

968-150719

□ Procedure No.: PS/00446/2019

RESOLUTION R/00303/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00446/2019, instructed by the Agency

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

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

BACKGROUND

FIRST: On December 10, 2019, the Director of the Spanish Agency

of Data Protection agreed to initiate a sanctioning procedure against XFERA MÓVILES,

S.A.. Having notified the initiation agreement and after analyzing the allegations presented, with

On February 11, 2020, the following resolution proposal was issued:

is transcribed:

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Procedure no.: PS/00446/2019

1105-310120

Of the procedure instructed by the Spanish Agency for Data Protection and based on

to the following:

BACKGROUND

FIRST: On June 17, 2019, it had entry in this Spanish Agency of

Data Protection a document presented by A.A.A. (hereinafter referred to as the claimant),

through which he makes a claim against XFERA MÓVILES, S.A. with NIF

A82528548 (hereinafter, the claimed).

SECOND: In accordance with the provisions of article 65 of Organic Law 3/2018, of

December 5, Protection of Personal Data and guarantee of rights

(LOPDGDD hereinafter), the claim was transferred to the person in charge or to the Data Protection Delegate that you may have appointed, requiring you to send the requested information and documentation to this Agency. East request for information was made within the framework of the file with code of reference E/06773/2019.

THIRD: Once the period of one month that was given to the claimed person for inform the Spanish Agency for Data Protection, as indicated in the

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second background, without the respondent providing the pertinent response, the

The claim was admitted for processing on October 8, 2019.

FOURTH: In relation to the investigation actions referenced with the

code E/09581/2019, a new request for information was sent to the respondent,

alluding to the claim outlined in the first antecedent, so that, within the term of

ten working days, submit to this Agency the information and documentation that

it was pointed out in it. This requirement was logged out on October 29

of 2019 with number 078254/2019 and was not collected by the person in charge, as stated

in the Notific@ certificate that is in the file, understood as rejected

in accordance with the provisions of art. 43.2 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), dated November 9, 2019.

According to the provisions of art. 43.3 of the aforementioned LPACAP, "It will be understood that the

obligation referred to in article 40.4 with the provision of the

notification in the electronic headquarters of the Administration or acting body or in the unique authorized electronic address.”

FIFTH: Although the notification was validly made by electronic means in accordance with the provisions of article 43 of the LPACAP, for informational purposes only A copy was sent by postal mail that was registered on November 12, 2019 with number 082551/2019 and that was collected by the person in charge on the 15th of November 2015, as stated in the Post Office certificate in the proceedings.

SIXTH: On December 10, 2019, 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 violation of Article 58.1 of the RGPD, typified in the Article 83.5 of the RGPD.

SEVENTH: The aforementioned initial agreement was collected by the person in charge on the 17th of December 2019, as stated in the Notific@ certificate that works in the proceedings.

EIGHTH: Dated January 15, 2020 and entry registration number 001714/2020, the respondent submits written arguments after the deadline in which states that in the initial agreement a lack of collaboration with the AEPD is imputed, but that what is attributed derives from a circumstance linked to the fact of having coincided the actions required with the summer season, influencing the ordinary management of the requirement. To substantiate this circumstance, acknowledgment of receipt of the request for an extension of the term dated August 19, 2019. Likewise, it indicates the full willingness to collaborate with the actions of the AEPD and

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requests to agree to the completion of the file without sanction or, where appropriate, incorporating the corresponding mitigating factors into the appropriate assessment.

In this regard, it should be noted that the first request for information, for which granted a response period of one month, it was notified on July 17, 2019 and the request for an extension of the term was made on August 19, 2019, therefore outside the granted period. Despite this, the admission to processing of the claim did not occurred until October 8, 2019, without receiving a response to the request. Likewise, a request for information was requested again, which was registered departure on October 29, 2019 and the start was finally agreed of the sanctioning procedure on December 10, 2019, without until that date would not have received a response to any of the requests made.

NINTH: Attached as an annex is a list of documents in the process.

Of the actions carried out in this procedure and the documentation in the file, the following have been accredited:

PROVEN FACTS

FIRST: The information requirements indicated in the second background and fourth were notified electronically, in accordance with the provisions of article 43 of the LPACAP.

SECOND: The respondent has not responded to the information requirements carried out by the Agency within the periods granted for it, namely:

1st. The request made within the framework of the file with reference code

E/06773/2019, in which the deadline to respond was one month.

2nd. The request made within the framework of the investigative actions referenced with code E/09581/2019, in which the deadline to respond was ten business days.

THIRD: The notification of the agreement to initiate this procedure sanctioning was carried out electronically through the Notific@ system, being collected by the person in charge on December 17, 2019.

FOURTH: The respondent has presented the allegations to the agreement to initiate this sanctioning procedure collected in the eighth antecedent.

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FOUNDATIONS OF LAW

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

Data Protection, in accordance with the provisions of art. 58.2 of the GDPR and in the art. 47 and 48.1 of LOPDGDD.

