

□ Procedure No.: PS/00365/2019

938-300320

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On 08/21/2018 it has entry in the Spanish Protection Agency
of Data (AEPD) a letter from Ms. A.A.A. (hereinafter, the claimant) in which
states that XFERA MÓVILES, S.A., with NIF A82528548 (hereinafter, the claimed or
YOIGO) has processed her NIE linked to a mobile phone contract to which she is
alien

The claimant states that "I found out from my bank that with my number
ID there is a contract for mobile telephony services with the company Xfera Móviles-
Yoigo. I have filed a claim with the service control department of this
company ..." The documentation you provide reveals that your NIE was communicated by the
claimed to the BADEXCUG asset solvency file with a registration date of March
2014, for an unpaid debt of XXX euros.

Annexes to the claim provide these documents: The copy of the "Certificate of
register of citizens of the Union", issued by a Spanish authority, in which
Among other data, your name and surname, the NIE ***NIE.1 and your address in
Spain. The copy of an Ibercheck report according to which, linked to your NIE,
there is a note of non-payment in the BADEXCUG file, informed by the
claimed, with registration date 03/16/2014, for an amount of XXX euros, being the
date of last update of the annotation on 08/19/2018.

SECOND: In view of the facts set forth in the claim, the AEPD made

actions aimed at its clarification.

A. Within the framework of file E/6739/2018, by means of a document signed on 10/02/2018, the claim is transferred to the respondent and it is requested that in the period of one month, provide an explanation of the facts set forth in it and detail measures taken to prevent similar situations from occurring in the future.

The writing is notified to the claimed electronically, being the date of posting available on 10/02/2018 and the date of acceptance of the notification on 10/03/2018, as evidenced by the FNMT certificate in the file.

Likewise, in a document signed on 10/02/2018, the AEPD addresses the claimant acknowledging receipt of your claim and communicating its transfer to the claimed.

Once the period granted has elapsed without the respondent having responded to the informative request, in accordance with the provisions of article 65.2 of the Law

Organic 3/2018, on Data Protection and Guarantee of Digital Rights

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

2/26

(LOPDGDD), on 02/19/2019 the agreement for admission to processing of the this claim.

B. Pursuant to article 67 of the LOPDGDD, within the framework of file number E/2053/2019, the Data Inspection of the AEPD carries out actions of prior investigation.

The certificates issued by the FNMT that prove that the respondent received the electronic notifications of the two informative requests that were made in the course of the actions of

prior investigation; requirements of dates 07/17/2019 and 09/23/2019 to those who do not answered. The notifications were accepted, respectively, on dates 07/17/2019 and 09/30/2019.

The first of the Data Inspection requirements is signed on 07/17/2019. On the same date, the respondent is notified and the latter accepts the notification.

The requirement granted the respondent a period of 15 business days to respond; indicated that the information was requested by the Data Inspection in use of the powers conferred by articles 58.1 RGPD and 67 LOPDGDD; was remembered at claimed the obligation imposed by Regulation (EU) 2016/679, General of Data Protection, (RGPD) to collaborate in the performance of the inspection function and informed that failure to comply with said obligation could lead to the commission of an offense typified in article 83.5.e) RGPD.

The claim, in writing that was entered in the electronic headquarters of the Agency on 08/07/2019, requests an extension of the deadline to respond to the request informative received on 07/17/2019. The AEPD responds on 08/12/2019 and grants the requested extension of time. The Agency's response, notified electronically on that same date, it is accepted on 08/19/2019. This is confirmed by the certificates of the FNMT that are in the file.

The second of the information requirements that the Data Inspection sent to the claimed was signed on 09/23/2019 and made available in the electronic office On the same date. In it, the respondent was granted a period of five working days to respond and, as in the previous one, he was informed that the information requested in use of the powers conferred by articles 58.1 RGPD and 67 LOPDGDD, the obligation imposed by the RGPD to collaborate to carry out the inspection function and that failure to comply with said obligation could entail the commission of an infringement typified in article 83.5.e) RGPD by

infringement of article 58.1. GDPR. The notification of this second requirement was accepted by the claimed party seven days after making it available, the 09/30/2019.

This Agency does not receive a response to the claim to either of the two information requirements made by the Data Inspection.

On 10/10/2019, the Preliminary Investigation Actions Report was signed, which

We reproduce the following fragment:

<< 1. With the notification date of July 17, 2019, a request was made for information to the respondent to provide the following documents:

- a. Service contract with the claimant.
- b. Channel and/or place of contracting. Procedure for accreditation

www.aepd.es

sedeagpd.gob.es

C/ Jorge Juan, 6

28001 – Madrid

3/26

of identity.

- c. Identification documentation in your possession.
- d. Prior payment requirement before possible inclusion in the file

BADEXCUG.

On August 7, 2019, this Agency received, with the number of registration 039557/2019, letter from the defendant requesting an extension of term, proceeding to grant an extension of 5 working days with the date of notification of August 19, 2019.

With the notification date of September 30, 2019, the request for information granting a new period of five days without the date

preparation of this report, this Agency has received a response

from the claimed.>>

THIRD: On 11/19/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the claimed party in accordance with

provided in articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for two violations of the RGPD: The violation of article 6.1. GDPR,

typified in article 83.5.a), and article 31, in relation to article 58.1.e),

both of the RGPD, typified in article 83.5.e) of the aforementioned Regulation (EU)

2016/679.

FOURTH: Notification of the initiation agreement - notification accepted by the respondent on

11/20/2019- presents allegations on 12/04/2019.

The brief of allegations is specified in a preliminary allegation and two allegations,

with the following content: Request -preliminary allegation- to be given transfer of a

copy of the file. It states - first allegation - that "..., at this time only

it is given to state that YOIGO has regularly processed the claimant's data in

under a service contract and, hence, likewise, the regular and ordinary treatment of

the relationship between the parties by virtue of the vicissitudes of the contract". Finally

-second allegation- affirms that "once the appropriate documentation has been gathered, it will be sent to the

AEPD".

FIFTH: Under article 53.1.a) LPACAP, the AEPD, in writing notified

electronically on 12/13/2019, gives transfer to the claimed of the complete copy of the

requested administrative file.

SIXTH: In accordance with article 77 LPACAP, dated 06/15/2020, a

trial period in which the claim and its

attached documentation; the documents obtained and generated by the Services of

Inspection of the AEPD before the claimed and the Report of previous actions of

Inspection. Likewise, the allegations of the

claimed to the agreement to initiate the sanctioning procedure.

The following procedures are carried out during the testing process:

A. The respondent is requested to provide the documents and prove the facts

which are detailed:

1. The copy of the contract signed by the claimant and the

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

4/26

claimed or, where appropriate, the entity to which the latter would have succeeded.

2. Documentation proving the existence of a pending debt

payment in the name of the claimant, requiring that you specify the amount owed and

the concepts from which the debt derives.

3. Proof of having informed the claimant at the time of signing the

contract that, in case of non-payment of debts, your data could be subject to

inclusion in capital solvency and credit files. Or, alternatively, that

proves that the claimant was required to pay the outstanding debt before the

inclusion of your data in BADEXCUG associated with debit positions.

The respondent responds to the request for evidence on 06/29/2020.

a. To the question formulated in point 1, he answers that "the claimant signed"

three contracts with YOIGO on 11/21/2013 and that the contracting was carried out

face-to-face being the seller's SFID ***SELLER.1 which corresponds to "Store

ByMobil". It adds that the three contracts included a terminal purchased in installments and

commitment to stay. Provide a copy of the three contracts that correspond to

the numbers ***PHONE.1, ***PHONE.2 and ***PHONE.3

Provides copies of each of the three contracts and, in addition, with respect to

each of them sends three copies: for the client, for YOIGO and for the entity

financial. The three copies are identical to each other, the only difference is that the two

The former incorporate as an annex the document "Request for portability of

mobile numbering.

