amount, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established by article 83.2 of the RGPD:

As aggravating factors:

☐ We are faced with an action that, although not intentional, is manifest.

festively negligent (83.2 b)

☐

The data processed in this case, are of a markedly personal nature and therefore person identifiers (article 83.2 g)

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Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against XFERA MÓVILES, S.A., with NIF A82528548, for the alleged infringement of article 5.1 f) of the RGPD, infringement typified in article 83.5 and classified as very serious in article 72.1 a) of the LOPDPGDD.

1. ORDER XFERA MÓVILES, S.A., with NIF A82528548, in accordance with the provisions placed in article 58.2 d) of the RGPD, so that within ten days proceed to order the controller or processor, that the processing operations processing comply with the provisions of the RGPD.

2. APPOINT R.R.R. as instructor. and, as secretary, to S.S.S., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and his documentation, the documents obtained and generated generated by the Subdirector General for Data Inspection during the investigation phase. investigations, as well as the report of previous inspection actions.

4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, the sanction tion that could correspond would be sixty-five thousand euros (€65,000) without prejudice to what results from the instruction.

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5. NOTIFY this agreement to XFERA MÓVILES, S.A., with NIF A82528548, granting him a hearing period of ten business days to formulate the allegations tions and submit any evidence you deem appropriate. In his brief of allegation You must provide your NIF and the procedure number that appears in the header. launch 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 the

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 acknowledge its responsibility within the term granted for the formulation of allegations to this initial agreement; what it will take coupled with a reduction of 20% of the sanction to be imposed in the present process. With the application of this reduction, the sanction would be established in fifty-two thousand euros (52,000 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 entail the reduction of 20% of its amount. With the application of this reduction, the sanction would be established at fifty-two thousand euros (52,000 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 responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the amount referred to in the previous paragraph may be made at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at thirty-nine thousand euros (39,000 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.

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In case you chose to proceed to the voluntary payment of any of the amounts mentioned above fifty-two thousand euros (52,000 euros) or thirty-nine thousand euros (39,000 euros), you must make it effective by depositing it in account no. ES00 0000 0000 0000 0000 0000 opened in the name of the Spanish Protection Agency of Data in Banco CAIXABANK, S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the cause of reduction of the amount to which it is accepted.

Likewise, you must send proof of entry to the Subdirector General for Inspection to continue with the procedure according to the amount entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, if applicable, the draft start-up agreement. After that period its expiration will occur and, consequently, the filing of proceedings; 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 April 2, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 39,000 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

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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:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his

responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified 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 each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction.

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

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00033/2020, 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

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

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