

Procedure No.: PS/00262/2019

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) dated July 30, 2018

filed a claim with the Spanish Data Protection Agency. The

claim is directed against XFERA MÓVILES, S.A. with NIF A82528548 (in

later, the claimed one). The grounds on which the claim is based consist of the

possible identity theft, since said entity demands the payment of a

debt that the claimant does not acknowledge. When the claimant became aware of such

request for payment, he filed a complaint with the General Directorate of the Police.

Along with the claim, provide a copy of the police report dated July 28,

2018 and the invoices corresponding to the required debt.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant, the Subdirector General for Inspection of

Data proceeded to carry out preliminary investigation actions for the

clarification of the facts in question, by virtue of the investigative powers

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 Law

Organic 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:

On December 6, 2018, this Agency received, with the number of registration 209002/2018, written response to the transfer of the claim from of XFERA MÓVILES, S.A. (hereinafter, XFERA), as the owner of the brand MÁSMOVIL, making the following statements:

- That, like the claimant, it is the will of this party to know the causes that may have led to the incident that has given rise to this claim for which the possible causes of the problem are being investigated internally. incident.

- That since there is a complaint for these same facts in police headquarters with certificate number 14651/18, filed on July 28 of the year in [www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

C/ Jorge Juan, 6

28001 – Madrid

2/6

course (Annex 1 of the claim), and that taking into account that these facts are already being officially investigated by criminal means, they request that is up to the resolution of said procedure to clarify the possible causes of the incident, by virtue of the principle of no bis in idem, that orders the sanctioning procedure in both legal systems

In view of such manifestations, a new request is made by this Agency to XFERA so that it can provide documentation that allows proving aspects such as the service contract, the contracting procedure and accreditation of the identity, as well as knowing the status of the corresponding criminal procedure to the police report 14651/18, to which XFERA refers in its writing, without having

received a response in this regard within the period given for it.

THIRD: On July 22, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, for the

alleged infringement of Article 6 of the RGPD, typified in Article 83.5 of the RGPD

expressly indicating their right to a hearing in the procedure and

granting him a period of TEN WORKING DAYS to formulate the allegations and

propose the tests that it considers appropriate, in accordance with the provisions of

section f) of article 127 of the RLOPD.

Likewise, in accordance with articles 64.2.f) and 85 of Law 39/2015, of 1

October, of the Common Administrative Procedure of the Public Administrations

(LPACAP), you were informed that if you do not make allegations in time to this agreement

initially, it may be considered a resolution proposal.

TO: Not having formulated allegations or presented evidence within the term

QUAR

given, this resolution is issued taking into account the following:

FACTS

FIRST: Identity theft is denounced, in the contracting of the service

of the claimed, not having notice of it until said entity demands payment

of a debt that the claimant does not acknowledge, after which he files a complaint with the

General Directorate of the Police on July 28, 2018, providing a copy of said

complaint and the invoices corresponding to the required debt.

SECOND: The respondent states that he is investigating internally the

possible causes of the incident that is the subject of this claim, but since there is a

complaint for these same facts in police headquarters with number 14651/18,

filed on July 28, 2018 (Annex 1 of the claim), and that

Bearing in mind that these facts are already being officially investigated by

criminal proceedings, the defendant states that he will wait for the resolution of said procedure to clarify the possible causes of the incident, by virtue of the foundation of the principle of no bis in idem, which orders the sanctioning procedure in both orders.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

3/6

## 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

Article 4.11 of the RGPD defines the "consent of the interested party" as any manifestation of free, specific, informed and unequivocal will by which the The interested party accepts, either by means of a declaration or a clear affirmative action, the treatment of personal data that concerns you, as well as article 6.1 of the RGPD establishes that for the treatment to be lawful, it will be required that the interested party consent to the processing of your personal data for one or more purposes specific.

For its part, article 6.1 of the RGPD establishes that "The treatment will only be lawful if at least one of the following conditions is met:

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 a party or for the application at the request of the latter of measures

pre-contractual;

c) the treatment is necessary for the fulfillment of an applicable legal obligation

to the data controller;

d) the treatment is necessary to protect the vital interests of the interested party or another

Physical person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the person responsible for the

treatment;

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.”

III

According to the evidence currently available,

it is considered that the respondent has used the data of the claimant for the hiring

of the telephone line \*\*\*TELEFONO.1 without your consent.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

The claimant states that the charge made by the entity denounced has as origin the contracting of the \*\*\*TELEFONO.1 line, activated on the 12th of January 2018, and the purchase of a terminal with payment in installments model Samsung Galaxy S8 64GB, worth €654. He adds that the line was contracted "on line" and they facilitate this Agency report on the hiring and copy of the contract.

XFERA MÓVILES, S.A. has stated that an internal investigation is underway the possible causes of the incident and that after the complaint filed on July 28, 2018 at police headquarters with number 14651/18, these events are already being officially investigated by criminal means, for which he requests that they be at the resolution of said procedure to clarify the possible causes of the incident, by virtue of the principle of no bis in idem, which orders the procedure sanctioning in both legal systems.

This Agency considered it necessary to verify such statements and for this made a new request for information to XFERA about the service contract, the contracting procedure and proof of identity, and on the status of the criminal proceedings corresponding to police report 14651/18, which reference in his writing, without having received a response in this regard within the given period for it.

Therefore, it is considered that by not obtaining a response to the request of the AEPD, it is understood that the entity has not proceeded to cancel the data of the claimant and consequently continues the treatment, so that accordance with the evidence available at this time, and without

Despite what results from the investigation, it is considered that the known facts could constitute an infringement, attributable to the defendant, for an alleged violation of article 6 of the RGPD, indicated in the foundation II.

III

Article 72.1.b) of the LOPDGDD states that “according to what is established

Article 83.5 of Regulation (EU) 2016/679 are considered very serious and

Infractions that suppose a substantial violation will prescribe after three years.

of the articles mentioned therein and, in particular, the following:

c) The processing of personal data without the concurrence of any of the conditions

of legality of the treatment in article 6 of Regulation (EU) 2016/679.”

IV

This infraction can be sanctioned with a fine of €20,000,000 maximum or,

in the case of a company, an amount equivalent to a maximum of 4% of the volume

of total annual global business of the previous financial year, opting for the one with the highest

amount, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with

the following criteria established by article 83.2 of the RGPD:

As aggravating the following:

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

5/6

☐ In the present case we are dealing with unintentional negligent action, but

identified significant (article 83.2 b)

☐ Basic personal identifiers are affected (name, a number

identification, the line identifier), according to article 83.2 g)

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. with NIF A82528548, for a violation of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine €60,000 (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.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

6/6

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/](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](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)