

Procedure No.: PS/00109/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and
in consideration the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) submits to the Spanish Agency for
Data Protection (AEPD), on September 19 and 20, 2018, both
writings stating that EDP ENERGÍA, S.A.U., (hereinafter, EDP or the
claimed) has processed your personal data (name, surnames, NIF, address and
mobile phone number) without your consent linked to an energy contract
electricity to which it is foreign.

With the letter of 09/20/2018, he provides a copy of a document bearing the rubric
"Notice of non-payment" -document that the claimant calls "invoice"-, issued on
05/31/2018. The claimant explains that after receiving this document he contacted
telephoned EDP and filed a claim for "billing me for services in the
supply point located in ***LOCATION.1, ***ADDRESS.1 ...without having
signed any contract or have any relationship with said address.

The aforementioned document - "Notification of non-payment" - has in the section dedicated to
the data of the recipient the name, two surnames and the address of the claimant
(located in ***LOCALIDAD.2). In the section dedicated to "Customer data",

In addition to the name and surnames of the claimant, they include their NIF and a fixed number that the
Claimant affirms that it does not belong to him (***TELEPHONE.1). In the section "Data of the
contract" -contract that is for electricity and gas with the number 700005852279- appears the
supply point address: ***ADDRESS.1***TOWN.1. On the side

right of the document is indicated: "EDP ENERGÍA, S.A.U. Plaza de la Gesta 2, 33007

Oviedo (...) CIF A-33543547".

The claimant states that, a few days after claiming by telephone before EDP for the invoice it had received, the respondent sent to his address a gas and electricity service contract to return it signed. And he adds that in that document -of which a copy has been provided to this Agency- appear, in addition to the personal data of which he is the owner and that appeared in the "Notification of non-payment" described above, your mobile number, from which you made the phone call from claim to EDP.

In the contractual document that the claimant received, above the

"Specific conditions of the contract", this legend is included:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

2/30

"The client contracts for the business or home premises indicated in the heading, the supply of gas with EDP COMERCIALIZADORA, S.A.U. and the supply of electricity and/or complementary services with EDP ENERGÍA, S.A.U. (hereinafter, jointly and/or individually, as appropriate, referred to as "EDP") in accordance with the Specific Conditions listed below and the General Conditions that appear in the annex". (The underlining is from the AEPD)

On the right side of the document there is:

"EDP ENERGÍA, S.A.U. Plaza de la Gesta 2, 33007 Oviedo (...) CIF A-33543547

EDP COMERCIALIZADORA, S.A.U. C/General Concha, 20 48010 Bilbao (...) CIF A-95000295".

SECOND: In view of the facts exposed, the AEPD, on 10/15/2018, in the scope of file number E/07378/2018, under article 9 of the Real Decree-Law 5/2018, on urgent measures for the adaptation of Spanish Law to the European regulations on data protection -rule in force since the 07/31/2018 until its repeal by Organic Law 3/2018, of December 5, of Data Protection and Guarantees of digital rights (LOPDGDD)- transferred of the complaint to the DPD of the entity complained against and requested that, within a month from receipt, inform this Agency of the circumstances that had originated the facts exposed in the claim, of the decision adopted to put put an end to the irregular situation caused and also proceed to communicate its decision to the claimant, having to prove to this Agency the receipt of that communication by the recipient.

The document in which the claim was notified to the respondent was signed by the AEPD on 10/15/2018 and EDP was notified electronically on the same date. The date of availability in the electronic office and the date of acceptance of the communication is on 10/15/2018, as evidenced by the certificate issued by the FNMT what works in the file.

In turn, the AEPD sent the claimant, on the same date, a letter in the that he acknowledged receipt of his claim and informed him of the transfer to the claimed. The notification was made by postal mail dated 10/17/2018 and was delivered on 10/27/2018.

EDP responds to the information request in writing, sent by mail certificate dated 11/15/2018, entered by the AEPD on 11/20/2018, signed by the "Data Protection Officer" "on behalf of the company EDP ENERGY, S.A.U. (...) and with CIF A33543547".

In it he does the following

Manifestations relevant to the purposes of the investigation:

That the personal data of the complainant were provided to EDP,

-

by telephone, on 05/17/2018, by D^a B.B.B. who made the

change in the ownership of the supply corresponding to the address located in

***ADDRESS.1, from

*** LOCATION.1, and stated to act in

representation of the affected.

-

A recording of the telephone conversation is provided.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

3/30

The respondent entity affirms that “As can be verified from the

minute 7:56 of the audio file called 803818026680675 of the

telephone recording, in accordance with the regulations on

data protection in force on the date of the telephone conversation, EDP

correctly informed about the treatment that is going to be carried out of the

personal data of both the Representative and his represented (the

now Complainant), by virtue of the processing of the change of ownership.”

(The underlining is from the AEPD)

-

That during the processing of the change of ownership -as can be

check in the audio file 803818026680926 that is part of the

document 1- EDP informed Ms. B.B.B. that the ID number of the affected was detected by the system as erroneous and its owner verification. It adds that, the following day, 05/18/2017, the person who claimed to act on behalf of the affected person was put back in telephone contact with EDP to complete the procedures for the change of ownership and, in the course of that conversation - the recording of which was also has provided this Agency -, he stated again that he was acting in representation of the claimant (minute 2:05 of the audio with reference 803818026691798)

EDP says that "it has kept all the precautions required both in terms of -
regarding contracting as well as regarding the information obligation established in terms of data protection. He adds that he understands that the reason for the request made by the AEPD Inspection may be due to the fact that "...the Representative has not adequately transferred the Complainant the information regarding both the terms of the contract as data processing".

-
States that, once received the informative request of the Data Inspection, contacted the claimant by letter addressed to your address dated 11/15/2018 of which you provide us with a copy. In the A letter addressed to the claimant states that "...the contracting of the electricity supply with EDP Energía, S.A.U. (hereinafter EDP) was carried out carried out by telephone by Doña B.B.B. ...".

It indicates that "Mrs. B.B.B., .. stated that she was acting with her knowledge and

-

on their behalf, proceeding with the change of ownership of the supply
corresponding to the address located at ***ADDRESS.1, ***LOCATION.1”.

It adds that the hiring was carried out "following all precautions
required, and complying with the duty of information (...), being
necessary that they become part of the database of
clients for the correct management of the signed contract”.

On 11/30/2018, in accordance with the provisions of article 9.5 of the Real
Decree-Law 5/2018, signing the agreement for admission to processing of this
claim.

Under article 11 of Royal Decree-Law 5/2018, once admitted to
processing the claim and before the adoption of the initiation agreement, within the framework of the
C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

4/30

prior investigation, by the Inspection service of this Agency,

Diligence dated 03/06/2019 by virtue of which it is incorporated into the file

E/7378/2018 -which brings cause PS/0109/2019- the general information of the
entity extracted from the Mercantile Registry on the same date from which we highlight that
the subscribed and paid-up share capital amounts to 1,000,000 euros and that the

The company began its operations on 03/18/1998.

THIRD:

The facts object of the claim are subject to the
provisions of Regulation (EU) 2016/679, of the European Parliament and of the Council,
of 04/27/2016, regarding the Protection of Natural Persons with regard to the

Treatment of Personal Data and the Free Circulation of these Data, which entered into effect on 05/25/2018.

The respondent affirms that she obtained the personal data of the claimant and gave her an electricity contract in her name on 05/17/2018, through a phone call from a person who claimed to hold her representation.

Thus, the processing of the personal data of the affected party began before that Regulation (EU) 2016/679 came into force -which happens on 05/25/2018- and when the Organic Law 15/1999 on Personal Data Protection was still in force.

Personal Character, LOPD. However, the conduct of EDP in which the infringement, the processing of the claimant's data without legitimacy for it linked to an electricity supply contract, has been maintained over time until the present. Currently or, at least, until 11/15/2018 as it is accredited documentaryly.