The "Registration contract with a terminal financed by BBVA is described below.

Individuals" focusing on its most relevant structure and content, but referring to the

contract 1. Regarding contracts 2 and 3, we limit ourselves to mentioning only their

differences with 1.

In contract 1, under the heading "Registration contract with terminal financed by

BBVA Particulares" appears the reference "nº ***REFERENCIA.1" and below this

legend: "The data that has an asterisk "*" is essential for Yoigo to

I can discharge you. Those with two asterisks "***" are essential for

BBVA can process the credit".

Next, in the "Point of sale data" section, you can see "SFIF

***POINT 1". The "Your data" section contains the data of the contract holder:

***NAME.1(first name) ***LAST NAME.1 (last name). Note that this surname is different

that of the claimant. The NIE, ***NIE.1, which coincides with that of the claimant. The date

of birth, 08/05/1985; nationality, ***NATIONALITY.1; sex, female; the

address, ***ADDRESS.1 and contact telephone number***TELEPHONE.3. just the name,

***NAME.1, and the NIE coincide with the data of the claimant. does not match the

surname nor the address, which is not the one that appears on the certificate of citizenship

of the Union that the claimant has provided to the AEPD or in the form of its

claim. In the "Services and promotions" section, it is indicated: "YOIGO number"

***TELEPHONE 1; "SIM card number/ ICC-ID" ***SIM.1; "Type of contract", "The Infinite 25".

In the "Product" section, it says: "With mobile/Modem: IMEI ***IMEI.1; "Mark and model: Samsung Galaxy S4 White". In the "Bank details" section, there is "Customer account code (IBAN)" and a customer account code that begins with the digits ***XXX and ends with the digits ***XXX.

The last of all the sections is "Signatures" and it indicates "Date *I** 11/21/2013" and then "Signature *I**", which has a blank space, that is, without

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

5/26

fill in and "Distributor stamp *I**", which also has the space intended for this purpose in white. Next, "Xfera Móviles, S.A.", which includes in the space intended for for this purpose a heading and "Banco Bilbao Vizcaya Argentaria, S.A.", which also incorporates a rubric.

The copies of contract 1 intended for the client and YOIGO are accompanied by an annex: The "Request for mobile number portability". This document includes this legend: "Important: In order for your current operator to accept the request for portability you must fill in all the sections". In the "Operators" section there is "Date", "11/21/2013 10:43"; "Donor Operator: Vodafone" and "Receiver Operator: YOIGO". The "Type of request" section includes, among other information, the "Telephone number (MSISDN) ***PHONE.1. In the "Customer data" section, the same that appear in the contract in the "Your data" section. Lastly, in the "Signature" section, there is "Date 11/21/2013 10:43" and then the indication "Signature of the applicant" without

There is no signature on the document. None of the copies (for the client and for YOIGO) that are submitted are signed by the applicant.

Contract 2, "Registration contract with terminal financed by BBVA", differs from the contract 1 in the following elements:

The reference "N° ***REFERENCE.2" corresponds to it. In the section "Services and promotions" appears as "N° Yoigo ***TELÉFONO.2". Although the remaining sections are identical to those of contract 1, described above, we must emphasize that in the last section, "Signatures", after "Date *I** 11/21/2013", the spaces destined for the "Signature*I**" and the "Distributor Seal*I**" are blank, without fill in

Regarding the document "Request for portability of mobile numbers", Annex to contract 2, of which the respondent sends us a copy for the client and for YOIGO, the differences in relation to the same document annexed to contract 1 are the following: In the "Operator" section, everything is the same with the exception of the time, figure "11:29". In the section "Type of request", among others, the "Telephone number (MSISDN) ***PHONE.2. It should be noted that in the "Signature" section, after "Date: 11/21/2013 11:29", as in the same document attached to the

Contract 1, the box for "Signature of the applicant" is blank and without fill in

Contract 3, "Subscription contract with terminal financed by BBVA", differs from 1 and the 2 in the following elements:

The reference "N° ***REFERENCE.3" corresponds to it. In the section "Services and promotions" appears as "N° Yoigo***TELÉFONO.3". Although the remaining sections are identical to those of contracts 1 and 2 described above, we must underline that in the last section, "Signatures", after "Date *I** 11/21/2013", the spaces destined for the "Signature*I**" and the "Distributor Stamp*I**" are blank, without

fill in

Annex to contract 3, the respondent sends us the document "Request for portability of mobile numbers", (copies for the client and for YOIGO). The differences with respect to the same document annexed to contracts 1 and 2 are the following: In the "Operator" section, everything is the same with the exception of the time, figure "19:00". In the section "Type of request", the "No. of application" is indicated, among other elements. phone (MSISDN)***PHONE.3. It should be noted that in the "Signature" section, after of "Date: 11/21/2013" "19:00", as well as the same document annexed to the contracts 1 and 2, the box "Signature of the applicant" appears blank and without filling in.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

6/26

b. The respondent responded to the second question that was asked that the The claimant had requested portability to a third operator in December 2013, failing to comply with the commitments of permanence assumed, which implied the early maturity of deferred payments for the amount stated on the invoice, amount that essentially comes from the purchase in installments of three terminals mobiles.

Provide a copy of the invoice number ***FACTURA.1, issued on 01/01/2014, which corresponds to December 2013. The invoiced amount amounts to 1,856.30 euros. The invoice includes the services and products linked to these lines:

***PHONE.1, ***PHONE.2 and ***PHONE.3.

The invoice includes the details of the holder of the three contracts, that is, those who appear in the "Your data" section of the three contracts provided. of the data

incorporated into the invoices only coincide with those of the claimant's name,

***NAME.1. The surname does not match, nor does the address, which is different from the that appears on the certificate of citizens of the Union that the claimant has provided to the AEPD and in the complaint form submitted to this Agency.

c. The respondent responded to the third question asked in the evidence phase that in the eighth clause of the general conditions of any of the three contracts that he had provided, the client was informed that "in case of not attending punctually its financial obligations to YOIGO, in accordance with the provided for in the contract, YOIGO may communicate your identification data, together with all those related to the debt pending payment, to entities dedicated to the provision of information services on asset solvency and credit,.."

B. Experian Bureau de Crédito, S.A. was requested to (Experian) to forward the information and documentation detailed:

1. Printed copy of all the information contained in the solvency file

BADEXCUG, associated with the personal data of the claimant -name, two surnames and NIF-, which would have been informed by the claimed party.

2. Copy of the documentation referring to the rights of access and cancellation that the claimant would eventually have exercised before her.

Experian responds in writing dated 07/08/2020 that it has an entry in the Agency registration on 07/13/2020. He states that on that date there is no BADEXCUG, associated with the NIF, name and two surnames of the claimant, none unpaid transaction. But it adds that, in the "History of Updates of the file BADEXCUG" contains this information regarding unpaid operations associated with the Claimant's NIF: There is an operation, number 5658833, reported by YOIGO, for a telecommunications service, whose debt was registered in BADEXCUG on 03/16/2014, for an unpaid amount of 1,856.30 euros and the

09/12/2018, being on that date the debit balance of the same amount, as consequence of the "automatic updating of the data file sent by the reporting entity.

SEVENTH: On 10/07/2020, the proposed resolution of the sanctioning procedure PS/00365/2019 formulated in these terms:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

7/26

<<FIRST: That the Director of the Spanish Agency for Data Protection sanction XFERA MÓVILES, S.A., with NIF A82528548, for two infractions of the article 6.1. RGD, letters b) and f), typified in article 83.5.a) RGD, with a fine administrative fee of 100,000 euros (one hundred thousand euros).

