

936-031219

□ Procedure No.: PS/00090/2020

RESOLUTION R/00260/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00090/2020, instructed by the Agency

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

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

BACKGROUND

FIRST: On March 19, 2020, the Director of the Spanish Agency for

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

S.A. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00090/2020

972-090320

AGREEMENT TO START A SANCTION PROCEDURE

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

Data, and based on the following

FACTS

FIRST: Dated September 3, 2019, entered this Agency

Spanish Data Protection, a document presented by A.A.A. (hereinafter the

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

NIF A82528548 (hereinafter, the claimed).

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SECOND: In view of the foregoing, there are indications of a possible breach of the provisions of Regulation (EU) 2016/679 (General Regulation of Data Protection, hereinafter RGPD), which has motivated the realization of preliminary investigative actions to clarify the facts in matter, by virtue of the investigative powers granted to the authorities of control in article 57.1 of the RGPD, and in accordance with the provisions of the Title VII, Chapter I, Second Section, of the aforementioned LOPDGDD.

Within the framework of investigation actions E/95799/2019, it was sent to the claimed a request for information, related to the claim outlined in the first section, so that within five working days, it could present before this Agency the information and documentation indicated therein. The requirement was registered departure on November 5, 2019 with number 080326/2019.

FOURTH: The request for information, which was carried out in accordance with the regulations established in Law 39/2015, of October 1, on Administrative Procedure Common of Public Administrations (hereinafter, LPACAP), was collected by the responsible on November 11, 2019, as stated in the certificate of Notific@ that works in the file.

FIFTH: Regarding the required information, the person in charge has not sent any response to this Spanish Data Protection Agency.

#### FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47, 48.1, 64.2 and 68.1 of the LOPDGDD, the Director of the Spanish Data Protection Agency is

competent to initiate and resolve this procedure.

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II

3/9

In accordance with the evidence available in this moment of agreement to initiate the sanctioning procedure, and without prejudice to what result of the instruction, it is considered that the respondent has not procured to the Agency Spanish Data Protection the information that required.

With the indicated conduct of the defendant, the power of investigation that the Article 58.1 of the RGPD confers on the control authorities, in this case, the AEPD, has been hampered.

Therefore, the facts described in the “Facts” section are considered constituting an infraction, attributable to the defendant, for violation of article 58.1 of the RGPD, which provides that each control authority will have, among its investigative powers:

“a) order the person in charge and the person in charge of the treatment and, where appropriate, the representative of the person in charge or the person in charge, who facilitate any information required for the performance of its functions; b) carry out investigations in the form of data protection audits; c) carry out a review of the certifications issued under article 42, paragraph 7; d) notify the person in charge or the person in charge of the treatment of the alleged violations of this Regulation; e) obtain from the controller and the in charge of the treatment access to all personal data and to all the

information necessary for the exercise of its functions; f) gain access to all premises of the controller and processor, including any equipment and means of data processing, in accordance with the Procedural law of the Union or of the Member States.”

III

In accordance with the evidence available in this moment of agreement to initiate the sanctioning procedure, and without prejudice to what result of the investigation, it is considered that the exposed facts could be constituting an infringement, attributable to the defendant.

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4/9

This infringement is typified in article 83.5.e) of the RGPD, which considers as such: “failure to provide access in breach of article 58, section 1”.

In the same article it is established that this infraction can be sanctioned with a maximum fine of twenty million euros (€20,000,000) or, in the case of a company, of an amount equivalent to four percent (4%) as a maximum of the global total annual turnover of the previous financial year, opting for the of greater amount.

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

“ñ) Not facilitating the access of the personnel of the data protection authority competent to personal data, information, premises, equipment and means of

treatment that are required by the data protection authority to

the exercise of its investigative powers.

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

#### IV

Based on the facts set forth, without prejudice to what results from the instruction of the procedure, it is considered that it corresponds to impute the claimed by the violation of article 58.1 of the RGPD typified in article 83.5 e) of the RGPD. The

The sanction that should be imposed is an administrative fine.

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

Consequently, the sanction to be imposed must be graduated according to the criteria established in article 83.2 of the RGPD, and with the provisions of article 76 of the LOPDGDD, with respect to section k) of the aforementioned article 83.2 RGPD.