The infringement for which EDP is held responsible is of the nature of the so-called permanent infractions, in which the consummation is projected in time beyond the initial fact and extends, violating the regulations of data protection, during the entire period of time in which the data is subject to treatment. In the present case, despite the fact that on the date on which the infringing conduct the applicable norm was the LOPD, the norm that results from application is the one that is in force when the infraction is consummated because it is in that moment when it is understood committed.

The Supreme Court has ruled on the rule to be applied in those cases in which the infractions are prolonged in time and there have been a normative change while the infraction was committed. The STS of 04/17/2002 (Rec. 466/2000) applied a provision that was not in force at the initial moment of commission of the infraction but yes in the subsequent ones, in which the conduct continued

offending The Judgment examined a case that dealt with the sanction imposed

to a Judge for breach of her duty to abstain in proceedings

Previous. The sanctioned alleged the non-validity of article 417.8 of the LOPJ when

the events occurred. The STS considered that the infraction had been committed

from the date of initiation of the Preliminary Proceedings until the moment in which the

Judge was suspended in the exercise of her functions, so that rule was of

app.

The SAN of 09/16/2008 (Rec.488/2006) pronounces in the same sense

FOURTH: On March 21, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed entity,

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

5/30

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1,

of the Common Administrative Procedure of the Public Administrations (in

hereinafter, LPACAP), for the alleged infringement of article 6.1 of the RGPD, typified in

Article 83.5.a) of the RGPD.

FIFTH: On 04/09/2019 the allegations are received in the AEPD Registry

of the one claimed to the agreement to initiate the sanctioning file in which it requests

that the proceedings be archived "for having acted ... in accordance with

Law" and, subsidiarily, that "a light sanction be imposed in the amount

minimal".

He provides as documentary evidence a CD with a recording, in which no

provides the date on which it took place, on which a person who identifies with the

name, surnames and NIF of the claimant, makes a call to EDP and states that they have cut off the supply while asking what is the amount owed adding which sounds like it is 140.77 euros. The entity, after asking about the point of supply informs him that he owes 170.80 euros and that he can pay by card.

The defendant, in support of her claims, put forward in the brief of arguments to the initial agreement the following arguments:

- That "he has kept all the required precautions" and that the "contracting has been at all times in good faith on the part of EDP, complying with the provisions in current regulations on data protection. He adds that for reasons that it alleges -which we will detail later- "the contractual relationship with the Complainant is perfectly valid, the data collection was carried out in accordance with Law and the treatment of the complainant's data is perfectly valid."

- In the event that the AEPD does not agree to file the proceedings, it alleges that the sanction established in the agreement to initiate the disciplinary proceedings violates the principle of proportionality. He maintains that there was no guilt or unlawfulness in its action and that "the sanction to be imposed would have to correspond to a minor infraction, in its minimum amount", because, it says, "it does not only the alleged aggravating factors would not apply, but would apply practically all of the extenuating circumstances included in the sanctioning regime".

- It states that, as it proved in procedure E/7378/2018, "there is a valid contractual relationship" between EDP and the claimant. He claims that the legitimacy of the treatment of the data of the claimant and the confirmation of a valid contractual relationship between the claimant and EDP is justified by two extremes that the Agency itself has considered proven in the agreement of beginning and that he described as irrelevant for the purposes of the assessment that corresponds to him

do. Namely, "that the claimant's data was obtained through Mrs.

BBB and that this lady affirmed on several occasions, during the course of the telephone conversations, acting on behalf of the claimant."

- States that we are dealing with an example of a representative mandate regulated in the Civil Code (articles 1709-1739) which leads him to state emphatically that "...therefore no rule has been broken by EDP in the

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

6/30

hiring ...". He adds that the mandate can be verbal, "provided that of the circumstances the veracity and granting of the same can be deduced "and that

It can be express or implied, deduced from the principal's own acts. Is doctrinal exposition on the mandate contract puts it in connection with

facts such as the recording you attach to your pleadings; what

for EDP it constitutes a ratification of the contract and of the mandate. to such

effect invokes the STS, First Chamber, of 01/09/1964, according to which the principal

that takes advantage of the acts of the president tacitly ratifies the mandate;

the prohibition of abuse of rights (former article 7.2 C.C.) -every time, it affirms,

the "Complainant" would have enjoyed the supplies provided- and would be

also contrary to the good faith that should preside over the exercise of rights

(former article 7.1 C.C.)

It emphasizes that "the consequences of a possible negligent action by

part of Mrs. B.B.B., ..., can in no case affect the validity

contractual, .. The contractual relationship between the parties is perfected and is

fully legitimate."

Invokes article 83 of Royal Decree 1955/2000, which regulates the activities of transport, distribution, commercialization, supply and authorization procedures for electric power installations, in which, says, the consumer who is up to date with the payment is granted the power to transfer your contract to another consumer who is going to use it in identical conditions. He insists that "the change of ownership occurs under the same contractual conditions, that is, without the change being considered a new registration and therefore a new contract".

-

-

- Given the exposure made by the Agency in the initial agreement regarding the fact that no evidence had been provided that the claimant had granted his representation to the person who claimed to act on your behalf (Mrs. B.B.B.) nor that the entity displayed the minimum diligence required to verify that Indeed, her interlocutor had the representation that she claimed to hold EDP counters that "there is no such obligation" and that "the C.C. admits the freedom of form in the figure of the mandate, this being able to be verbal..."

SIXTH: On 11/18/2019 a trial period is opened in which they agree, as the only evidentiary proceedings, the incorporation to PS/109/2019 of the documents that make up file E/07378/2018 -whose incorporation for this purpose is already it was announced in the Agreement to Commence the procedure-: The claim briefs; the documentation generated by the AEPD; the response of the respondent to the request for information and the Diligence of 11/18/2019 with the information obtained on that date to through AXESOR regarding the result of the activity of the claimed party during the fiscal years 2017 and 2018. Likewise, they are considered incorporated into the sanctioning file

the allegations of the respondent to the initiation agreement and its attached documents.

SEVENTH: On 11/26/2019, a resolution proposal is formulated in the following

terms:

<<FIRST: That by the Director of the Spanish Agency for the Protection of

Data is sanctioned to EDP ENERGÍA, S.A.U., with NIF A-33543547, for an infringement

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

7/30

of article 6.1 of the RGPD, typified in article 83.5.a) of the RGPD, with a fine of

75,000.00 euros (seventy-five thousand euros).

(...)

SECOND: That, in accordance with article 58.2 of the RGPD, the

EDP ENERGÍA, S.A.U., with NIF A-33543547, which ADOPTS THE MEASURES

INDISPENSABLE to adapt your telematic contracting protocols to the

provisions of the RGPD regarding the legality of the treatment; in particular in the

contracting through a representative, in which you must be able to

prove both the reality of the representation granted by the owner of the data

as the identity of the person who has the status of represented in the contract.

Also, if you do not have them implemented, you must adopt them in the protocol

face-to-face hiring. Measures that, where appropriate, must be adopted within the

of one month computed from the date on which the sanctioning resolution is

executive.>>

The proposed resolution was notified electronically to the respondent, being the

availability date on 11/26/2019 and acceptance date on 11/27/2019.

Pursuant to article 73 of the LPACAP, the term to formulate allegations is

ten days computed from the day following the notification.

EIGHTH: On 12/12/2019, the electronic headquarters of this Agency have the allegations of the respondent to the proposed resolution in which he requests that proceed to file the procedure for having acted, he says, in accordance with the law.

In defense of her claim, the respondent reiterates the allegations already made

-to the agreement to start the sanctioning file and in the previous informative procedure- and,

In short, he adduces the following arguments:

- It states in the first allegation that "the evidence presented by this representation mark the proactive performance of the representative in contracting in name of his client, confirming the existence of the point of supply and therefore the existence of the contract. Consider that the treatment that EDP has made of the personal data of the complainant is legitimate because in his opinion there is a valid contractual relationship between the two.

