

☐ Procedure No.: PS/00262/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: The General Directorate of the Civil Guard (Company of Manzanares,
Post of Bolaños) transfers to the Spanish Data Protection Agency, dated
May 13, 2019, the actions followed in relation to a usurpation of
identity in the contracting of telecommunications services, which took place on
February 26, 2019.

The claim filed by D. A.A.A. and Mrs. B.B.B. (hereinafter the
claimants).

The claim is directed against XFERA MÓVILES, S.A. with NIF A82528548
(hereinafter, the claimed).

Providing the following documentation:

☐ Report No. 2019-000593-00000110 dated February 26, 2019 in which
the claimants state that according to information from the company they have been
registered two telephone and internet lines with numbers ***TELEFONO.1 and
***TELEFONO.2 and with a charge account that is not yours. The
morning of February 25, 2019 the telephone company contacts
with one of his daughters informing her that, if they do not pay the amounts
owed to said numbers, the service would be interrupted.

☐ Summary of the actions carried out by the Civil Guard of Bolaños

☐ MASMOVIL (XFERA MÓVILES, S.A.) contracts for telephone lines
of Calatrava (Ciudad Real).

denounced.

SECOND: In view of the facts denounced, the General Subdirectorate of Data Inspection proceeded to carry out preliminary investigation actions for the clarification of the facts in question, by virtue of the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second Section, of the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

In addition, the following extremes are noted:

Examining the information provided by the Civil Guard, it is confirmed that the lines reported have been contracted by persons other than the claimants. Nope
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debts pending payment were produced by the claimants, since in the contracts included the bank account of the people who had supplanted the identity of the claimants. These people, who used the DNI of the claimants for both contracts, they lived at the same address as this one and have been identified by the Civil Guard from the bank accounts provided in the contract.

Required information from the respondent about the measures adopted after the reception of the complaint before the Civil Guard of Bolaños of a possible impersonation

of identity in contracting the lines ***TELEFONO.1 and ***TELEFONO.2 and on the guarantees required for the accreditation of identity in the contracting of the aforementioned telephone lines.

On January 16, 2020, the respondent states that according to his investigations, the reported lines have been classified as hiring fraudulent, and the debts associated with them have been forgiven.

They provide a screenshot of the data that works in their systems of the reported lines.

THIRD: On September 8, 2020, the Director of the Spanish Agency of Data Protection agreed to initiate sanctioning procedure to the claimed, with in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP), for the alleged infringement of Article 6.1 of the RGPD, typified in Article 83.5 a) of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, he stated that he was aware of the usurpation of the identity of the claimant on February 25, 2019, providing subsequently denounced on February 26, 2019 and dated March 4, 2019, proceeded to the suspension of services and the cancellation of the debt generated to date for fraudulent hiring. This led to the blocking of the data of the interested parties and the cataloging of the registration as fraudulent. They add that the lack of diligence in the custody of the DNI cannot be transferred to the reclaimed.

On the other hand, they manifest the inexistence of the elements of the right sanctioning, they do not appreciate the concrete existence of the principle of responsibility, since that no intentional or negligent action is revealed from which the

same. Therefore, as there is no evidence of fraud or fault on the part of the defendant, nor so even by way of mere non-observance, in relation to the facts that originate the sanctioning procedure, it can only lead to its file.

FIFTH: On October 13, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigative actions, E/08518/2019, as well as the documents provided by the claimant.

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

PROVEN FACTS

FIRST: Two telephone and internet lines have been registered in the name of the claimants. The usurpation of identity in the contracting of services of telecommunications, took place on February 26, 2019.

SECOND: The defendant acknowledges said error and thus in his allegations states that the reported lines have been classified as fraudulent hiring, and the debts associated with them have been forgiven.

FOUNDATIONS OF LAW

Yo

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 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

II

The defendant is imputed the commission of an infraction for violation of the Article 6.1 of the RGPD.

Article 6, Legality of the treatment, of the RGPD establishes that:

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

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

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

(...)"

Article 4 of the GDPR, Definitions, in section 11, states that:

"11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern him".

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a

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declaration or a clear affirmative action, the treatment of personal data that concern.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship”.

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

On the other hand, the LOPDGDD in its article 72 indicates for prescription purposes:

“Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly the following:

(...)

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(...)"

III

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGD, since it processed the personal data without having any legitimacy for it. The personal data was incorporated into the company's information systems, without having accredited that he had legitimately contracted, had his consent for the collection and subsequent processing of your personal data, or there is any other cause that made the treatment carried out lawful.

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

We must emphasize that the respondent has recognized said error and thus both in his writing dated January 16, 2019, as in the allegations to the Initiation Agreement of the present sanctioning procedure has stated that the lines denounced have been classified as fraudulent hiring, and the debts associated with them have been condoned.

The lack of diligence displayed by the entity in complying with the obligations imposed by the personal data protection regulations it is therefore evident. Diligent compliance with the principle of legality in the treatment of third-party data requires that the data controller be in a position to prove it (principle of proactive responsibility).

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In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGD, which point out:

"1. Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

in article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

yes, as well as the number of interested parties affected and the level of damages

that they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

- f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement, in particular if the person in charge or the person in charge notified the infringement and, in such case, what extent;
- i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;
- j) adherence to codes of conduct under article 40 or mechanisms certificates approved in accordance with article 42, and
- k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its Article 76, "Sanctions and corrective measures", establishes that:"2. According to the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of treatments of personal data.
- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process after the commission

of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of data.

h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested."

v

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

Extenuating:

- Any measure taken by the person in charge or in charge of the treatment to alleviate the damages suffered by the interested parties (art.83.2. c) of the RGPD).

Aggravating factors:

- The intentionality or negligence of the infringement (art.83.2. b) of the RGPD).

- Basic personal identifiers are affected (personal data (art.83.2. g) of the RGPD).

- The obvious link between the business activity of the defendant and the processing of personal data of clients or third parties (article 83.2.k, of the

RGPD in relation to article 76.2.b, of the LOPDGDD)

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the

Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE XFERA MÓVILES, S.A., with NIF A82528548, for a violation of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of 40,000 euros.

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

THIRD: 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

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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,

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

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