SECOND: That the Director of the Spanish Data Protection Agency sanction XFERA MÓVILES, S.A., with NIF A82528548, for an infraction of the article 31 RGD, in relation to article 58.1.e, RGD, typified in article 83.5.e) of the RGD, with an administrative fine of 20,000 euros (twenty thousand euros) >>

The certificate issued by the FNMT, which is in the file, certifies that the

The proposed resolution was notified and accepted by the respondent on 10/07/2020.

EIGHTH: The respondent submits her brief of allegations to the proposal for resolution on 10/21/2020 requesting that the file be archived

sanctioning

He provides, attached to his pleadings brief, documentation of great relevance to the effects that concern us that he claims to have received "from his logistics provider" "in the time elapsed since the test phase. They are the following documents:

1. A "Certificate of Registration of Citizens of the Union" that incorporates for two

Sometimes, at the beginning and at the bottom of the document text and inside a box, this note:

"Notice: Invalid document to prove the identity or nationality of the carrier".

The text of the document is as follows: "The person in charge of the Central Registry of

Foreigners from the Provincial Police Station of ***LOCATION.1 CERTIFIES: That,

in accordance with the provisions of articles 3.3 and 3.7 of Royal Decree 240/2007,

of February 16, and bearing in mind that this document only proves the registration

in the Central Registry of Foreigners if it is presented together with the passport or

valid identity document, the person indicated below, has

requested and obtained its registration in the Central Registry of Foreigners (...) as

***NAME.1

Community resident in Spain, since 11/15/2010: Mr.

LASTNAME 1; born on 08/05/1985, in ***LOCATION.2 (COUNTRY.1); son of

Gabriel and Viorica. Nationality: ***COUNTRY.1. Address: street ***ADDRESS.2. Number

of Foreigner Identity (NIE) ***NIE.1.

2. A bank receipt issued by BBVA corresponding to a debit for

direct debit account in which the "ordering party" is Vodafone España, S.A.U., and the

"Holder" ***NAME.1 ***SURNAME.1. The document indicates that it is a "Duplicate of

receipt dated 11/12/2013", "charged to Vodafone account *****XX". They appear in it

following personal data: "****NAME.1***SURNAME.1. ***ADDRESS.1, the

date 11/12/2013 and the customer current account XXX ending in the digits XXX.

3. Copy of the contracts with reference numbers ***REFERENCE.1,

***REFERENCE.2 and ***REFERENCE.3 (which are identified in the Proven Facts,

respectively, as contracts number 1, 2 and 3) In all of them, the data of the

contracting parties, the object of the contract and the date of execution, as well as the

contractual stipulations, are identical to those that appear in the contracts that the claimed submitted to the Agency in its response to the requested evidence.

C/ Jorge Juan, 6

www.aepd.es

28001 – Madrid

sedeagpd.gob.es

8/26

However, there are substantial and highly relevant differences between those contractual documents sent by the claimed party in the trial phase and the contracts that he now contributes with his arguments to the resolution proposal. These, to Unlike the previous ones, they are signed by the client and bear the stamp of the distributor with whom the contract was formalized. Signature and stamp appearing on all the copies it provides and with respect to each of the three contracts. Contribute also, with respect to each of the three contracts, the corresponding copy of the Mobile Number Portability Request (copy for YOIGO) which, unlike the one that had been sent in the test phase, this one is signed by the applicant of the portability.

The respondent states that, "in view of the new documents provided", she has It was proven that it had a legal basis that legitimized the treatment of "the personal data of the person who contracts" and that, in addition, has been able to demonstrate that end, thus complying with the principle of responsibility proactive.

It concludes, on the one hand, that while it has provided the corresponding signed contracts, a bank receipt and the certificate of registration of citizens of the Union with the data of the person who appears as the owner of the contracts, there is no infringement of article 6.1.b) RGPD. On the other hand, that "the existence of these contracts

correctly formalized enables my client, in case of non-payment, to communicate the data of the person who signed the contract and accrued invoices to the asset solvency files based on their legitimate interest (article 6.1.f)". Add, also, that it has complied with the provisions of article 20 LOPDGDD, since the debt reported to BADEXCUG was true, expired and payable; the person was informed contracting party in clause 8.5 of the General Conditions of the contract of the possibility to include your data in solvency files and between the expiration date of the obligation (on 01/07/2014) and the date of termination of BADEXCUG (12/18/2018) have not five years have elapsed. In consideration of which it states that there is no Violation of article 6.1.f) RGPD.

The third point invoked by the respondent in her arguments refers to the accreditation of the identity of the contracting party. He states that "In light of the documentation provided, in combination with the events that occurred, it can be stated that a correct identification of the person hiring was made".

On the identification of the person who signed the three contracts with the distributor, the respondent states that it has provided a Certificate of the Registry of Ciudadanos la Unión, which includes data such as the NIE, date of birth, name and surname, among others. That, in addition, the data collected in the Certificate of the Register of Citizens of the Union coincide with those that appear on the receipt bank account of home debit provided by the person who contracted the services with purpose of proving that she was the holder of the direct debit bank account. To what I know adds that the information contained in the request for number portability mobile phone, of which copies have been sent to this Agency, coincides with the one recorded in the aforementioned certificate. All this, he says, without losing sight of the fact that "the hiring was face-to-face and the person in question had to provide the documentation in hand, such as the handwritten signature of contracts.

The last allegation (fourth) of the allegations to the proposed resolution is

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

9/26

refers to the "violation of the principles of non-retroactivity and typicity" in which understanding of the claimed would be incurred if it was sanctioned in the terms provided in the initial agreement and in the resolution proposal. This extreme is, in his opinion, another of the reasons that determine that the AEPD should proceed to file the file sanctioning

After citing articles 2.3. of the Civil Code -non-retroactivity of laws- and 99.2 of the RGPD -which provides that it will be applicable from May 25, 2018- concludes that "Therefore, the events that occurred prior to that date have no place in the same". It goes on to say that the "contracting in which the claim that initiates this procedure" took place in November 2013 and the communication by YOIGO of the contracting party's data to the BADEXCUG file in March of 2014. Dates on which "the RGPD had not even been approved and the LOPDGDD. That is to say, the LOPD would be applicable". For all these reasons, after invoking the principle of non-retroactivity as a basic foundation of our legal system, affirms that "any attempt to assess the events that occurred in 2013 and 2014 under the prism of the RGPD approved in 2016 and applicable from May 25, 2018 is completely contrary to the fundamental principles of our legal system legal".

It considers that, in the present case, it would be appropriate to apply Organic Law 15/1999, of Data Protection, as it is more favorable to that party and argues to this end that "in

the sanctioning, penal or administrative law, in case of collision of two norms whose temporary validity has been different, being able to apply any of them, is a basic principle of law that the one that is most favorable to the accused is applied". and the norm more favorable is the LOPD "in force at the time of the facts", since, according to the same, "specifically to its article 47, the facts object of this procedure would be prescribed since 2017". Reason for which, alleges the respondent, "Under this reasoning, the file of this procedure also proceeds."

It is emphasized that the arguments to the proposed resolution presented do not include no mention of the second of the infractions imputed to the one claimed in this sanctioning file, the violation of article 31 RGPD, in relation to 58.1.e) RGPD, typified in article 83.5.e).

NINTH: The suspension of administrative deadlines agreed by the Royal Decree 463/2020 affected the sanctioning procedure PS/365/2019 whose initiation agreement was had signed on 11/19/2019. The computation of terms was resumed, according to the Real Decree 463/2020, dated 06/01/2020.