- In her second allegation, the respondent maintains that she is the victim of a situation of "legal defenselessness" as a result of the actions of the AEPD every time that this Agency has admitted "accredited the origin of the data, provided in BBB, the call at the time of hiring made by Ms.

However, they are irrelevant in terms of proving due treatment.

of the same when -argues the claimed- it is precisely that point that that justifies the legitimacy of the processing of the complainant's data, since the existence of a valid contractual relationship between the parties is confirmed"

Regarding the sound document that EDP provided to this Agency annexed to its allegations to the initial agreement, after reproducing the assessment that

that test was made by the instructor of the file in the proposed resolution,
adds the following statements, despite the fact that neither in the sound document
provides a date and neither in it nor in any other is what it now alleges justified:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

8/30

“That this representation not only indicates that the recording collects the
consent of the natural person who calls to proceed with the payment of the
invoices, the date of the call being collected on August 10, 2018, but
that said payer is the son of the Complainant knowing the latter
as contract holder. (The underlining is from the AEPD)

The respondent says that, in her opinion, "recruitment by representation,, is
has done in accordance with the law, not only requesting the documentation
required and obtained the proof of the contracting carried out, but that the same
it is ratified at a later time.”

- In his third allegation he tries to refute the total lack of diligence in his
action attributed to it by the motion for a resolution and in this regard it says: “...
however, my principal acted in compliance with the requirements demanded by the
civil and commercial regulations, ensuring the identification of the old and new
holder, as well as to translate the operation carried out into a durable medium” and
highlights - appears written in bold - that the AEPD "not only hinders and inhibits the
legal traffic, but completely annuls the figure of the representative and the
mandate, not considering this administrative body these operations
performed by third parties as legitimate acts”

- In the fourth allegation -in response to the statement made by the proposal

of resolution that the entity completely lacks a protocol of

action for telematic contracting when the person who facilitates

the data is not the owner, but a third party who claims to act on his behalf- says:

“ We are not facing a contract; which has a double process

verification implemented for new hires” and that the supposed

analyzed supposes "a mere modification of the holder of the contract already signed

previously” which leads him to affirm that it is not applicable “nor the

contracting procedure” “neither the double verification supposes a guarantee

legal mandatory implementation by my client”. And he concludes by saying: “...the

AEPD requires accreditation of the granting of representation through

an element of evidence for my client, such as a minimum duty of diligence

necessary, a requirement that the regulations do not include. Therefore, in this case and

the AEPD sanctions for not complying with this requirement would mean a resolution

not in accordance with law”.

- In his allegation

the fifth declares: “The different

viable possibilities, both technically and operationally speaking, to

reinforce contracting procedures when such procedures are

processed by a third party on behalf of the owner.

Of the actions carried out, the following have been accredited

FACTS

1.- Mr. A.A.A., with NIF ***DNI.1 and address in ***LOCALIDAD.2 ***ADDRESS.2,

declares to have received the document "Notification of non-payment" at his address (to which he

referred to as "invoice") that bears the anagram of "EDP" and is signed on

05/31/2018. In the aforementioned document, EDP requires the payment of a debt derived

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

9/30

of a contract that he denies having signed. Contract to which he claims to be totally unrelated and that corresponds to a supply address with which it has no relationship.

2.- In the document mentioned in Fact 1, "Notice of non-payment", of which the claimant provided a copy to the AEPD with his claim, they require the payment of a debt amounting to 79.81 euros derived from a gas and electricity contract.

The document provides the following "Contract data": As "Type of contract", "Gas + electricity formula plan"; as "Account No./Contract" 70000852279; What "Supply Address" "****ADDRESS.1 ***LOCATION.1.

In the document they appear as "Customer data", in addition to the name and two surnames of the claimant, his address, located in a town other than the point of supply; your NIF and a landline number of which the claimant denies being the owner, ***TELEPHONE 1.

3.- Work in the file, provided by the claimant, the copy of the "Contract of energy and/or services", which EDP sent to your address. At the bottom of the document, in the section for the signature of the entity, it states "EDP ENERGÍA, S.A.U. and/or EDP COMERCIALIZADORA, S.A.U."

Above the heading "Specific conditions of the contract" appears this legend:

"The client contracts for the business or home premises indicated in the heading, the supply of gas with EDP COMERCIALIZADORA, S.A.U. and the supply of electricity and/or complementary services with EDP ENERGÍA, S.A.U. (hereinafter, jointly and/or individually, as appropriate, referred to as

“EDP”) in accordance with the Specific Conditions listed below and

the General Conditions that appear in the annex”. (The underlining is from the AEPD)

4.- The "Energy and/or services contract" provided by the claimant, described in the

Proven fact 3, offers the following information:

- In the “Client” section: as “Holder of the contract”, “Mr. A.A.A.”; What

“Address” “***ADDRESS.2 ***TOWN.2”. In the section "NIF" the

***DNI.1. And in the “Telephone 1” section, the mobile number ***TELEFONO.3. The

“Telephone 2” and “Fax” box does not contain any data. There is no phone number either.

fixed that appeared in the non-payment notification document (see Done

tested 2)

- In the “Supply data” section, the “Supply address

(***ADDRESS.1***LOCALIDAD.1” and the CUPS numbers for electricity and

Of gas.

- In the section “Account No. Contract” “70000852279 Gas+Light Formula”

- In the section “Duration and billing” “Issue date: 05.18.2018”

5.- The claimant has declared that, after receiving the “invoice” at his address -the

document "Notification of non-payment" - made the corresponding claim before EDP

by phone call from your mobile phone. He explained that a few days later

received at home the copy of the contract for the supply point on which

Verse the notification of non-payment and your claim, in order for you to sign it. underlines that,

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

10/30

without your consent, the contractual document received incorporates your

mobile phone, number from which you made the telephone claim to EDP.

6.- EDP, within the framework of E/7378/2018, in its response to the informative request of the Agency, affirmed that the claimant's personal data was provided to him on the 05/17/2018, by telephone, by D^a B.B.B. "Whoever declares to act in a condition of representative of the Complainant (hereinafter the "Representative") during the processing of the change of ownership of the supply corresponding to the address located in ***ADDRESS.1 ***LOCATION.1" (the underlined is from the AEPD)

7.- EDP, within the framework of E/7378/2018, sent this Agency a CD containing two documents (1 and 2) Document 1 is made up of two audio files (i) 803818026680675 and (ii) 803818026680926.

7.1. In audio (i) of document 1, the person making the call requests to make a change of owner and is identified as "old owner". The telemarketer says:

"Tell me first, if you would be so kind, the ID of the holder in force right now, yours." The

Caller says: "Okay, it's a CIF, it's a company, okay? B24292534". The name of the

The company that facilitates is "Hydraulic works and paving". as address of

supply that you want to change the owner of, the ***ADDRESS is provided.1. Mrs

BBB identifies itself as "representative" of the former contract holder and claims to be the Responsible for Administration of the company.

At minute 2:38 the operator says: "Now tell me the name of the new headline". The dialog is as follows:

- "A.A.A. (...)"

- "DNI of Mr. A.A.A.?"

- "****DNI.1"

- "X of ***LOCATION.3, right?"

- "Wait a minute, because you have written me an X but it looks like a Y. And since he has written it. Let's see, I'll confirm it right now...X."

- "Tell me the phone number of Mr. A.A.A...."

- "***PHONE.2"

At minute 5:21 of the recording you can hear: "Being 4:51 p.m. on the 17th of May 2018 Mrs. B.B.B. has called and wants to contract with EDP for which we proceed to make the following recording accordingly. are you from agreement?"

