

938-0419

Procedure No.: PS/00011/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On September 7, 2018, this Agency entered the
claim filed by Ms. A.A.A. (hereinafter, the claimant), in which
states that XFERA MÓVILES, S.A. (YOIGO) with NIF A82528548 (hereinafter, the
claimed) had improperly included their personal data in the files of
delinquency, specifically, in the Badexcug asset solvency and credit file, to
Despite having paid the debt within the period granted for this purpose by the
claimed.

SECOND: In view of the facts set forth in the claim and the documents
provided by the claimant, the General Subdirectorate for Data Inspection proceeded
to carry out actions for its clarification, under 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).

On 10/9/2018 the Data Inspection of the AEPD directs a request
information to XFERA MÓVILES, S.A. The certificate of the service of the "Support of the
Service of Electronic Notifications and Enabled Electronic Address" leaves
proof that the letter of requirement was sent by the AEPD to the entity being
the date of availability on 10/09/2018 at 12:49 p.m. and the date of
acceptance by the claimed party on 10/16/2018 at 11:53.

XFERA MÓVILES, S.A., did not respond to the request, so the AEPD

reiterated in order to analyze the claim made by the claimant and

communicate the decision adopted in this regard.

This second information requirement was sent electronically on 11/20/2018 and it is recorded as received by the claimed party on 11/26/2018 at 11:06, as evidenced by the the "Support of the Electronic Notifications and Electronic Address service Enabled". XFERA MÓVILES, S.A also did not respond to the second request that notified this Agency.

Through Diligence dated 03/01/2019, it is incorporated into the file administrative information that regarding the claimed entity appears in the Mercantile Registry on its subscribed and paid-up capital - amounts to 1,000,000 euros- and on the date of commencement of operations -01/04/2000-.

THIRD: On March 13, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against XFERA MÓVILES, S.A., for the infringement of article 5.1.d) of the RGPD typified in article 83.5.a) of the C/ Jorge Juan, 6

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cited RGPD and qualified as a very serious infringement in article 72.1.a) of the LOPDGDD.

FOURTH: Once notified of the aforementioned initial agreement, XFERA presented a written allegations in which, in summary, it states that the dismissal of the file with the consequent file of actions; subsidiarily, in the case that his claim did not succeed, that the minimum sanction be imposed legally applicable.

In support of such claims, it invokes the following arguments:

1.- States that the personal data of the complainant have been treated in a according to the principle of accuracy. It affirms that the treatment of the data personal information was carried out at all times in accordance with article 5.1. d) GDPR.

From this he concludes that the integral elements of the type are not present.

offender, so the AEPD, in its opinion, incurs a violation of the typicity principle.

It explains that the personal data of the complainant were processed in by virtue of the consent obtained by YOIGO when contracting correspondent.

2.- Regarding the inclusion of the complainant's data in solvency files states that the elements of the type of infractions that are impute.

In this regard, it affirms that the inclusion in the ASNEF file of the data of the complainant was produced with all the conditions that are legally required.

3.- Considers that the AEPD has violated the principles of presumption of innocence and typicity Indicates that we are dealing with personal data relating to the

Non-compliance with monetary obligations (non-payment of a debt originated by the contracting of telecommunications services that accrued correctly and legitimate) that is decisive to judge the economic solvency of the

complainant. We find the prior existence of a certain debt, overdue, payable, which has been unpaid and for which no payment had been made. filed any judicial, arbitral or administrative claim by the

complainant. which is not enough in his opinion, given the circumstances that concur, in order to sanction without infringing the principle of typicity.

It indicates that a prior request for payment was made and that the processing of the data of the complainant to the file of information on patrimonial solvency,

by YOIGO, was fully in accordance with the Law. that it has not been committed
infraction on the part of the agency is imputed to him since the error of
confuse accuracy with reasonableness by demanding rigorous behavior that
exceeds what can be understood as orderly and reasonable management.

4. Regarding the circumstances that affect the determination of the amount of the
sanction, disagrees with the Agency's decision and considers that the criteria
collected in article 83.2 of the RGD highlights the concurrence of
all of them in a flattering way.