Royal Decree 463/2020, "declaring the state of alarm for the management of the health crisis caused by Covid 19" (BOE of 03/14/2020) established in the Third Additional Provision, "Suspension of administrative deadlines":

"1. Terms are suspended and the deadlines for the processing of the procedures of public sector entities. The calculation of the deadlines will resume at the moment in which this Royal Decree loses its validity or, in its case, the extensions thereof.

2. The suspension of terms and the interruption of terms will apply to the entire

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

10/26

public sector defined in Law 39/2015, of October 1, on the Procedure

Common Administrative of Public Administrations.”

Royal Decree 537/2020 (BOE of 05/23/2020), establishes in article 9,

"Administrative deadlines suspended by virtue of Royal Decree 463/2020, of 14

March":

“With effect from June 1, 2020, the computation of the deadlines

Administrative procedures that had been suspended will be resumed, or restarted, if so

would have foreseen in a norm with the force of law approved during the validity of the

State of alarm and its extensions.

Thus, the maximum duration date of the PS/365/2019 procedure, as

provided in article 64.2 of the LOPDGDD and applied the rules of the Royal

Decrees 463/2020 and 537/2020, is 11/05/2020.

In view of everything that has been done, the Spanish Agency for Data Protection

consider, in this sanctioning procedure, the following

PROVEN FACTS

1.-The claimant declares that she has been informed by her financial entity that, linked to your NIE, there is a contract with the claimed entity. Contribute with your denounces the copy of an Ibercheck document that informs that in the file BADEXCUG there is a note of non-payment linked to your NIE, communicated by YOIGO on 03/16/2014.

2. Work in the file, provided by the claimant, the copy on both sides of the document, issued by a Spanish authority on 01/02/2017, called “Certificate of registration of citizens of the Union”. The certificate contains the name of the claimant -***NAME.1-; your surname -***SURNAME.2-; your NIE, ***NIE.1; its

nationality, ***COUNTRY.1 and domiciled in Spain -place ***ADDRESS.3 –. The

document informs that the holder is a community resident in Spain from the

04/09/2014.

The back of the document says: “This certificate is issued in accordance with

what is established in articles 3.3 and 7.1 of Royal Decree 240/2007, of February 16, and

taking into account that this document only proves the registration in the Registry

Central Office for Foreigners of the General Directorate of the Police, if they do not appear together

of the passport or identity document.

3.- The respondent states that the claimant signed with her on 11/21/2013,

face-to-face at a distributor - “Bymobil Store”, with SFID ***SELLER.1- three

telephony contracts that each include the acquisition of a terminal

Samsung Galaxy s4. It has stated that “YOIGO has regularly processed the data

of the claimant by virtue of a service contract and, hence, likewise, the treatment

regular and ordinary of the relationship between the parties by virtue of the vicissitudes of the

contract”.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

11/26

4.- The respondent has provided copies of each of the three contracts that

allegedly the claimant celebrated with YOIGO, which deal with the service of

telephony, prior portability of the numbering from VODAFONE, and on the

acquisition in installments, for each of the three lines whose service is contracted, of a

mobile brand and model Samsung Galaxy S4, white, being subject to the

financial advantages of the acquisition of the terminals to the maintenance by the

contracting party of the permanence commitment.

Each contract is identified by a reference: The one we have called contract 1,

***REFERENCE.1 and corresponds to the line number

carries the reference

***TELEPHONE 1.

The one we have called contract 2, has the reference

***REFERENCE.2 and corresponds to the line ***TELEPHONE.2. the one we have

called contract 3 bears the reference ***REFERENCE.3 and corresponds to the line

phone number ***PHONE.3.

5.- In the three contracts, the owner's data is reflected in the "Your data" section.

It consists of the name of ***NAME.1; the surname ***SURNAME.1 -different therefore

of the claimant-; the NIF ***NIE.1; nationality, ***COUNTRY.1 and an address in

***ADDRESS.3, different from the one included in the Union Resident Certificate

of the claimant and of the person who provided the claim.

6.- All contracts include in the header, under "Registration contract with

terminal financed by BBVA Particulares" and the reference number that identifies it,

this legend:

"The data that has an asterisk "*" is essential so that Yoigo can give you

high. Those with two asterisks "***" are essential for BBVA to be able to

process the credit.

In the three contracts, in the last of the sections, "Signature", the following appears:

"Signature *I**", the space is blank. "Dealer stamp *I**", the space is in

white; "Xfera Móviles, S.A.", the same heading appears in all three copies. "Bank

Bilbao Vizcaya Argentaria, S.A.", the same heading is incorporated in the three contracts.

7.- Experian Bureau de Crédito, S.A., has informed that in the History of

File Updates BADEXCUG is registered that the claimed communicated to the

aforementioned solvency file, associated with the NIE ***NIE.1, with registration date 03/16/2014, an unpaid transaction for a debit balance of 1,856.30 euros from a telecommunications service.

Experian Credit Bureau. S.A., has reported that this operation was withdrawn from BADEXCUG on 12/09/2018, as a consequence of the “automatic update of the data file sent by the reporting entity”.

8.- During the informative procedure prior to the admission agreement for processing the claim that concerns us, the AEPD went to the claimed and requested its collaboration. The request was communicated by letter dated 10/02/2018 notified electronically, the notification being accepted by the claimed party 03/10/2018. To complete this procedure, the respondent was granted a period of one month. The defendant did not respond to the information request of the AEPD.

9.- The Data Inspection of the AEPD, within the framework of the actions of previous investigation E/2053/2019, made two requests for information to the claimed on dates, respectively, 07/17/2019 and 09/23/2019. The certificates

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

12/26

issued by the Electronic Notifications and Electronic Address Service

Authorized of the FNMT that appear in the file certify that both requirements were received by the claimed electronically on 07/17/2019 and 09/30/2019, respectively. The respondent did not respond to any of them.

10.- The two informative requirements of the Data Inspection, of dates 07/17/2019 and 09/23/2019, they granted the defendant to evacuate that procedure,

respectively, a period of 15 days and five days and in both writings it was put into his knowledge that the information was requested in use of the powers conferred on the Data Inspection of the AEPD by articles 58.1 RGPD and 67 LOPDGDD and that, being the claimed obliged by the RGPD to collaborate in the performance of the inspection function of the AEPD, non-compliance with said obligation could entail an infringement of the data protection regulations typified in article 83.5.e, GDPR.

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48.1 of the LOPDGDD, The Director of the Spanish Data Protection Agency is competent to resolve this procedure.

Yo

II

It is appropriate to analyze, in the first place, the argument invoked by the defendant in the fourth section of his arguments to the motion for a resolution regarding the "violation of the principles of non-retroactivity and typicity" in which, in his opinion, the AEPD would incur if it issued a sanctioning resolution in the terms of the agreement opening and the motion for a resolution. It adds that the rule applicable to the facts on which the claim deals is the LOPD and that under the protection of the aforementioned Law Organically, the imputed infraction would be prescribed.

To this end, the respondent states that the "contract in which it has its origin of the claim that initiates this procedure" took place in November of the year 2013 and communication by YOIGO of the contracting party's data to the BADEXCUG file in March 2014. Based on these proven facts; from the beginning of non-retroactivity of the laws established in article 2.3 of the Civil Code and, taking

in consideration that article 99.2 of the RGPD provides that the Regulation will be applicable as of May 25, 2018, concludes that "Therefore, the events that occurred prior to that date have no place in it.

Based on the principle of non-retroactivity, which would prevent the application of the RGPD and the LOPDGDD, warns that "any claim to assess some events that occurred in 2013 and 2014 under the prism of the RGPD approved in 2016 and applicable from the 25 of May 2018 is completely contrary to the fundamental principles of our legal system".