II

In accordance with the evidence available at the present time of the sanctioning procedure, it is considered that the defendant has not sought the Spanish Data Protection Agency the information requested.

With the aforementioned conduct of the defendant, the power of investigation that article 58.1 of the RGPD confers to the control authorities, in this case, the AEPD, it has been seen hampered.

Therefore, the proven facts are deemed to constitute an infraction, attributable to the

claimed, for violation of article 58.1 of the RGPD, which provides that each

The control authority will have, among its investigative powers:

“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 facilitate any

information required for the performance of its functions; b) carry out

investigations in the form of data protection audits; c) carry out

a review of the certifications issued under article 42, paragraph

7; d) notify the person in charge or the person in charge of the treatment of the alleged

violations of this Regulation; e) obtain from the controller and the

in charge of the treatment access to all personal data and to all the

information necessary for the exercise of its functions; f) gain access to

all premises of the controller and processor, including

any equipment and means of data processing, in accordance with the

Procedural law of the Union or of the Member States.”

III

This infringement is typified in article 83.5.e) of the RGPD, which considers as such: "no

facilitate access in breach of article 58, section 1”.

In the same article it is established that this infraction can be sanctioned with a fine.

twenty million euros (€20,000,000) maximum or, in the case of a

company, of an amount equivalent to four percent (4%) as a maximum of the

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global total annual turnover of the previous financial year, opting for the
of greater amount.

For the purposes of the limitation period for infringements, the infringement charged
prescribes after three years, in accordance with article 72.1 of the LOPDGDD, which qualifies as
very serious the following conduct:

“ñ) Not facilitating the access of the personnel of the data protection authority
competent to personal data, information, premises, equipment and means of
treatment that are required by the data protection authority to
the exercise of its investigative powers.

o) The resistance or obstruction of the exercise of the inspection function by the
competent data protection authority.”

IV

The fine imposed must be, in each individual case, effective, proportionate
and dissuasive, in accordance with the provisions of article 83.1 of the RGPD.

In

Consequently, it is appropriate to graduate the sanction to be imposed in accordance with the criteria that
established in article 83.2 of the RGPD, and with the provisions of article 76 of the
LOPDGDD, with respect to section k) of the aforementioned article 83.2 RGPD.

In the initial assessment it was found that no extenuating circumstances were applicable, and

The following facts have been considered as aggravating:

- Art. 83.2 b) RGPD: the intention or negligence in the infringement. Is about
a company that is not newly created and should have
procedures established for the fulfillment of the obligations that
contemplates the data protection regulations, among them, to respond to
the requirements of the supervisory authority.
- Art. 83.2 k) RGPD: 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. The

claim refers to the particular case of a person, but the

data processing to which it refers, may potentially affect a

very high number of clients of the responsible entity or users of the

service provided by the responsible entity.

v

As regards the allegations presented by the respondent, included in the

eighth background, it is considered that it would not be justified to assess as extenuating

the reasons alleged when indicating that due to the summer period they have not been able to answer

the information requirements sent by this Agency, since the deadlines

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granted were widely exceeded, without in any case reaching

receive a response from the respondent.

In view of the foregoing, the following is issued

MOTION FOR A RESOLUTION

That the Director of the Spanish Data Protection Agency sanction

XFERA MÓVILES, S.A., with NIF A82528548, for an infraction of Article 58.1 of the

RGPD, typified in Article 83.5 of the RGPD, a fine of 5,000.00 euros.

Likewise, in accordance with the provisions of article 85.2 of the LPACAP,

informs that 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 the amount of the same. With the application of this reduction, the sanction would be established at 4,000.00 euros and its payment will imply the termination of the procedure. The effectiveness of this reduction will be conditioned to the Withdrawal or waiver of any administrative action or recourse against the sanction.

In case you chose to proceed with the voluntary payment of the amount specified above, in accordance with the provisions of article 85.2 cited, must do so effective by depositing it in 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., indicating in the concept the reference number of the procedure that appears in the heading of this document and the cause, for voluntary payment, reduction of the amount of the sanction. Also, you must send the proof of entry to the General Subdirectorate of Inspection to proceed to close The file.

By virtue of this, you are notified of the foregoing, and the procedure is made clear to you. so that within TEN DAYS you can allege whatever you consider in your defense and present the documents and information that it considers pertinent, in accordance with article 89.2 of the LPACAP).

BBB

INSTRUCTOR

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: On March 5, 2020, XFERA MÓVILES, S.A. has proceeded to

SECOND

payment of the sanction in the amount of 4,000 euros making use of the planned reduction in the motion for a resolution transcribed above.

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THIRD: The payment made entails the waiver of any action or resource in via against the sanction, in relation to the facts referred to in the resolution proposal.

FOUNDATIONS OF LAW

Yo

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 the Procedure Common Administrative of Public Administrations (hereinafter LPACAP), under the heading "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."

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According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00446/2019, 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, 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 process as prescribed by art. 114.1.c) of Law 39/2015, of October 1, on Procedure Common Administrative of Public Administrations, interested parties may file a 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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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