

936-031219

□ Procedure No.: PS/00447/2019

RESOLUTION R/00097/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00447/2019, 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 January 22, 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/00447/2019

935-240719

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: D.A.A.A. (hereinafter, the claimant) dated June 17, 2019

filed a claim with the Spanish Data Protection Agency. The

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

the claimed or Yoigo).

The claimant states that they are claiming an unpaid debt in

name of Yoigo, for a contract that I did not carry out.

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In addition, it provides supporting documentation of the invoices that it claims

Yoigo, from January and February 2016 and amounting to 70.90 and 27.41 euros.

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

documents provided by the claimant and the facts and documents of which he has

had knowledge of this Agency, the Subdirector General for Data Inspection

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.

Within the framework of file E/6773/2019, by means of a document signed on

07/12/2019, the claim was transferred to Yoigo, requesting that within the period of

one month will provide information on the facts set forth in the claim and detail

measures taken to prevent similar situations from occurring in the future.

The document was notified to the claimed party electronically, being the date of acceptance of

notification on 07/17/2019 as evidenced by the certificate issued by the FNMT

what works in the file.

After the period granted to the respondent without having responded to the

request for information, in accordance with the provisions of article 65.2 of the Law Organic 3/2018, on Data Protection and Guarantee of Digital Rights (LOPDGDD), on 10/08/2019, the agreement for admission to processing of the this claim.

On the other hand, in the framework of file number E/09581/2019, according to the Article 67 of the LOPDGDD, the Data Inspection of the AEPD initiates actions of prior investigation.

The certificate issued by the FNMT is in the administrative file, in the stating that the notification dated 10/29/2019 was returned due to rejection automatic on 11/09/2019 and the one issued by Correos certifies receipt by the claimed from the notification corresponding to the information requirement that was made in the course of the investigation, delivered, on 11/15/2019.

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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 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 General Data Protection Regulation deals in article 5 with the principles that must govern the processing of personal data and mentions among

them that of "legality, loyalty and transparency". The provision provides:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner with the interested party;"

Article 6 of the RGPD, "Legality of the treatment", details in its section 1 the assumptions 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 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;

(...)"

The violation of article 6.1 of the RGPD is typified in article 83

of the RGPD that, under the heading "General conditions for the imposition of fines administrative", says:

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"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.”

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72.1.b) qualifies this infraction, for the purposes of prescription, as a very serious infraction.

The documentation in the file offers evidence that the claimed violated article 6.1 of the RGPD, since it processed the personal data of the claimant (name, surnames and DNI) linked to the registration in his name of a service of telecommunications that the claimant denies having contracted.

It should be remembered that article 5 of the RGPD, after alluding in its section 1 to the principles relating to the processing of personal data -among them, as has pointed out in the preceding Basis, that of "legality"-, it says in its section 2:

“The person responsible for the treatment will be responsible for compliance with the provided in section 1 and able to demonstrate it (<<proactive responsibility>>)”

In the same sense, Recital 42 of the RGPD is pronounced, which says:

“When the treatment is carried out with the consent of the interested party, the The data controller must be able to demonstrate that the data controller has given consent to the treatment operation...”

Criterion that coincides with the doctrine followed by the Contentious Chamber Administrative of the National High Court during the validity of the Law Organic15/1999. The court considered that when the owner of the data denies contracting corresponds the burden of proof to who affirms its existence, being obligation of the data controller of third parties to collect and keep the documentation necessary to prove the consent of the holder. We quote, for all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

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

We must point out that the defendant, despite the repeated requests she received from the AEPD to explain the facts on which it deals, never responded or provided any evidence that would allow estimating that the treatment of the data of the claimant had been legitimate.

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We refer in this regard to the request for information that the AEPD addressed the claim within the framework of E/6723/2019, therefore before the present claim would have been admitted for processing (E/09581/2019). Request whose receipt by the claimed party it is proven (certificate issued by the FNMT) that the 07/17/2019.