The respondent considers that, if any rule is applied to the conduct that is object of assessment in the sanctioning file this should be the Organic Law

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

13/26

15/1999, on the Protection of Personal Data, LOPD, which -it says- is the one that was "in force at the time of the facts". And the application of the LOPD, in the opinion of the requested, would determine the archive of the file because, in his opinion, under of article 47 LOPD the infraction would be prescribed from the year 2017.

However, in addition to underlining that the preceding allegations of the claimed refer, only, to one of the infractions of the regulations for the protection of data attributed to it in the initial agreement and in the resolution proposal -that is, the violation of article 6.1, b) and f) of the RGPD- and are not applicable to the infringement of article 31, in relation to 58.1.e) RGPD that is also attributed to him, It seems necessary to make these clarifications:

The legal argument used by the defendant to request the application of the

LOPD is that "in sanctioning, criminal or administrative law, in the event of a collision of two regulations whose temporary validity has been different, being able to apply any of them, it is a basic principle of law that the one that is more favorable to the prisoner". Reason why, he says, the LOPD should be applied because it is the norm more favorable.

This hypothesis, however, contemplates the assumption in which the conduct infringement is committed under the validity of a rule and the procedure through which the existence of penal or administrative sanctioning responsibility is elucidated develops while another different substantive norm is in force. In such a case, although under of the principle of non-retroactivity of the rules, the substantive rule must be applied in force when the acts were committed, the principle of "retroactivity of more favorable sanctioning provisions" -a principle that the Constitutional Court esteem included, a sensu contrario, in article 9.3 of the Spanish Constitution- allows the alleged perpetrator to opt for the law that is subsequent to the made in time, whenever it is more favorable. Retroactivity of the standard most favorable penalty established in article 26.2 of Law 40/2015 on the Regime Public Sector Law: "2. The sanctioning provisions will take effect retroactive insofar as they favor the alleged offender or the offender, both in terms of to the typification of the infraction as well as to the sanction and its limitation periods, even with respect to the sanctions pending compliance when the law enters into force. new layout."

The argument invoked by the respondent cannot be extrapolated to the matter before us. occupies. The only substantive norm that would proceed to apply in the present case is the RGPD because this is the norm that is in force when the procedure is initiated sanctioning and, at the same time, the rule in force at the time in which it is understood committed the infraction, according to doctrine of the Supreme Court (for all, STS

04/17/2002. Rec. 466/2000)

The claim - which insistently affirms that the LOPD was "in force in the moment of the facts"; that the contract they bring causes the events that occurred dates from November 2013 and that the inclusion in the BADEXCUG solvency file occurred in 2014 - forget to mention elements that are decisive in this question: That it will not be until 12/09/2018 when I unsubscribe from the BADEXCUG file the incident reported to that solvency file associated with the claimant's NIF, which which implies that until that date, at least, it would have continued to process the data claimant's personal Extreme to be related to the individual

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

14/26

operation of solvency files. In order for the annotations communicated to these files remain active, the reporting creditor must confirm the inclusion periodically -periodicity that in the case of BADEXCUG is weekly- well, if not If so, the annotation is removed from the file automatically. The maintenance in the BADEXCUG file until 12/09/2018 of the annotation linked to the NIE of the claimant that YOIGO had communicated in 2014, necessarily presupposes that the claimed entity processed until that date, at least, the personal data of the claimant.

In short, although the processing of the personal data of the claimant by the claimed one began before the LOPD and RGPD existed -in the years 2013 the hiring and in 2014 the inclusion in BADEXCUG- and being in force the LOPD, the presumed infraction attributed to the claimed one -qualified as a violation of article 6.1.,

sections b) and f) RGPD- participates in the nature of the so-called

permanent violations

, in which the consummation is projected in the longest time

beyond the initial fact and extends, violating the data protection regulations,

during the entire period of time in which the data is processed.

Well, in violations of this nature, the rule that

is in effect when the offending conduct ends, that being the date on which the

infraction is understood to have been committed.

The Supreme Court has ruled on which norm should be applied in

those cases in which the infractions are prolonged in time and there have been

a normative change while the infraction was committed. The STS of 04/17/2002 (Rec.

466/2000) deals with a case in which a provision was applied that was not

in force at the initial moment of commission of the infraction, but in the subsequent ones,

in which the offending conduct continued to occur. The Judgment examined a

course that dealt with the sanction imposed on a Judge for breach of

their duty to abstain in preliminary proceedings. The sanctioned alleged the

in force when the facts of article 417.8 of the applied LOPJ occurred. the STS

considered that the offense had been committed since the date of initiation

of the Preliminary Proceedings until the moment in which the Judge was suspended in the

exercise of their functions, in which the provision was already in force, so that

rule was applicable. The SAN of 09/16/2008 pronounces in the same sense

(Rec.488/2006)

Consequently, the date on which we must understand that the alleged

Infringement of article 6.1, sections b) and f) RGPD, attributed to the claimed party, is that of the

time it ends, which with the available information would be 12/09/2018.

On that date, the current regulations on data protection were the RGPD and

the LOPDGDD (entered into force on 12/07/2018). And the Organic Law, regarding the statutes of limitations, provides that very serious infractions have a term of three-year prescription (article 72) Thus, the application of the GDPR to the facts on which the claim deals in no case violates the principle of non-retroactivity.

On the other hand, since the applicable regulation is the RGD, the alleged infringement of the article 6.1. RGD attributed to the claimed in no case would have prescribed, so the prescription could not serve as a legal basis for the file of the file that the respondent requests in its allegations to the proposed resolution.

At the same time, with regard to the violation of article 31, in relation to www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

15/26

article 58.1.e, both of the RGD, typified in article 83.5.e) RGD that also attributed to the one claimed in the initial agreement - imputation that was confirmed in the motion for a resolution - it should be noted that the conduct in which such infraction occurred during the year 2019, in force the RGD. Let us remember that the agreement to process the claim was signed on 02/19/2019 and that the informative requirements of the Data Inspection to which the claimed party does not responded are dated 07/17/2019 and 09/23/2019. So, regarding this infringement, it is not appropriate to raise either the violation of the principle of typicity or even less of the non-retroactivity of the rules.

III

In the agreement to initiate the disciplinary proceedings, the defendant was attributed

two GDPR violations. One of them, to which we will refer in this

Basis III, is the violation of article 6.1, sections b) and f), RGPD, in relation to
with article 5.1.a) RGPD.

Article 5.1.a) GDPR provides that "1. Personal data will be: a) processed
lawfully, loyally and transparently with the interested party;"

The principle of legality is developed, among other precepts, in article 6 RGPD
that, under the heading "Legality of the treatment", details in its section 1 the assumptions in
those in which the processing of third-party data is considered lawful:

"1. The treatment will only be lawful if it meets at least one of the following
conditions:

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

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

(...)

f) the treatment is necessary for the satisfaction of legitimate interests pursued
by the person in charge of the treatment or by a third party, provided that on said
interests do not override the interests or fundamental rights and freedoms of the
interested party that require the protection of personal data, in particular when the
interested is a child. (...)"

The violation of section f) of article 6.1 RGPD attributed to the claimed
was related to article 20 of the LOPDGDD - framed in Title IV,

"Provisions applicable to specific treatments" - related to the "Systems of
credit information", rule that provides:

"1. Unless proven otherwise, the data processing will be presumed lawful.

related to the breach of monetary, financial or

credit through common credit information systems when the requirements are met.

following requirements:

a) That the data have been provided by the creditor or by someone acting on his behalf.

account or interest.

b) That the data refer to certain, overdue and payable debts, whose

existence or amount had not been the subject of an administrative or judicial claim for

the debtor or through an alternative dispute resolution procedure

binding between the parties.