- Yes

-Mrs. B.B.B., with DNI *** DNI.2 as administrator and on behalf of the owner

A.A.A., with DNI ***DNI.1, telephone ***TELEFONO.2, accepts EDP's offer for the

*** ADDRESS.1, which consists of a gas + electricity formula plan ... for electricity CUPS

(...) with a gas CUPS (...) In his name and that of his representative, after exceeding the

risk analysis of the operation, we will take the necessary steps to activate the

access contracts, moment from which the new contract will come into force

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

11/30

the above being resolved (...) Are you satisfied with the above information AND

contract conditions?

- Yes

- (...) Your personal data and those of your representative will be processed for the management of

these contracts by EDP Energía, S.A.U., with CIF A 33543547 and EDP

Comercializadora, S.A.U., with CIF A 95000295 (...)

At minute 8:35 of the recording the caller says:

– "Yes, I want to ask you something. Regarding the validity of the change, well,

I'm not really worried, because he's been renting for quite a few months now and he's not going to

Nothing will happen..., but, really, the next invoice is going to arrive in his name.”

7.2. In audio (ii) of document 1, the teleoperator informs Mrs. B.B.B. “...,

you see, is that since we have had problems with the national identity document,

Could you confirm that it was exactly an M?, because you gave me the wrong

system. To which doña B.B.B. replies: well no, because it is written by hand.

- Of course we can prove that it is an H. But of course, without confirming...

be a national identity document and we can make a serious mistake... It remains

to call back.

8.- The CD provided by EDP to the Agency in the framework of E/7378/2018, contains two

documents. Document 2 is, in turn, made up of two audio files: (i)

803818026691798 and (ii) 803818026691972.

8.1. Audio (i) document 2: The caller says:

-Hello good day. Yesterday I called to make a change of ownership. we did i think

that the whole process because the recording was made and such. But in the end no, well no

it fit because the DNI of the new holder, ... well the letter. We were not clear

100% and we do not continue (...)

At minute 6:15 you hear:

- “The billing shipping address. Home. Where do you want me to be?

let's send? To the supply?”

-"Yes"

-"Perfect. Supply point address.

8.2. Audio (ii) document 2: At minute 2:44 of the recording, it is indicated:

-“It is now 1:46 in the afternoon of May 18, 2018.

Mrs. B.B.B. calls us. ... with DNI... and wants to contract with EDP for which

We proceed to make the next recording accordingly, okay?”

- "Yes"

- "Very well, Mrs. B.B.B. ...with DNI ... as a representative and on behalf of the owner, Mr. Mr. A.A.A....with DNI telephone.... accepts EDP's offer to the supply point...". Mrs. B.B.B. nods to the question.

At minute 6:32 you hear:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

12/30

- "The reason why we have to make the recording again is that if the DNI does not is valid the recording is invalid"

9.- Work in the file, provided by EDP, copy of the letter dated

11/15/2018, and in compliance with the request made by the AEPD in the letter of information request (E/7378/2018), addressed to the claimant. In it he states the following:

- That the contracting of electricity supply with EDP ENERGÍA, S.A.U., "is carried out by telephone by Doña B.B.B., who stated that she acted with your knowledge and on your behalf..."

- "That said hiring was carried out following all precautions required..."

10.- Work in the file, provided by EDP -with its allegations to the agreement of beginning- the recording of a telephone conversation, of which no date is provided, maintained between the entity and a person who identified himself with the data of the claimant -name, two surnames and NIF-. The caller says call to pay an outstanding bill, because the supply has been cut off.

The EDP employee asks about the pending amount and answers: "I

it sounds like it is 140.77 euros". After asking for the supply point they report that he owes 170.80 euros and that he can pay by card. The caller is interrogated for a phone number and facilitates the ***PHONE.2.

FOUNDATIONS OF LAW

Yo

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 RGPD dedicates article 5 to the principles that should govern the treatment and, among them, he mentions those of "legality, loyalty and transparency". The provision provides:

"1. The personal data will be:

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

(The underlining is from the AEPD)

Article 6 of the RGPD -under the heading "Legality of the treatment"- details in its section 1 the cases 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

www.aepd.es

sedeagpd.gob.es

C/ Jorge Juan, 6

28001 – Madrid

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;

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the data controller;

d) the processing is necessary to protect the vital interests of the data subject or of another natural 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 controller or by a third party, provided that on such interests do not override the interests or rights and freedoms fundamental data of the interested party that require the protection of personal data, in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to treatment carried out by public authorities in the exercise of their functions.

(...)"

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 exposes in previous paragraphs, to the one of "legality" -, adds in 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>>)"

(The underlining is from the AEPD)

The infringement 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:

"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."

It should also be noted that Organic Law 3/2018, on Data Protection Personal and Guarantee of Digital Rights (LOPDGDD), for the purposes of prescription, qualifies in its article 72.1.b) as a very serious infraction "The treatment of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of Regulation (EU) 2016/679"

III

The person claimed in this sanctioning procedure is attributed a

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

14/30

violation of article 6.1 RGPD. The respondent processed the personal data of the unlawful claimant. It has not been able to prove that the data processing carried out had its legal basis in any of the circumstances detailed in the article 6.1 of the RGPD.

A.- It has been accredited through the documentation that is in the file administrative process -essentially described in the Proven Facts- that EDP dealt with the personal data of the claimant (name, surnames, NIF, address and number of mobile phone) linked to an electricity contract of which the affected party denies having been a party and without the respondent having provided documentation of any kind of the that it is evidenced that the treatment of the data was protected in any of the conditions of legality that article 6.1 RGPD relates.

In accordance with article 6.1 of the RGPD, the processing of personal data of third parties must be "lawful", for which it must, in principle, comply with any of the conditions described in sections a) to f) of the precept.

B.- In the case analyzed, EDP attributes to the claimant the status of party to the electricity contract for the supply point located on the street

***ADDRESS.1, from ***TOWN.1. The claimant denies having signed the aforementioned contract and denies knowledge of that supply point. The claimant is domiciled in another Autonomous Community.

The respondent asserts that the claimant is a party to a supply contract held with her through whom she identified herself as her representative, the Mrs. B.B.B., implying that the legal basis of the treatment is the execution of the contract (article 6.1.b, of the RGPD).

However, to protect the treatment carried out by EDP in the article 6.1.b) of the RGPD it is necessary that the condition of contracting party of the affected is accredited. The *raison d'être* of this cause of legitimation of the treatment is precisely that, to the extent that the owner of the data grants the consent to the contract, you also consent to your personal data being processed necessary for its execution and compliance.

Thus, the question is whether EDP has provided evidence showing

that the affected party consented to contract with that entity; which transferred to the assumption that we are dealing with will consist of assessing whether evidence has been provided that Mrs. B.B.B. actually held the representation of the claimant or, in other words, that

As stated by the respondent, the claimant had agreed with Mrs. B.B.B. a representative mandate to contract the electricity supply on their behalf.

EDP argues that this is enough evidence to demonstrate that the claimant had granted its representation to Mrs. B.B.B. to sign with her, in her name, an electricity contract the sound document that has contributed to this

Agency: a CD with the recordings of the telephone conversations held

between that entity and a third person (Mrs. B.B.B.) in which she

“manifests” “repeatedly” that it holds the representation of the claimant to give

registration in your name (or change the ownership of the supply contract that appeared in

name of a company on whose behalf Mrs. B.B.B. acts) a contract

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

15/30

of electricity for the supply point of ***ADDRESS.1 in

***LOCATION.1.

The recordings sent to the Agency by EDP (described in Facts

proven 7 and 8) do prove, exclusively, that a person, Mrs.

B.B.B., insistently stated that they represent the claimant for

contract on your behalf with EDP. The aforementioned recordings do not prove that the

claimant will grant his representation to the aforementioned lady to contract on his behalf

the electricity supply nor do they provide any indication to that effect.

However, the recordings sent by EDP (four audios, of which two of them make up document 1 and the rest make up document two of those provided with the response to the information request) do prove the origin of some of the personal data of the complainant that EDP processed associated with a contract that he denies having celebrated: we refer to the data of the name, surnames and DNI of the claimant.