However, no response was received and on 10/15/2019 it was agreed admission to processing of the claim. In the same vein, it should be noted that investigation actions have been initiated (E/09581/2019), they are carried out by the data inspection of this Agency two informative requirements to which neither responds the claimed. Reminder that, circumscribed to the violation of the article 6.1. of the RGPD, is intended to show that the claimed party has had ample opportunities to provide evidence or documents that prove that, contrary to the statements and documentary evidence provided by the claimant, the processing of data that is subject to assessment in this case was set to Right.

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)

In short, there is evidence in the file that the respondent dealt with the personal data of the claimant without legitimacy to do so. Treatment that is materialized in the registration of a telecommunications service linked to your data personal. Treatment that, moreover, has been maintained over time for more than four years, since they date from at least January 2016. The conduct described violates the article 6.1. of the RGD and is subsumable in the sanctioning type of article 83.5.a, of the GDPR.

III

In order to determine the administrative fine to be imposed, the precautions visions of articles 83.1 and 83.2 of the RGD, precepts that indicate:

“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.”

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“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 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 RGD, 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.

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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 officer.

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 transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to be imposed to the one claimed as responsible for an infraction typified in article 83.5.a) of the RGD, in an initial assessment, they are considered concurrent in the present case, as

aggravating factors, the following factors:

- The duration of the illegitimate treatment of the data of the affected person carried out by the claimed. The documentation in the file shows that the treatment

of the data began, at least, before January 2016. What entails, in short, a

Very qualified aggravating circumstance (article 83.2.a, of the RGPD)

- The defendant violated article 6.1 RGPD, through a conduct subsumable in

Article 83.5.a) of the RGPD. The treatment materialized in the linking of the data

claims of the claimant to a telecommunications contract that he denies having signed.

Highly qualified aggravating circumstance that can be framed in article 83.2.a of the RGPD.

- The lack of cooperation with the AEPD in order to remedy the infraction and mitigate its effects (article 83.2.f, of the RGPD)

- The evident 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, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: START A SANCTION PROCEDURE against XFERA MÓVILES, S.A.

(YOIGO), with NIF A82528548, for the alleged infringement of article 6.1.a) of the RGPD

typified in article 83.5.a) and classified as a very serious infraction, for the purposes of

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prescription, by article 72.1.b) of the LOPDGDD.

SECOND: APPOINT instructor D. B.B.B. and secretary to Ms. C.C.C., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector (LRJSP).

THIRD: INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and its attached documentation, and all documents generated by the claim.

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 to the infraction (article 83.5.a, RGPD) would be 60,000 euros (sixty thousand euros), without prejudice to what results from the investigation.

FIFTH: NOTIFY this agreement to XFERA MÓVILES, S.A. (YOIGO), with NIF A82528548, granting a hearing period of ten business days for formulate the allegations and present the evidence that it deems appropriate. In its Allegation brief must provide your NIF and the procedure number that appears at the top of this document.

If within the stipulated period it does not make allegations to this initial agreement, the The same may be considered a resolution proposal, as established in the Article 64.2.f) of Law 39/2015, of October 1, on Administrative Procedure Common to Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event that the sanction to be imposed was a fine, it may recognize its responsibility within the term granted for the formulation of allegations to this initial agreement; it which will entail a reduction of 20% of the sanction to be imposed in the present procedure. With the application of this reduction, the total sanction would be established at 48,000 euros (forty-eight thousand 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

which will mean a reduction of 20% of its amount. With the application of this

reduction, the total sanction would be established at 48,000 euros (forty-eight thousand

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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 total sanction would be established at 36,000 euros

(thirty-six thousand 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, 48,000 euros or 36,000 euros, you must do so

cash by depositing it in account number ES00 0000 0000 0000 0000 0000 opened

on behalf of the Spanish Agency for Data Protection at CAIXABANK Bank,

S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the reason for the reduction of the amount to which welcomes

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

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

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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: On February 10, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 36,000 euros making use of the two planned reductions 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
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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.

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00447/2019, 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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