C/ Jorge Juan, 6

www.aepd.es

28001 – Madrid

sedeagpd.gob.es

16/26

c) That the creditor has informed the affected party in the contract or at the time

to require payment about the possibility of inclusion in said systems, with

indication of those in which it participates.

The entity that maintains the credit information system with relative data

non-compliance with monetary, financial or credit obligations must notify

to the affected the inclusion of such data and will inform you about the possibility of exercising

the rights established in articles 15 to 22 of Regulation (EU) 2016/679

within thirty days after notification of the debt to the system,

The data remains blocked during that period.

d) That the data is only kept in the system while the problem persists.

default, with a maximum limit of five years from the expiration date of

monetary, financial or credit obligation.

e) That the data referring to a specific debtor can only be

consulted when the person consulting the system maintained a contractual relationship with the affected party that implies the payment of a pecuniary amount or this would have requested the conclusion of a contract that involves financing, deferred payment or periodic billing, as happens, among other cases, in those provided for in the legislation of consumer credit contracts and real estate credit contracts.

When the right to limit the

processing of the data contesting its accuracy in accordance with the provisions of article 18.1.a) of Regulation (EU) 2016/679, the system will inform those who may consult it in accordance with the previous paragraph about the mere existence of said circumstance, without providing the specific data with respect to which exercised the right, while it is resolved on the request of the affected.

f) That, in the event that the request to conclude the contract is denied, or this will not be held, as a result of the consultation carried out, whoever has consulted, the system informs the affected party of the result of said consultation.

(...)"

The violation of article 6.1, sections b) and f) of the RGPD is found typified in article 83.5.a) RGPD that establishes:

"5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of 20,000,000 Eur 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."

In the proposed resolution of the sanctioning file, the

attribution to the claimed individual of violations of article 6.1. GDPR, sections b)

and f), typified in article 83.5.a) RGPD and it was proposed to impose a sanction of

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

17/26

fine of 100,000 euros.

The resolution proposal confirmed the imputation to the claimed of the aforementioned infringement of the RGPD in light of the documentation that was then in the file and that was obtained, essentially, during the testing phase. In this sense it must be remembered that the respondent had not responded to the request for information from the agency; He did not respond either to the two informative requests that he made the Data Inspection of the AEPD and that, in the processing of allegations to the agreement of beginning, did not provide any document or make any other statement other than declaring that it had processed the claimant's data in the normal course of a relationship contractual. Therefore, until the taking of evidence, the only documents that were in the administrative file were those that the claimant provided with her complaint: The copy of the Certificate card that accredited being included in the registry of citizens of the Union in which their NIE and the Ibercheck document that was about an inclusion in BADEXCUG for a debt of €1,856.30 linked to your NIE.

In response to the tests that were carried out during the investigation, the requested provided abundant documentation, notwithstanding which the proposal for resolution appreciated the commission of the infringement of article 6.1 RGPD.

This documentation consisted of a copy of three contracts that, according to demonstration of the claimed had been held in person before one of the

its distributors in November 2013 and whose purpose was the telephone service of three mobile lines carried by the operator VODAFONE and the acquisition financed from three high-end mobile terminals. In the three contracts provided included the data of the owner, the name ***NAME.1, coinciding with the name of the claimant; the surname, ***SURNAME.1, other than that of the claimant; the NIE, identical that of the claimant and the address at ***ADDRESS.3, which differed from the one provided by the claimant in her complaint.

What was relevant in the documentation provided in the test phase was that the three contracts lacked the signature and seal of the distributor and that in the header of the contractual documents warned that these would not be valid if it did not appear in them the client's signature and the distributor's seal.

This circumstance, together with the fact that the respondent did not contribute in her response to the tests carried out no type of document related to identity of the person who contracted from which it could be inferred that, on the occasion of the recruitment, had displayed a minimum diligence in order to verify that the person who provided personal data as their own was its owner, they forced to assess the responsibility of the defendant in the commission of an infraction of the article 6.1., b) and f) of the RGPD.

Thus, the following was argued in the motion for a resolution regarding this GDPR violation:

<<(…) In the case analyzed, the legal basis for data processing carried out by the claimed party, taking into account the characteristics of these treatments, should be articles 6.1.b) RGPD -which refers to the treatment necessary for the execution of a contract in which the owner of the data is a party- and 6.1. f) GDPR -foundation related to the satisfaction of the legitimate interest pursued by the responsible for the treatment provided that said interest does not prevail the

fundamental rights and freedoms of the interested party that require the protection of

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

18/26

personal information-.

(...)

The behaviors in which the violation of article 6.1. GDPR of

those who held the defendant responsible were the following:

B. On the one hand, the processing of the claimant's data - her NIE, ***NIE.1, and her

name, ***NAME.1- linked to three contracts -“Registration contract with terminal

financed by BBVA Particulares”-

the references

***REFERENCE.1, for line number ***TELEPHONE.1; ***REFERENCE.2, from the

line ***PHONE.2; and number ***REFERENCE.3, for the mobile phone line

***PHONE.3.

identified with

The three contracts are dated 11/21/2013, which is when we estimate

initiated the illicit treatment by the claimed. The end of the illicit treatment is estimated

occurred on 12/09/2018, given that we are not aware that it would have continued

after that date. (...)

(...) in light of the documentation provided by the respondent, there is no

present case no evidence that the claimant had contracted with her

any of the services and products that were registered linked to your NIE and your

Name.

Although the defendant has provided the AEPD in the testing phase with three copies of the "Registration contract with a terminal financed by BBVA Particulares" -it has even sent three copies for each of the contracts (copies for YOIGO, for the client and for the financial entity)-, all of them dated 11/21/2013, in which they appear, in the section regarding the data of the holder, the NIE and the name of the claimant, these documents do not prove anything about the fact that the claimant had contracted with the claimed

None of the three documents that the respondent has provided... are found signed by the owner of the data and alleged contracting party. the document itself contractual warns in its header that "The data that has an asterisk "*" is essential so that Yoigo can register you. Those with two asterisks "**" they are essential for BBVA to be able to process the loan". In all three contracts provided to this Agency, in the epigraph "Signature", the annotation "Signature *I**" appears, preceding the space for the client's signature and the indication "Seal distributor *I**", preceding the space for the stamp of the distributor before which the alleged contract is celebrated in person. With such annotations the contractual document is warning us that the client's signature and the seal of the Distributor are essential for the operator to register a telephone service and so that BBVA -which is the one who intervenes financing the installment purchase of the mobile terminals, as detailed in the General Conditions of the contract- process the credit in favor of the client.

(...)

Added to the foregoing is another essential point... The respondent has not provided this Agency any document that proves the identity of the person who, supposedly, he contracted with her and provided the NIE ***NIE.1 as his own, the name of ***NAME.1, the surname ***SURNAME.1 and the address ***ADDRESS.3

(...) the accreditation of the identity of the person who hires is part of the evidentiary activity that is incumbent on the data controller (...) However, has not provided any document relating to the identity of the person allegedly signed the contracts that have given rise to the facts that we occupy.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

19/26

(...)

C. The second conduct of the defendant contrary to the principle of legality, for violation in this case of article 6.1.f) RGPD, is the communication to the file of BADEXCUG solvency of an incident linked to the NIE of the claimant for a alleged debt of 1,856.30 euros.

The incident was registered on 03/16/2014 and discharged on 12/09/2018 as consequence of the "automatic updating of the data file sent by the reporting entity. This means that the annotation published by the BADEXCUG credit information, the debtor status of the holder of the NIE ***NIE.1, the claimant, was active for more than four years.

(...)

Article 20 of the LOPDGDD contains a iuris tantum presumption of prevalence of the legitimate interest of the person responsible for the treatment that communicates data from third parties to credit information systems, popularly known as solvency or delinquency files. For the aforementioned presumption to display its effectiveness, all the requirements that the precept details in its

section 1, letters a) to f).