Data that, as evidenced by listening to the recordings, were provided by Mrs. B.B.B. to EDP.

However, the recordings do not explain the origin of other data in the claimant that EDP also treated linked to a contract to which the holder of the personal data is foreign: your address in ***LOCALIDAD.2,, which does not match, as has already been highlighted, with that of the supply point and the mobile number of the claimant that EDP included in the copy of the contract that it sent to his address.

The recordings also show these extremes: That the aforementioned lady BBB -which in the opinion of EPD acted on behalf of the claimant- requested that the invoicing was sent to your representative at the address of the supply point -***ADDRESS.1, ***LOCATION.1- but at no time did he provide another address than that corresponding to the supply point and provided only as mobile number of the person whom he claimed to represent the ***TELEPHONE.2.

Therefore, from the foregoing we must conclude that it was not Mrs. B.B.B. who provided EDP with the details of the claimant's address - an address that has nothing to do with the supply point, since it is located in another Autonomous Community, in the locality of ***LOCALIDAD.2, ***ADDRESS.2-, address to which EDP sent the document called "Notice of default" described in the Proven Facts and later a copy of the contract to be sent to him signed.

Also, the mobile number of the claimant, ***TELEFONO.3, which EDP incorporated into the contractual document that was sent to your address, it was not provided either

by Mrs. B.B.B.. Let us recall the explanation that the claimant has offered. That made a telephone claim with EDP through his mobile number and that the The result was receiving from the entity a contractual document to be returned signed in which appeared his mobile number, from which he made the call of claim. Well, in that contractual document, surprisingly, not even the landline telephone number that appeared in the Non-Payment Notice, the ***TELEPHONE.1 -regarding which the claimant stated in his writing of claim that did not belong to her - nor the mobile number that Mrs. BBB provided to EDP in the course of the recordings such as the telephone number of his assumption represented: ***TELEPHONE.2.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

16/30

And finally, it is striking that this mobile number is curiously (***TELEPHONE.2) the same one that will later be provided to EDP by a person who will contact the entity as a result of a cut at the supply point and ask How much is the amount owed? Recording that EDP has contributed with its writing of allegations to the initial agreement (see Proven fact 10) that in his opinion would serve to justify the legality of the data processing on which the claim is based occupies us.

In short: EDP has not provided this Agency with any document that proof of the condition of representative of the claimant that Mrs. B.B.B. he claimed hold when he contacted the entity by telephone and changed the ownership of the contract in the name of the claimant, providing in that act the name, two surnames and

NIF of your supposed represented. EDP has also not proven what the legitimacy is to process other data of the claimant, such as their address or mobile phone; data that Mrs. B.B.B. did not provide to EDP.

To this should be added another circumstance of great significance. In the light of documentation provided by EDP -four audios with the calls made between that company and Mrs. B.B.B. on September 17 and 18, 2018 in order to manage the registration of the contract in the name of the claimant- it is verified that in no At that time, the entity demanded that the third party (Mrs. B.B.B.) who provided the data of the claimant and said to hold his representation would provide some document that I would credit that point.

Nor is there any knowledge that the entity, before registering the electricity supply contract in the name of the claimant -and despite the fact that the legitimacy of EDP to process the claimant's personal data was supported, exclusively, in that they had been provided by his supposed representative - would have taken some measure to verify the reality of that representation. Outside contacting the owner of the data directly or articulating some other mechanism, the truth is that EDP has not shown that it had deployed a minimum diligence in verifying that, indeed, the owner of the data had granted his representation to the third party who provided them (Mrs. B.B.B.). Likewise, there is no evidence that this entity has implemented an ad hoc protocol.

C-. Respect for the principle of legality that must govern the processing of personal data. third parties and referred to in article 6.1. of the RGPD, it implies that the person in charge be able to demonstrate compliance (principle of proactive responsibility, article 5.2 of the RGPD)

In the present case -in which the respondent affirms that the legality of the treatment is justified by the existence of a contract in which the affected party was a party- it is transferred

the person responsible for the processing of personal data bears the burden of proof of the hiring; or at least the burden of proof that he displayed the diligence that was proceeding to comply with such obligation.

We refer to article 5.2 of the RGPD. In similar terms, it was pronounced the, currently repealed, Directive 95/46, which was transposed into domestic law Spanish through Organic Law 15/1999, on Data Protection (LOPD) and that clearly reflected the Regulations for the development of the LOPD, approved by the

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

17/30

Royal Decree 1720/2007. Regulations in force when EDP started data processing which is the object of assessment in this disciplinary proceeding and which is currently find repealed.

The Administrative Litigation Chamber of the National High Court, in cases such as the one proposed here, has been considered under the previous regulations that When the owner of the data denies the contract, the burden of proof corresponds to who affirms its existence, and the data controller must third parties collect and keep the necessary documentation to prove the owner's consent.

We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Basis of Fourth Right: "On the other hand, it is the data controller (for all, Judgment of this Chamber of October 25, 2002 Rec. 185/2001) to whom it corresponds ensure that the person from whom consent is requested actually gives it, and that the person who is giving the consent is effectively the owner of those

personal data, having to keep proof of compliance with the obligation to provision of the Administration, responsible for ensuring compliance with the Law.

D.- EDP also invokes, in defense of its claim that it acted in accordance with Law and respected the principle of legality when processing the claimant's data, which, the change of ownership of the electricity contract managed by Mrs. B.B.B. -in quality of representative of the company that was the holder of the energy contract for the point of supply of ***ADDRESS.1- did not oblige him to prove that the alleged representative held the representation of the new client and owner of the data treated. It justifies such an affirmation in that article 83 of Royal Decree 1955/2000 grants the consumer who is up to date with the payment the power to transfer his contract to another consumer who is going to make use of it under identical conditions. And it also adds that in the present case "the change of ownership occurs under the same contractual conditions, that is, without the change being considered a new registration and therefore a new contract".

In response to such allegation, regarding the alleged enabling rule for the treatment carried out (the R.D. 1955/2000), it is enough to point out that article 6.1 of the RGD, in its section c) contemplates as one of the assumptions of legality of the treatment that this is necessary for the fulfillment of a legal obligation applicable to the responsible for the treatment.

However, the obligation in such a case must be imposed by a rule with formal rank of Law. The requirement that the enabling norm have the formal rank of Law was also established in the previous data protection regulations. Us we refer to article 10.2 of the Regulations for the development of the LOPD, currently repealed, but in force when EDP started processing the complainant's data. STC/292/2000 had an impact on this issue at the time regarding the article 6.1, in fine, of the LOPD, which mentioned the Law as an exception to the principle of

consent. The Constitutional Court warned that a limitation to a right fundamental or to the exercise of the faculties that integrate it requires that it be carried out carried out through a Law in the formal sense, without the introduction of limitations or restrictions to the content of a right of that nature through a norm regulatory.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

18/30

In any case, and without prejudice to the preceding exposition, the regulatory norm invoked by EDP has as a factual assumption that the consumer was at the payment stream. And as revealed by listening to the recording provided with the allegations to the initiation agreement - in which a person who is identified with the data of the claimant contacts EDP to ask about the amount owed since it have cut off the electricity supply - three bills were due.

Regarding the second reflection of the claimed one -that there was no discharge new with the data of the claimant but a subrogation of the claimant in the previous contract - it is a question of a civil/commercial nature on which this Agency should not pronounce itself. What is relevant for the purposes at hand is that, regardless of whether we are facing a subrogation or a new contract,

In both cases, the claimant would have, as claimed by the claimant, the contracting party status. And as such, to assert as a legal basis of the treatment article 6.1.b) of the RGPD, it is essential that the owner of the data had given his intended representative consent to act in such condition, an extreme that in no case has been accredited by EDP.

This Agency reiterates that none of the documents that EDP has provided proves what is substantial in the matter examined: that the owner of the data granted to Mrs. B.B.B. his representation so that on his behalf he could manage the change in the ownership of the electricity contract of the supply point of ***ADDRESS.1.