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He considers the application that the AEPD makes in the start agreement in the
which, after collecting a long list of favorable criteria, only puts
as repairs a supposed inactivity of this operator.

In this regard, it indicates that it was due to justified reasons derived from
internal circumstances but that, in any case, do not deserve attention, for
how much they can never imply an automatic attribution of any reproach.

FIFTH: On April 15, 2019, the instructor of the procedure agreed to the
opening of a period of practice tests, considering incorporated the
previous investigative actions, as well as the documents provided by the
claimed.

SIXTH: On May 21, 2019, the respondent was notified of the proposed resolution
formulated in the following terms: <<That by the Director of the Spanish Agency
of Data Protection, XFERA MÓVILES, S.A. is sanctioned. (YOIGO) with NIF
A82528548, for an infringement of Article 5 of the RGD, typified in Article 83.5
of the GDPR, a fine of €60,000.00 (sixty thousand euros)>>.

SEVENTH: On June 4, 2019, this Agency received a document from the
representation of the defendant, in which they made the appropriate allegations to the

resolution proposal.

In this brief of allegations, the filing of this proceeding is requested.

sanctioning or subsidiarily that a sanction be imposed for a minor infraction in its minimum amount, reiterating everything expressed and manifested in the writing of allegations to the agreement to initiate the sanctioning procedure, pointing out an error in the interpretation of the law, given that reference is made to art. 5.1 d) of the RGPD, in relation to the fact that the respondent did not respond to the requirements of this Agency, being that art. 5.1 d) refers to the principle of data accuracy.

In addition, it states that the previous error is the cause of defenselessness, violation of the principle of legality and non-violation of the principle of accuracy.

PROVEN FACTS

1.-

The payment request notification was made on the date August 14, 2018 by Xfera Móviles (Yoigo), in which the payment of the debt contracted by the claimant for an amount of XXX euros and warned that her Data could be included in asset and credit solvency files if kept non-payment situation, giving a period of 15 days to regularize the situation.

two.-

Transfer made by the claimant on August 24, 2018 to Xfera Móviles (Yoigo) for an amount of XXX euros, and remittance of proof of payment of the operation carried out on the claimant, on the same date. Date of registration and cancellation in Badexcug by Xfera Móviles, S.A. 26 of August and September 2, 2018.

Experian, in its letter dated December 5, 2018, states that To date there is no data on Ms. AAA in the Badexcug file.

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5.-

Xfera Móviles, S.A. is notified. dated October 9, 2018, the

claim made by the claimant to this Agency. On the 20th of the following month,

this notice is reiterated. Not having answered said entity to said

requirements.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of

control, and as established in arts. 47 and 48.1 of the LOPDPGDD, the Director of

The Spanish Agency for Data Protection is competent to resolve this

process.

II

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

Article 5 of the RGPD, that is, the principles that must govern the treatment of personal data.

personal data and mentions among them that of "Accuracy". The provision provides:

"1. The personal data will be:

(...)

d) "accurate and, if necessary, updated; all measures will be taken

reasonable to eliminate or rectify without delay the personal data that

are inaccurate with respect to the purposes for which they are processed (<<accuracy>>)"

The infringement is typified in article 83 of the RGPD, under the heading "Conditions

for the imposition of administrative fines” 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:

1

Basic principles for treatment, including conditions for consent under articles 5,6,7 and 9.” (The underlined is from the AEPD)

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 4 also regulates the principle of accuracy of data, indicating in section 1. “According to article 5.1. d) of RGPD the data will be exact and, if necessary, updated”, and in 72, under the heading "Infringements considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.)

2016/679 are considered very serious and the infractions that

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suppose a substantial violation of the articles mentioned in it and, in particular the following:

a) The processing of personal data violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679.”

III

In view of the documentation in the file, it is concluded than the one claimed, violated article 5.1d) of the RGPD.

Well, XFERA processed the claimant's personal data in a

undue, and this is so, because it has been proven in the file that reported the personal data of the claimant to the Badexcug file on August 26, 2018, when the notification of payment requirement for the same was carried out dated August 14, 2018, in which the payment of the debt was claimed contracted and warned that their data could be included in solvency files assets and credit, giving a period of 15 days to regularize the situation.