The treatment of data in which the behavior of the claimed person is specified now examined - the communication of the claimant's data to the BADEXCUG file and its kept in that file for more than four years - cannot be based on the presumption of article 20 LOPDGDD because one of the requirements on which Organic Law 5/2018 builds this presumption.

(...)

It is evident, based on the documentation in the file, that the debt amounting to XXX euros that the claimed party reported to BADEXCUG linked to the claimant's NIF did not meet the "certainty" requirement, since such debt was not true in relation to the person to whom it was attributed and whose personal data were subject to of treatment. (...). The core of the issue is that, while the claimed has not accredited that it was indeed the claimant who signed with her the contracts from which the debts derive, the condition of claimant's debtor. >>

In the process of pleadings to the proposed resolution, the respondent has provided diverse and highly relevant documentation that directly affects the legal assessment of the behaviors that until now we had described as Violation of article 6.1., letters b) and f), of the RGPD.

Article 82 of the LPACAP, "Hearing procedure", establishes in section 2 that "The interested parties, within a period of not less than ten days nor more than fifteen, may plead and present the documents and justifications they deem pertinent".

The documents provided are, in summary, the following:

(i) The "originals" of the three contracts that were entered into through a YOIGO distributor in person. The three contracts are duly signed by the customer and also bear the stamp of the distributor. He has

provided, with respect to each of the line numbers for which the service is contracted.

mobile phone service, number portability request document

mobile from VODAFONE, duly signed by the applicant.

The data contained in the contracts provided in this procedure -both the

relating to the identity of the contract holder (name, surname, NIE, address and account

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

20/26

bank), to the object of the contracts, to the date, the reference number or the line of

mobile telephony on which each one deals - are identical to those that appeared in the

contractual documents that the respondent provided in the evidence process and that

They lacked signature and seal.

(ii) A direct debit receipt has also been provided

issued by BBVA on 11/12/2013 in which the payer is the operator VODAFONE and the

holder of the charge account a person identified with the same name and surname

of the owner of the three contracts -that is, ***NAME.1***SURNAME.1-. the digits

of the charge account that appear on the bank receipt are the same as those

included in the three contracts for the purposes of direct debiting of invoices. on receipt

provided the address of the account holder coincides with the one that appears in

the three contracts as the address of the contracting party, street ***ADDRESS.3

In addition, the bank debit document shows that the payer

of the position is the telecommunications operator VODAFONE ESPAÑA, S.A.U., which

It is also the operator that appears as the donor of the three mobile phone lines

contracted with YOIGO.

Another of the documents provided (iii) is a Certificate of Registration of Citizens of the Union” in which the person in charge of the Central Registry of Foreigners of the Provincial Police Station of ***LOCALIDAD.1 certifies that, in accordance with the established in articles 3.3 and 3.7 of Royal Decree 240/2007, of February 16, and Bearing in mind that this document only proves the registration in the Registry Central de Extranjeros if it is presented together with the passport or document of identity in force, the person indicated below, has requested and obtained his registration in the Central Registry of Foreigners (...) as a community resident in ***FIRST NAME.1***LAST NAME.1; born on Spain, since 11/15/2010: Mr.

08/05/1985, in ***LOCATION.2 (***COUNTRY.1); son of Gabriel and Viorica. Nationality: ***COUNTRY.1. Address: street ***ADDRESS.2. Foreigner Identity Number (NIE) ***NIE.1. The document includes on two occasions this “Notice: Invalid document to prove the identity or nationality of the bearer.

The conduct that was taken into consideration to attribute to the defendant a infringement of the principle of legality was the treatment of the personal data of the claimant -NIE and name- without the legal basis that was accredited sheltered The treatment carried out by the respondent consisted of registering three contracts in the name of a person identified with the NIE and name of the claimant and to include the NIE in the BADEXCUG solvency file associated with a debt unpaid arising from said contracts.

The respondent has contributed with her arguments to the proposed resolution the documents that serve, in his opinion, as a basis for the causes of legality described in sections b) and f) of article 6.1 RGPD. It has provided three contracts signed with it through a distributor in which the data of the contracting person coincide with those of the claimant in the NIE and the name -***NOMBRE.1-, although not in the

last name -the contract includes *** LAST NAME.1 and the claimant says her last name is

***SURNAME.2- nor at home. All three contracts are signed by the person

contractor. And in order to prove that the person who identified himself with the data that

contained in the contracts and provided them as his own was who he claimed to be, has provided the

document called Certificate of registration of citizens of the Union whose data

coincide with those that appear in the three contracts to identify their owner.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

21/26

However, the Certificate includes on two occasions a notice informing that

this document is not valid to prove the identity or nationality of the bearer

and the text of the document warns that "(...) this document only proves the

registration in the Central Registry of Foreigners if presented together with the passport

or valid identity document.

The Certificate provided cannot be granted the power to prove the identity of

the contracting person, but having obtained that document shows, in

principle, that the one claimed, on the occasion of the execution of the three contracts,

deployed some diligence aimed at identifying the contracting person.

The claimed, through its distributor, also collected from the person who

contracted and provided as its own the data contained in the contracts other

documents that reveal that you identified yourself with the same data before your entity

financial. BBVA's debit account receipt proves that in November 2013

the contracting person was identified before said entity with the same name,

surname and address provided to the claimed in the hiring. Furthermore, the account

bank account of which he was the holder, according to the BBVA receipt, is the one that appears in the contracts as direct debit payment account. Similarly, the ordering party bank charge that appears on the receipt from BBVA, the operator VODAFONE, is also, according to the contracts, the donor operator in the portability of the lines telephone companies whose services were contracted with the claimed party.

In short, although the Union Citizen Registration Certificate lacks by itself of force to prove the identity of the person who exhibits it, there is in the procedure other documents that demonstrate that these data identified the contracting person validly in other areas, such as in their relations with the BBVA, of which he was a client, or with the operator VODAFONE, with whom he had contracted services whose payment was directly deposited in his bank account.

Assessed together the various documents that the respondent has provided it seems fair to conclude that, considering the circumstances of the case, it deployed a minimum and reasonable diligence in the identification of the person who signed the contracts and provided as his own the NIE and the name of the claimant. And it is also example of diligence in complying with the obligations imposed by the RGPD that the respondent has kept the documentation referring to the contracting and the identity of the contracting party, which was collected in 2013, the date of the contracts, in order to prove the legality of the data processing carried out.

The diligence shown by the respondent in identifying the person who contracted and provided the personal data of the NIE and the name of the claimed party as his own prevents assessing in the case examined the concurrence of fault or negligence, necessary to be able to demand administrative responsibility. As indicated by the SAN of 04/29/2010, (Sixth Legal Basis), "The question is not whether the appellant processed the personal data of the complainant without her consent, as if whether or not you used reasonable diligence in trying to identify the person with

who signed the contract. (The underlining is from the AEPD)

The presence of the subjective element or culpability in a broad sense, such as condition for the sanctioning responsibility to arise, has been confirmed by the Constitutional Court, among others, in its STC 76/1999, in which it states that the Administrative sanctions share the same nature as criminal ones, since they are one of the manifestations of the ius puniendi of the State and that, as a requirement derived from the principles of legal certainty and criminal legality enshrined in the www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

22/26

articles 9.3 and 25.1 of the C.E., its existence is essential to impose it.

In the same sense, Law 40/2015 on the Legal Regime of the Public Sector provided in article 28.1. that “they can only be sanctioned for acts constituting natural and legal persons, as well as(...), that result responsible for them by way of fraud or negligence.”