Nor has the respondent provided documents or evidence that show that the entity, in such a situation - a telematic contracting through who claims to be the representative of the owner of the data-, displayed the diligence minimum requirement to verify that your interlocutor actually had the representation that he claimed to hold.

Respect for the principle of legality, before the principle of consent, which is in the essence of the fundamental right to protection of personal data, requires prove that the owner of the data consented to a third party holding a contract with EDP or, at least, that the data controller deployed the essential diligence to prove that point. Not to act like this - and not to demand it Thus, this Agency, which is responsible for ensuring compliance with the regulations regulating the right to protection of personal data - the result would be empty the content of the principle of legality and in particular article 6.1 of the LOPD.

E.- Confirmed that EDP processed the personal data of the claimant and verified also that this entity has not provided the AEPD with any document that demonstrates that the claimant granted his representation to the person who entered into the contract with her and affirmed to act on her behalf -which would have allowed the treatment to be lawful under article 6.1.b, of the RGPD- it must be assessed if the fault of the claimed entity or if it omitted the due diligence, attending the circumstances of the case, essential for the behavior analyzed to be subsumable in the offending type of article 83.5. of the GDPR.

This, because our sanctioning law governs the principle of culpability,

that prevents the imposition of sanctions based on the strict liability of the alleged

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

19/30

offender. The presence of the element of culpability in the broad sense, as condition for the sanctioning responsibility to arise, has been recognized by the Constitutional Court, among others, in its STC 76/1999, in which it states that the Administrative sanctions share the same nature as criminal ones, since they are one of the manifestations of the *ius puniendi* of the State and that, as a requirement derived from the principles of legal certainty and criminal legality enshrined in the articles 9.3 and 25.1 of the C.E., its existence is essential to impose it.

Law 40/2015 on the Legal Regime of the Public Sector provides in the article 28, under the heading “Responsibility”:

"1. They may only be sanctioned for acts constituting an infraction.

natural and legal persons administratively, as well as, when a Law recognize capacity to act, affected groups, unions and entities without legal personality and independent or autonomous estates, which result responsible for them by way of fraud or negligence.” (The underlining is from the AEPD)

In the case analyzed, not only is the element of guilt present - extreme that the respondent denies in its allegations to the initial agreement - but rather appreciates a very serious lack of diligence on the part of the respondent that has a consequence directly in determining the amount of the penalty to be imposed.

In compliance with the obligations that the RGPD imposes on the person responsible for the treatment, it must display the minimum diligence required by the circumstances

of the case. The SAN of 04/29/2020 is illustrative -which, although it was issued in a matter of fraudulent contracting and under the previous regulations, it is perfectly extrapolated to the that occupies us- whose sixth Legal Basis says:

"The question is not to clarify whether the appellant processed the personal data of the complainant without her consent, such as whether or not she used due diligence reasonable in trying to identify the person with whom you signed the contract". (The underlining is from the AEPD)

For this reason, even when there is unlawful conduct, when the person responsible for the treatment certifies having acted with the diligence that the circumstances of the case required to comply with the obligations imposed by the data protection regulations. data, as strict liability is proscribed in our Administrative Law sanctioning party, the AEPD proceeds to file the file.

In the case that we examine, it is verified that the EDP entity did not deploy the the least diligence in order to be in a position to prove that the holder of the personal data had granted its representation to the person who claimed to act in your name on the contract. The respondent did not verify before managing the change ownership of the electricity supply contract in the name of the claimant if the person he claimed to act on his behalf, he actually held it.

To such an extent, the lack of diligence shown by EDP in the course that concerns us that the recordings of the conversations held between the entity and the person who identified himself as the claimant's representative I manifest that the supposed representative did not obtain the data of the DNI of the affected

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

by checking the document. Rather, as Mrs. B.B.B. explained in the conversation with EDP whose recording is in the file, the data had been handwritten by the person it claimed to represent. It is also striking that despite the incidents arising in telephone contracting regarding the letter of the DNI of the represented -which forced Mrs. B.B.B. I had to call a second once to EDP after verifying the letter of the document- the respondent continued without articulate some consistent measure aimed at verifying that the holder of the the data had granted its representation to the person who intervened in the hiring.

In light of the recordings in the file and what is alleged by EDP

In its defense, it is clearly evident that the entity completely lacks a protocol of action for telematic contracts when the person who provides the data is not its owner, but a third party that claims to act on its behalf.

Lack that, in addition, prevents compliance with the principle of responsibility proactive.

Regarding the element of guilt in the framework of the procedure

sanctioning party it seems appropriate to refer to the SAN of 05/30/2015 (Rec. 163/2014)

which has highlighted the differences that exist between the attribution of responsibility to

a natural person and a legal person and connects the "reproachability" of a

certain conduct to a "legal person" with the circumstance that that

"Would it have provided or not an effective protection to the legal right protected by the

rule". The second Legal Basis of the aforementioned Judgment states:

<<However, the mode of attribution of responsibility to people

legal does not correspond to the forms of fraudulent or reckless guilt that

They are attributable to human behavior. So, in the case of violations

committed by legal persons, although the element of guilt, it is necessarily applied differently from the way it is applied with respect to natural persons. According to STC 246/1999 "(...) this construction, different from the imputability of the authorship of the infraction to the legal person arises from the nature of legal fiction to which these subjects respond. missing in them volitional element in the strict sense, but not the ability to break the rules to the that they are subjected. Capacity for infringement and, therefore, direct blame that derives from the legal right protected by the norm that is violated and the need for said protection is really effective and for the risk that, consequently, must assume the legal entity that is subject to compliance with said rule">> (The underlined is from the AEPD)

EDP—given the nature of the business activity it carries out, which implies the processing of numerous personal data - had the obligation to have adopted the necessary and timely measures to be in conditions of comply with the obligations that are implicit in the principle of legality.

In short, the conduct of EDP, materialized in the processing of data

Personal information of the claimant –name, two surnames, NIF, mobile phone and address– linked to an electricity supply contract in which he denies being a party, without has accredited that condition of the claimant and without having observed a minimum diligence in its action, violates article 6.1.b, of the RGPD, action

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

21/30

Subsumable in the sanctioning type of article 83.5 of the RGPD.

The arguments put forward by the claimant in her various briefs - briefs whose content is summarized in the second, fifth and eighth Background, and to which we mention in the preceding Foundations of this resolution- demand to make some precisions:

In defense of its claim to archive the file, EDP makes various allegations that revolve around the same idea: the existence of a contract of representative mandate between Mrs. B.B.B. and the claimant for the first will enter into an energy contract with EDP on its behalf. representative mandate that

For EDP, it is the legitimate legal basis for the treatment it has carried out.

To support such an assertion, the respondent makes endless assertions devoid of any legal consistency. He says, for example, that "there is a relationship valid contractual relationship" between EDP and the complainant and justifies that assertion in two elements that, it states, the Agency considered proven in the initiation agreement:

"That the claimant's data was obtained through Mrs. B.B.B. and what is this

The lady stated on several occasions, during the telephone conversations, that acted on behalf of the claimant.

In the allegations to the proposed resolution, EDP once again focuses on this issue to now denounce the legal defenselessness to which this Agency has subdued.

Thus, it states that "he is in a situation of legal defenselessness, since that the AEPD itself accredited admits the origin of the data, provided in the call at the time of the hiring made by Mrs. B.B.B., resulting in no however irrelevant in order to prove the due treatment of the same, when is precisely the point of reference that justifies the legitimacy of the treatment of the data of the Complainant, since the existence of a valid contractual relationship

between the parties is confirmed.” Second allegation of the brief of allegations to the resolution proposal. (The underlining is from the AEPD)

Well, in relation to this "legal defenselessness" that EDP suffers, we must specify what this Agency did say and what it did not say, but EDP wants to attribute it.