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5/9

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

In the initial evaluation it is appreciated that no

mitigating, and the following facts have been considered as aggravating:

- Art. 83.2 b) RGPD: the intention or negligence in the infringement. It is about

of a company that is not newly created and should have procedures established for the fulfillment of the obligations that contemplates the data protection regulations, among them, to respond to the requirements of the supervisory authority.

- Art. 83.2 k) RGPD: any other aggravating or mitigating factor applicable to the circumstances of the case, such as the financial benefits obtained or the Losses avoided, directly or indirectly, through the infringement. The claim refers to the particular case of a person, but the data processing to which it refers, may potentially affect a very high number of clients of the responsible entity or users of the service provided by the responsible entity.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: START A PUNISHMENT PROCEDURE against XFERA MÓVILES, S.A., with NIF A82528548, for the infringement of article 58.1 of the RGPD, typified in art. 83. 5 e) of the aforementioned RGPD.

SECOND: APPOINT B.B.B. and, as secretary, to C.C.C., indicating that any of them may be challenged, as the case may be, in accordance with established in articles 23 and 24 of Law 40/2015, of October 1, on the Regime Legal Department of the Public Sector (LRJSP).

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THIRD: INCORPORATE to the disciplinary file, for evidentiary purposes, the request for information issued by the Subdirector General for Inspection of Data within the framework of research actions with reference code E/95799/2019 and proof of notification.

FOURTH: THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Public Administrations, the sanction that could correspond would be 5,000.00 euros, without prejudice to what result of the instruction.

FIFTH: NOTIFY this agreement to XFERA MÓVILES, S.A., with NIF A82528548, granting him a hearing period of ten business days to formulate the allegations and present the evidence it deems appropriate. In his writing of allegations you must provide your NIF and the procedure number that appears in the header of this document.

If within the stipulated period it does not make allegations to this initial agreement, the same may be considered a resolution proposal, as established in the Article 64.2.f) of the LPACAP.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where applicable, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of performances; in accordance with the provisions of article 64 of the LOPDGDD.

In accordance with the provisions of article 85 of the LPACAP, you may acknowledge their responsibility within the term granted for the formulation of allegations to this initiation agreement; which will lead to a reduction in 20% of the penalty to be imposed in this proceeding. With the application of this reduction, the penalty would be established at 4,000.00 euros, resolving the procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of the present procedure, carry out the voluntary payment of the proposed sanction, which

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7/9

which will mean a reduction of 20% of its amount. With the application of this reduction, the sanction would be established at 4,000.00 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the sanction is cumulative to the one

It is appropriate to apply for the acknowledgment of responsibility, provided that this acknowledgment of responsibility is revealed within the period

granted to formulate arguments at the opening of the procedure. The pay volunteer of the amount referred to in the preceding paragraph may be made at any time prior to resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be established at 3,000.00 euros.

In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the withdrawal or renunciation of any action or resource in via administrative against the sanction.

In the event that you choose to proceed with the voluntary payment of any of the amounts indicated above (4,000.00 euros or 3,000.00 euros), you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 0000 opened in the name of the Spanish Agency for Data Protection in the Bank CAIXABANK, S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the cause of



reduction of the amount to which it is accepted.

Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP, there is no administrative appeal against this act.

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8/9

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: On June 11, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 3000 euros making use of the two reductions provided in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

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

control, and as established in art. 47 of the Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection

is competent to sanction the infractions that are committed against said

Regulation; infractions of article 48 of Law 9/2014, of May 9, General

Telecommunications (hereinafter LGT), in accordance with the provisions of the

article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and

38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the

information and electronic commerce (hereinafter LSSI), as provided in article

43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on Administrative Procedure

Common to Public Administrations (hereinafter, LPACAP), under the rubric

"Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

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

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified

the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in

any time prior to the resolution, will imply the termination of the procedure,

except in relation to the replacement of the altered situation or the determination of the

compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature,

the competent body to resolve the procedure will apply reductions of, at

least 20% of the amount of the proposed sanction, these being cumulative

each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction.

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

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9/9

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00090/2020, of in accordance with the provisions of article 85 of the LPACAP.

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

In accordance with the provisions of article 50 of the LOPDGDD, this

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

Against this resolution, which puts an end to the administrative procedure as prescribed by the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal contentious-administrative before the Contentious-administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-Administrative Jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

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