Consequently, absent the subjective element of the infraction -all once the documentation provided shows that the defendant acted with a minimum and reasonable diligence to guarantee the identity of the person who hired and provided certain personal data as their own - it is appropriate to agree on the file of the procedure regarding the infringement of article 6.1, sections b) and f) RGPD that was attributed to the one claimed in the agreement to initiate the disciplinary proceedings.

IV

A. Article 58 GDPR refers to the powers granted to the authorities of control and refers in section 1 to its "powers of investigation", precept

which states:

"1. Each supervisory authority will have all investigative powers

listed below:(...)

e) obtain from the person in charge and the person in charge of the treatment access to all the data

personal and to all the information necessary for the exercise of their functions;

f) obtain access to all the premises of the person in charge and of the person in charge of the

processing, including any data processing equipment and means, of

in accordance with the procedural law of the Union or of the Member States."

In turn, article 31 RGPD -related to the general obligations of the

responsible and in charge of treatment, Section 1, of Chapter IV of the

Regulation (EU) 2016/679- states:

"The person in charge and the person in charge of treatment, and in their case their representatives

Cooperate with the supervisory authority that requests it in the performance of their duties.

functions".

On the other hand, the LOPDGDD, article 51.1, establishes that "The Spanish Agency

of Data Protection will develop its research activity through the

actions provided for in Title VIII and the preventive audit plans". The

LOPDGDD fits in this Title article 67, which deals with the actions of

prior investigation.

In addition, article 53 of the LOPDGDD refers to the scope of the activity of

investigation and indicates in section 1 that "Those who carry out the activity of

research may collect the information necessary for the fulfillment of their

functions, carry out inspections, require the display or delivery of documents and

necessary data, examine them in the place where they are deposited or in

where the treatments are carried out, obtain a copy of them, inspect the

physical and logical equipment and require the execution of treatments and programs or

treatment management and support procedures subject to investigation”.

Failure by a data controller to comply with the obligation

Article 31 of the RGPD imposes, in relation to the powers that in terms of

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

23/26

inspection is attributed to this Agency by article 58.1 e) of the aforementioned Regulation

(EU) 2016/679, is subsumable in the sanctioning type of article 83.5.e) RGPD that

He says:

“Infractions of the following provisions will be sanctioned, in accordance

with paragraph 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:

(...)

e) Failure to comply with a resolution or a temporary or definitive limitation of the

processing or suspension of data flows by the supervisory authority

in accordance with article 58, paragraph 2, or failure to provide access in breach of the

article 58, paragraph

1. (The underlining is from the AEPD)

For prescription purposes, the LOPDGDD qualifies in its article 72.1. What

very serious infraction: “o) The resistance or obstruction of the exercise of the function

inspector by the competent data protection authority. The term of

prescription for very serious offenses is three years.

B. The documentation in the administrative file proves that the claimed refused to collaborate with the inspection carried out by the Inspection Service of the AEPD within the framework of E/2053/2019 and that when taking the decision not to collaborate with the investigation carried out by the control authority he was fully aware of the consequences that could result from his conduct omission.

Regardless of the informative request that the Agency made to the claimed before the start of the preliminary investigation actions -that is, before the had agreed to admit the claim for processing-, informative request to the who did not respond either, and focusing on the previous investigation actions, because according to article 51.1 LOPDGDD these are framed in the function researcher that the control authorities have recognized and that develops the article 58.1 RGPD, these circumstances stand out:

The defendant did not give any response to the AEPD. The only letter received from her in the course of the preliminary investigation actions is dated 08/07/2019 and in he requests that the term be extended to respond to the information request had made on 07/17/2019 and received on that same date. In that requirement gave him a term of fifteen business days to complete the process. The AEPD responds in writing on 08/12/2019 and grants the requested extension of time. The response of this Agency, which is notified electronically on the same date, is accepted by the claimed seven days later, on 08/19/2019. none received response. The Data Inspection sent the respondent a second request informative dated 09/23/2019, which was made available in the electronic office on same day and whose notification was accepted by the respondent on 09/30/2019. The claimed did not respond to this second requirement either. Ultimately, despite that the receipt by the respondent of both informative requirements of the

Data Inspection is accredited, did not respond to any of them.

The second relevant circumstance is that in the two requirements that

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

24/26

sent to the respondent, she was informed in detail of the consequences that could

arising from not meeting the request for collaboration with the AEPD. He was reminded of the

obligation imposed by the RGPD to collaborate in the development of the function

inspector and that failure to comply with said obligation could lead to the commission

of an infringement typified in article 83.5.e, RGPD for infringement of article 58.1.

GDPR.

In consideration of the proven facts, it is estimated that the defendant incurred

an infringement of article 31 RGPD, in relation to article 58.1.e, of the same

standard, typified in article 83.5.e) RGPD and qualified by the LOPDGDD for the purposes

of prescription, as a very serious infraction (article 72.1.o.)

C. In determining the administrative fine to be imposed for the infraction of the

article 31, in relation to article 58.1.e), RGPD, the

provisions of articles 83.1 and 83.2 of the RGPD.

In response to the GDPR requirement that administrative fines be

"effective, proportionate and dissuasive" and the provisions of articles 83.4 and

83.5 RGPD, the total annual global volume of the exercise must be taken into consideration

previous financial statement of the claimed. Of course, as specified in Recital

150 of the RGPD, "If administrative fines are imposed on a company, for such it must

understood as a company in accordance with article 101 and 102 of the TFEU". The group

MASMOVIL, to which the defendant belongs, obtained income in 2018

of 1,451 million euros and a net profit of 71 million euros.

After analyzing the circumstances that preside over the offending conduct, in order to

Specify the amount of the fine sanction that must be imposed on the person responsible,

considers that the following elements are present that entail an aggravation of

the guilt of the offending subject and/or the unlawfulness of his conduct.

- The defendant acted with an extremely serious lack of diligence when

repeatedly refused to collaborate with the inspection function that the AEPD was

exercising. Refusal that cannot be justified or in the existence of any incident

in the notifications of the informative requirements, since they received

correctly by the claimed party, nor in the course of the terms granted for

answer. The AEPD acted with total flexibility and gave all kinds of facilities to the

requested so that it could provide the requested collaboration. Deadlines have been extended

to respond at the time the respondent requested it -despite the time

elapsed between the receipt of the information request and the request for

extension of the deadline - and considerable time was allowed to elapse after the

deadlines expired and before reiterating the information request. It was also not obtained

no response to the second request for collaboration. Circumstance

aggravating circumstance that falls under article 83.2.b, RGPD.

- The link between the activity of the claimed party 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)

In view of the foregoing considerations, it is agreed to sanction the

claimed for the infringement of article 31, in relation to 58.1.e, RGPD, typified

in article 83.5.e) RGPD and qualified by the LOPDGDD for prescription purposes

as a very serious infraction (article 72.1.o.), with an administrative fine of 20,000

euros.

C/ Jorge Juan, 6

www.aepd.es

28001 – Madrid

sedeagpd.gob.es

25/26

Therefore, in accordance with the applicable legislation, the Director of the Agency

Spanish Data Protection RESOLVES:

FIRST: REGARDING the alleged infringement of article 6.1. letters b) and f) of the

RGPD, which was attributed to XFERA MÓVILES, S.A., with NIF A82528548, in the agreement

start of this sanctioning file, AGREE to FILE the procedure

sanctioning party for NON-EXISTENCE OF INFRINGEMENT, as the claimed party has provided the

documents that prove it.

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

infringement of article 31 of the RGPD, in relation to article 58.1.e, typified in the

article 83.5.e) of the RGPD, a penalty of twenty thousand euros (€20,000).

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

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

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 Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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 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 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

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,

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

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->

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

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es