In Legal Basis II of the motion for a resolution, section B (in the this resolution, Legal Basis III), it is said that the recordings sent by EDP (Proven Facts 7 and 8) “exclusively prove that a person, Mrs. B.B.B., insistently stated that she represented the claimant to contract on his behalf with EDP.” And then it is added: "The aforementioned recordings, nor do they prove that the claimant granted his representation to the said lady to contract the electricity supply on her behalf, nor do they provide any evidence any in that sense.” And it goes on to say that the “recordings sent by EDP (four audios, of which two of them make up document 1 and the rest the document two of those provided with the response to the information request) do prove what is the origin of some of the claimant's personal data that EDP processed

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

22/30

associated with a contract that he denies having entered into: we refer to the data of name, surnames and ID of the claimant. Data that, as evidenced by the audition of the recordings, were provided by Mrs. to EDP.”

“However, the recordings do not explain the origin of other data from the claimant that EDP also treated linked to a contract to which the holder of the

personal data is foreign: your address in ***LOCALIDAD.2, which does not match, as has already been highlighted, with that of the supply point and the mobile number of the claimant that EDP included in the copy of the contract that it sent to his address”

BBB

As it seems obvious, in such paragraphs nothing else is stated than the recordings of EDP demonstrate that the data of the complainant that were subject to treatment by the entity (except its address and mobile number) come from or originate in the information that, in light of the recordings sent to the AEDP, was provided by Mrs.

BBB

. This, in contrast to other data of the complainant that EDP also treated but that the aforementioned lady did not provide him, since they are not mentioned in the recordings provided: the claimant's address and mobile phone number.

Pretend -as the complainant does- that in such paragraphs this Agency is acknowledging that it was the claimant who provided his data to Mrs. B.B.B. It is any inadmissible point.

In short, when the Agency states that the recordings provided are irrelevant is referring to their lack of virtuality to prove or provide evidence that the claimant granted his representation to Mrs. B.B.B.. As such representation is neither credited nor evidence of its existence is provided, it is not possible accept, as the claimant claims, that there was a valid contractual relationship between the parts.

The claimed, in proof of the alleged validity of the contractual relationship between EDP and the claimant, has invoked again the recording that it provided as a document attached to the pleadings to the initiation agreement.

Regarding this recording – which, as I already underlined at the time, the Agency did not contains date- EDP, surprisingly, provides new information that, without

However, it is not accompanied by its necessary proof. The entity now says in its brief of allegations to the proposal - second allegation, third paragraph - that the recording is from 08/10/2019 (data that does not appear on the sound recording) and that "said payer, is the son of the Complainant, knowing the latter as the owner of the contract"

The recording provided by EDP with the brief of allegations to the agreement of beginning (Proven fact tenth) -in which the person who calls and identifies himself with the personal data of the claimant asks how much the debt amounts to, since they have cut off the supply, after which the telephone operator of the claimed one questions him about the CUPS of the home and informs you of the amount pending payment and the possibility of card payment - cannot have the probative effect that EDP wants attribute to him

It suffices to point out in this regard that the processing of the complainant's data without legitimation for it begins in May 2018; that in the recordings it is indicated that

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

23/30

payment will be made by direct debit, which seems to have not happened given the existing non-payment situation and that the claimant, who received at his home the non-payment notification was fully aware of the amount owed.

The entity also affirms (third allegation of the allegations to the proposal, first paragraph) that "acted...ensuring the identification of the previous and new owner, as well as to translate the operation carried out into a durable medium"

Interesting statement that demands precision: identification is not the

legal basis of the treatment, but rather that it is the alleged consent of the claimant to the mandate granted to Mrs. B.B.B.. Thus, it is true that in the recordings provided by EDP Mrs. B.B.B., who insistently affirms that she is the claimant's representative, provided EDP, or in other words, "identified" before EDP to his intended representative and provided his name, two surnames and NIF.

EDP evidently through the recording provided -in which the intended

The claimant's representative identifies him/her - knows his/her name, surnames and NIF. But the relevant issue is another: the accreditation that the aforementioned lady acted in condition of the claimant's representative because they both agreed to do so, which requires proving that the claimant consented to such representation.

The various arguments put forward by EDP have the same common element.

They intentionally omit any reference to what constitutes the core of the conduct contrary to the RGPD for which the entity is responsible: the proof that the claimant granted Mrs. B.B.B. his representation to intervene in his name in contracting with EDP.

Related to the above we have to bring up another of the interesting statements made by EDP in its defense (which also stands out in bold): that "the AEPD, not only hinders and inhibits legal traffic, but also completely annuls the figure of the representative and the mandate, not considering this administrative body these operations carried out by third parties, as legitimate acts" (The underlining is the AEPD)

Affirmation that again starts from a false premise. This Agency - of course could be otherwise because it is subject to the Spanish legal system - nothing has to say about the figure of the representative mandate

What is decisive is that EDP has not proved that the person who intervened in the hiring, and said to act as representative of the claimant, held that

representation. What is relevant is the lack of proof that the claimant -whose data personal has treated EDP associated with a contract that he denies having entered into- had granted his representation to the person who intervened in the contracting and said act in such a condition.

The defendant -who in her arguments to the initial agreement explained in detail the provisions of the Civil Code that regulate the mandate and insisted that in our DC. governs the principle of freedom of form, so this Agency cannot require that the mandate be documented - forgets that article 1278 of the C.c provides that "The Contracts will be binding regardless of the form in which they have been concluded,

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

24/30

provided that they meet the essential conditions for their validity. and one of these conditions is consent. Consent of the claimant to the mandate representative that he had supposedly conferred on Mrs. B.B.B., who was essential condition for its existence and about which EDP contributes nothing and says nothing.

Regarding the lack of diligence shown by EDP to verify that the person who provided the personal data of the claimant held his representation and that, not even after the phone call, did some type of activity to confirm the identity of the new owner EDP has responded in his arguments to the proposal:

"However, this consideration is not correct, since, not even in this case

We are facing a contract, nor does my client lack procedures that regulate these aspects." It then indicates:

“First of all, my client has a double verification process implemented for new hires via text message to phone of contact provided, keeping it as proof of the ratification of the hiring.

Second, this case involves a mere modification of the owner of the contract already signed previously...” (The underlining is from the AEPD)

Allegations that only show confusion regarding the obligations to be which is subject to the person responsible for the processing of personal data of third parties by the specific legislation. The mere manifestations of those who claim to act in representation of another cannot justify the legality of the treatment nor constitute a proof of respect for this principle in the processing of data whose compliance

The controller is bound by the GDPR.

v

In order to specify the amount of the administrative fine to be imposed in each case individual, it must be in accordance with the provisions of articles 83.1 and 83.2 of the RGPD, precepts that state:

“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

such as the number of interested parties affected and the level of damages that have suffered;

b) intentionality or negligence in the infringement;

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

25/30

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 whether the person in charge or the person in charge notified the infringement and, if so, in what measure;

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 related 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 obtained or losses avoided, directly or indirectly, through the 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 the 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 treatments of personal data.

commission of the offence.

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

d) The possibility that the conduct of the affected party could have induced the

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

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of

h) The submission by the person in charge or person in charge, with

voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any interested party.”

A) In light of the transcribed regulations and in order to specify the amount of the sanction of fine to be imposed on EDP as responsible for a typified infraction

in article 83.5.a) of the RGPD, it seems appropriate to make two clarifications:

The first, that article 83.2 RGPD requires that the control authority

guarantees that the sanction to be imposed is in each case “effective, proportionate and

dissuasive” and, second, that the amount of the sanction provided for in the RGPD for

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

data.

26/30

infringements contemplated in article 83.5 have as a maximum limit the greater of these two amounts: 20,000,000 euros or 4% of the total annual turnover overall for the previous financial year. During the 2017 financial year, the turnover of EDP ENERGÍA, S.A.U., amounted to 1,297,962,000 euros, for which 4% of this amount amounts to 51,918,480 euros.