Therefore, the claimant's position that on August 24, 2018, before the Over the period of 15 days offered by the claimant, he proceeds to regularize his situation, sending proof of payment on that date.

In this regard, we must point out that the claim two days after informs your data to the Badexcug file, when said debt was already settled, for therefore, it was not enforceable and the data was inaccurate.

This is why it is considered that XFERA did not act with the diligence that was required. because he must have verified that the debt reported to BADEXCUG was inaccurate. It should also be taken into account that the respondent did not answer the requirements of this Agency, as recognized by the same in its letter of allegations, although it is not the subject of this proceeding.

Likewise, what is alleged by Xfera is rejected, it is clear that, at all times, refers in the motion for a resolution to the fact that the respondent processed the data of the claimant in an undue manner, and that the operator is not sanctioned for lack of response to the requirements of this Agency, but for violating the principle of accuracy of article 5.1d) of the RGPD, in this specific case, acted in contrary to the principle of accuracy enshrined in article 5.1 d) of the RGPD, in relation to article 4 of the LOPDGDD, since XFERA included improperly the data of the claimant in the Badexcug file, without said registration would then have responded to their situation, by not complying with the

requirements established in the aforementioned regulations on data protection of personal character.

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IV

It is accredited in this Agency that the entities associated with files of arrears periodically provide the relationships of the high, low and modifications of the data of its clients so that such updates remain registered in the aforementioned file, being the informant entities the ones that decide on the registration or cancellation of the data of its clients from the delinquency file.

The personal data of the complainant are data that appear in their own automated files. Additionally, they are communicated to the person in charge of the solvency file through procedures that involve treatment automated processing of the data processed, transferred, and incorporated into the common file of information on financial solvency.

In accordance with the foregoing, said entity has not limited itself to transmitting the information to the person in charge of the common file on patrimonial solvency, but has automatically processed the solvency data in its own files, it has communicated through automated processing to the common file, and, particularly, has decided on the purpose of the treatment (the qualification in its files as a debtor), the content of the information (an alleged debt), and the use of the treatment (the incorporation into a common file of information on solvency patrimonial and credit, which can be accessed by third parties to carry out a evaluation or economic profile of the people incorporated into it).

All this, without the data kept in the file responding to the situation of the complainant, since this entity included their personal data in Badexcug, being a non-collectible debt since the complainant paid within the term granted by the claimant.

v

In order to determine the administrative fine to be imposed, the observe the provisions of articles 83.1 and 83.2 of the RGPD, precepts that point out:

“Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 9 and 6 are in each individual case effective, proportionate and dissuasive.”

“Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in the Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation in question as well as the number of stakeholders affected and the level of damage and damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

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to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

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

f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in particular if the person in charge or the person in charge notified the infringement and, in such case, to what extent;

i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms certificates approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.”

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

“Sanctions and corrective measures”, provides:

“two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing personal.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have led to the commission of

the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party.”

In accordance with the precepts transcribed, in order to set the amount of the sanction of fine to be imposed in the present case for the infraction typified in article 83.5.a) of the

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RGPD for which XFERA MÓVILES, S.A. is responsible. (YOIGO), are estimated concurrent the following factors:

2. The merely local scope of the data processing carried out by the claimed party.

3. The purpose of the treatment was reasonable in the hypothesis that the claimed was legitimized for the treatment carried out.

4. Only one person has been affected by the offending conduct.

5. The damage caused to the affected party by the processing of their data is not very significant.

6. The duration of the treatment carried out by the claimed party has not translated into a serious harm or damage.

7. There is no evidence that the respondent had acted maliciously or with a relevant negligence.

8. The respondent did not adopt any measure to correct the effects of the infringement or responded to the request addressed to it by the AEPD Inspection.
9. There is an obvious link between the processing of personal data and the activity carried out by the claimant.

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

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE XFERA MÓVILES, S.A. (YOIGO) with NIF A82528548, by an infringement of Article 5.1 d) of the RGPD, typified in Article 83.5 of the RGPD, with a fine of €60,000.00 (sixty thousand 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

Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise,

it will be collected during 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 LOPDPGDD, this

Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a 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-](https://sedeagpd.gob.es/sede-electronica-web/)

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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