

□ Procedure No.: PS/00436/2019

938-090320

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Dated September 20, 2018, had entry in 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).

SECOND: In accordance with the provisions of article 65 of Organic Law 3/2018, of
December 5, Protection of Personal Data and guarantee of rights
(LOPDGDD hereinafter), the claim was transferred to the person in charge or to the
Data Protection Delegate that you may have appointed, requiring you to
to send the requested information and documentation to this Agency. East
request for information was made within the framework of the file with code of
reference E/07400/2018.

THIRD: Once the period of one month that was given to the claimed person for
inform the Spanish Agency for Data Protection, as indicated in the
second antecedent without the respondent providing the pertinent response, he became
to reiterate the request for information, granting an additional period of five days
was also not answered. The claim was admitted for processing on the 21st of
December 2018.

FOURTH: In relation to the investigation actions referenced with the
code E/00413/2019, a new request for information was sent to the respondent,

alluding to the claim outlined in the first antecedent, so that, within the term of ten working days, submit to this Agency the information and documentation that it was pointed out in it. The request, which was made 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 June 28, 2019, as stated in the Notific@ certificate what works in the file.

FIFTH: On November 29, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, 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 violation of Article 58.1 of the RGPD, typified in the Article 83.5 of the RGPD.

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SIXTH: The aforementioned start-up agreement that was registered at exit on the 2nd of December 2019 with registration number 089439/2019, was not collected by the responsible, understood as rejected in accordance with the provisions of art. 43.2 of the LPACAP on December 13, 2019, as stated in the Notific@ certificate what works in the file.

According to the provisions of art. 43.3 of the aforementioned LPACAP, "It will be understood that the obligation referred to in article 40.4 with the provision of the notification in the electronic headquarters of the Administration or acting body or in the

unique authorized electronic address.”

After the period of ten business days granted in the initial agreement for the presentation of arguments, the respondent has not presented arguments.

SEVENTH: On February 4, 2020, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency sanction XFERA MÓVILES, S.A., for an infringement of Article 58.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €5,000.00.

Likewise, the procedure was revealed so that within a period of ten days could allege whatever he considered in his defense and present the documents and information that it considers pertinent, in accordance with article 89.2 of the LPACAP.

EIGHTH: The proposed resolution, which was registered as output on the 4th of February 2020 with registration number 009586/2020, was not collected by the responsible, understood as rejected in accordance with the provisions of art. 43.2 of the LPACAP on February 15, 2020, as stated in the Notific@ certificate what works in the file.

After the period of ten business days granted in the resolution proposal for the presentation of arguments, the respondent has not presented arguments. In view of everything that has been done, by the Spanish Protection Agency of Data in this procedure the following are considered proven facts,

FACTS

FIRST: The information requirements indicated in the second background and fourth were notified electronically, in accordance with the provisions of article 43 of the LPACAP.

SECOND: The respondent has not responded to the information requirements carried out by the Agency within the periods granted for it, namely:

1st. The request made within the framework of the file with reference code

E/07400/2018, in which the deadline to respond was one month.

2nd. The request made within the framework of the investigative actions

referenced with code E/00413/2019, in which the deadline to respond was

ten business days.

THIRD: The notification of the agreement to initiate this procedure

sanctioning was carried out electronically through the Notific@ system, not being

collected by the person in charge and, consequently, understood as rejected as

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provided for in art. 43.2 of the LPACAP, dated December 13, 2019. No

presented arguments to the initiation agreement.

FOURTH: The notification of the resolution proposal was made electronically to

through the Notific@ system, not being collected by the person in charge and understanding

rejected in accordance with the provisions of art. 43.2 of the LPACAP dated February 15

of 2020. No arguments were presented to the proposed resolution.

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 as established in arts. 47 and 48.1 of the LOPDGDD, the

Director of the Spanish Data Protection Agency is competent to resolve

this procedure.

II

The defendant is imputed the commission of an infraction for not having tried to the Spanish Data Protection Agency the information it requested. With the indicated conduct of the defendant, the power of investigation that article 58.1 of the RGPD confers on the control authorities, in this case, the AEPD, has been seen hampered.

Therefore, the proven facts are deemed to constitute an infraction, attributable to the claimed, 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

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 fine. twenty million euros (€20,000,000) maximum 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.

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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 behavior:

“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

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

Consequently, the following have been taken into account as aggravating circumstances:
facts:

- Art. 83.2 b) RGPD: the intention or negligence in the infringement. Is about
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, 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 infringement of Article 58.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €5,000.00 (five 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

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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

is between the 1st and 15th of each month, both inclusive, the term to carry out the

voluntary payment will be until the 20th day of the following month or immediately after, and if

is between the 16th and last day of each month, both inclusive, the term of the

payment will be until the 5th of the second following month or immediately after.

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

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 period of

month 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, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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