Although the main claim of the respondent has been the archiving of the actions, in its allegations to the initial agreement requested in a subsidiary that the minimum sanction provided for minor infractions be imposed. Allegation which has no reason to be when -as is the case here- the applicable standard is the RGPD which, unlike the LOPD, does not distinguish between minor, serious and very serious and that does not contemplate a mechanism equivalent to article 45.5 of the aforementioned Organic Law 15/1999.

B) On the origin of estimating any of the mitigating factors described in the standard EDP argued that for the matter at hand "practice totality of the mitigating factors included in the sanctioning regime".

However, we cannot share this assertion of the claimed. It's more,

In the present case, it is not even considered appropriate to consider as mitigating factors the fact that only one person or the merely local scope of the offense (article 83.2.a)

In a case such as the one we are analyzing -in which the claimed entity, for

telematic contracting in which a third party intervenes on behalf of the owner of the data, lacks a protocol adjusted to Law that allows demonstrate that he actually holds that representation - the offending conduct does not constitutes a specific and isolated event, the only specific event is the claim made by the affected party. Thus, it does not seem correct that the fact that the affected by the conduct of the entity is a single person, can be estimated as exponent of less culpability or unlawfulness of their conduct or appreciate Nor is the local scope of the infringement a mitigating factor. The conduct contrary to standard is the result of an action model through which EDP develops its activity and that it continues to maintain since, in its opinion, it is adjusted to Law, no matter how obvious the breach of the principles of legality and proactive responsibility.

Nor can the circumstance described in article 76.2.c) of the LOPDGDD, by reference to article 832.k of the RGPD: "The benefits obtained as a result of the commission of the infraction".

Regarding this issue, the National High Court, Contentious Chamber Administrative, in its SAN of 04/17/2018 (Rec. 254/2017) rejected the claim of the plaintiff, sanctioned by the AEPD, to admit as a mitigating factor the Article 45.5.e) LOPD due to lack of benefits. The third legal basis of the SAN says: "Regarding the absence of benefits, we can only reiterate what argued by the appealed resolution, regarding what is relevant is that the Abanca's action was motivated by the search for economic benefit, for so the fact that it was not finally obtained cannot serve as a

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

basis for a mitigation of culpability or unlawfulness of their conduct. that has been also the spirit of the SAN of 03/31/2017.

C) The concurrence, as aggravating circumstances, of the circumstances following:

- The duration of the illegitimate treatment of the claimant's data carried out by EDP. The documentation that makes up the file reveals that the treatment began on 05/17/2018 (Proven fact 6) and was maintained, at least, until 11/15/2018; that is, for almost five months. For this purpose, the letter that EDP sent to the claimant, dated 11/15/2018, in response to the informative request of the AEPD -Proven fact 9- in which it is shown that it continues to process the data of the affected since it considers that the claimant had signed a contract with it through of Mrs. B.B.B., (article 83.2.a, of the RGPD)
- The business volume or activity figure of the entity (article 83.2.a, of the GDPR) We are in the presence of a large company in the energy sector. The volume global annual total for the financial year 2017 amounted to 1,297,962,000 euros, (article 83.2.a of the RGPD)
- Article 83.2.f) of the RGPD mentions "the degree of cooperation with the control authority in order to remedy the infraction and mitigate the possible Adverse effects". Circumstance that also operates as an aggravating circumstance. Although it is true that EDP responded to information requests from this Agency It is also that, despite the fact that it could not prove the legality of the data processing of the claimant, since he did not have any document showing that the third party who intervened in the contracting acted on behalf of the owner of the data -it is Moreover, it is documented through the recordings sent to the Agency that the

alleged representative of the claimant did not even verify his identity by contrasting it with an official document but relied on a handwritten note provided by who had identified himself with the data of the affected person - decided to continue treating the data of the affected party, associated with an electricity supply contract, after the AEPD made the information request as shown in the letter dated 11/15/2018 addressed to the claimant.

- The scope of the treatment (article 83.2.a, RGPD) since the personal data of the complainant who have been processed by EDP without legitimacy to do so there were several: the name and two surnames, NIF, home address and telephone number mobile.

- The defendant has acted with a very serious lack of diligence, (article 83.2.b, of the RGPD). We are not only facing a lack of diligence at the moment to link the claimant's data to an electricity contract under the consent granted by the person who claimed to act on their behalf. How I know detailed in the preceding Foundations, EDP has shown that it absolutely lacks of an action protocol that contemplated the need to collect some document that would prove the representation that is said to hold in the telematic contracts in which the person who contacts the entity claims to be involved on behalf of another person.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

28/30

- The obvious link between EDP's business activity and the processing of personal data of clients or third parties (article 83.2.k, of the RGPD in relation

with article 76.2.b, of the LOPDGDD)

SAW

In accordance with articles 58.2 and 83.2 of the RGPD, previously transcribed, the control authorities may impose, in addition to the sanction of a fine, any of the corrective measures or sanctions contemplated in letters a) to h) and j) of section 2 of article 58 of the aforementioned RGPD.

In the present case, taking into account that the claim -regarding the processing of personal data collected in telematic contracts in which a third party intervenes and declares to hold the representation of the owner of the data and represented - completely lacks a protocol of action respectful of the obligations imposed by the RGPD, it is agreed, under article 58.2. d) of GDPR, order EDP to incorporate the contracting protocol that it has implemented for contracting through a representative, all the changes that allow be in a position to prove before this Agency that the represented party, and owner of the data, has authorized such representation and has conferred it in favor of the person who intervenes in the legal business. The period in which you must have implemented the new measures will be one month computed from the date on which the resolution in the one that so agrees is executive.

In line with the above, article 83.6 RGPD must be brought up, which establishes: "Failure to comply with the resolutions of the control authority in accordance with the article 58, section 2, will be sanctioned in accordance with section 2 of this article with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, of an amount equivalent to a maximum of 4% of the turnover global annual total of the previous financial year, opting for the highest amount.

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 EDP ENERGIA, S.A.U., with NIF A33543547, for a infringement of article 6.1 of the RGD, typified in article 83.5 of the RGD, a fine of 75,000 euros (seventy-five thousand euros).

SECOND: Under article 58.2.d) of the GDPR, ORDER EDP ENERGÍA, S.A.U., with NIF A33543547, that ADJUSTS its telematic contracting protocols to THE PROVISIONS of the RGD regarding the LEGALITY OF THE PROCESSING, in particular in the contracts made THROUGH A REPRESENTATIVE, in the that as data controller must be able to prove both the reality of the representation granted by the owner of the data and represented as his identity.

The period within which EDP must implement the measures ordered

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

29/30

adopt and certify its compliance before the AEPD, it will be one month computed from the date on which this sanctioning resolution becomes executive.

THIRD: NOTIFY this resolution to EDP ENERGIA, S.A.U.

FOURTH

: Warn the sanctioned party that she must enforce the sanction of a fine administrative imposed once this resolution is enforceable, in accordance with the provisions of article 98.1.b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (in hereinafter LPACAP), within the voluntary payment term established in article 68 of the

General Collection Regulations, approved by Royal Decree 939/2005, dated 29

July, in relation to article 62 of Law 58/2003, of December 17, through its

income, indicating the NIF of the sanctioned and the procedure number that appears in

the heading of this document, in the restricted account number ES00 0000 0000

0000 0000 0000, opened on behalf of the Spanish Agency for Data Protection in

CAIXABANK Bank, S.A. Otherwise, it will be collected in

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, 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 article

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 article 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 article 16.4 of the aforementioned Law 39/2015, of October 1.

You must also transfer to the Agency the documentation that proves the filing

effectiveness of the contentious-administrative appeal. If the Agency is not aware

of the filing of the contentious-administrative appeal within a period of two months

Electronic Registration of

through the

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

30/30

from the day following the notification of this resolution, it would terminate the

precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es