

Procedure No.: PS/00233/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) on February 18, 2019 filed claim before the Spanish Data Protection Agency. The claim is directed against VIAQUA XESTIÓN INTEGRAL DE AUGAS DE GALICIA, S.A. with NIF A66141185 (hereinafter, the claimed).

The reasons on which the claim is based are that the respondent has proceeded to change the data that appeared in your contract, without your authorization or knowledge.

After the claim filed with said entity, it has been stated that the

Changes produced are a consequence of the request of the tenant that is in the point of supply, providing as proof a recording, where a third party identifies with a name and surname that has nothing to do with the tenant of the house in question.

SECOND: In accordance with the mechanism prior to the admission for processing of the claims that are formulated before the Spanish Agency for Data Protection, foreseen in article 65.4 of Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights, which consists of transferring the same to the Data Protection Delegates designated by those responsible or in charge of the treatment, or to these when they have not been designated, and with the purpose indicated in the aforementioned article, on March 28, 2019, transfer of this claim to the claimed entity, so that it proceeds to its analysis and is given a term of response of a month, not having received a response to it.

THIRD: On September 6, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of article 6 of the RGD, typified in article 83.5 of the RGD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, he stated that "he has acted at all times in compliance with current data protection regulations and ordinances regulations that regulate the water supply service in the Concello de Poio.

The petitioners' petitions have no legal basis, and derive from a dispute between the latter, the tenant and VIAQUA, on issues related to the nature of the water supply contract and the subsidiary assumption of payments.

In order to avoid management problems, the Municipal Tax Ordinance of Poio provides in its article 3 that the holder of the supply contracts must always be the owner of the property, without it being possible for the tenants of a dwelling contract this supply themselves. It is admitted, however, that a person

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other than the owner of the contract appears as the payer (generally, the tenant of the property)

Until the change of bank account object of the claim, the receipts of the property property of the claimant were charged in a completely normal way in a bank account that was not owned by him, and that a tenant of the dwelling whose data was processed as a beneficiary/taxpayer, being the owner of the contract, owner of the property and subsidiary responsible for the claimant. Were the

data of the tenant which were modified in the telephone call of the 17th of December 2017, by a user who claimed to be a tenant of the property and answered the relevant security questions.

The claimant alleges that this change was made without her consent, but said consent does not seem necessary, since the modification was made with relation to the personal data of the beneficiary of the supply and not yours. By logic, these changes may not require the consent or authorization of the owner, since, in case of not giving it, a tenant could not modify the direct debit to another account bank or unsubscribe as a beneficiary of the service after having moved to another living place.

Consequently, the reported change in the account number did not refer to data from the claimant. The claimant could not give authorization or consent to the change of a your tenant's account number for another account number that is also not yours ownership. The claimant cannot fail to appear as subsidiary responsible for payments, as long as you own the property. No harm has been caused for the actions of the defendant, which in any case has been governed in its actions by the compliance with the regulations applicable to the water supply in the Concello de Poio.”

FIFTH: On September 25, 2019, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, E/03429/2019, as well as the documents provided by the claimed on September 23, 2019

SIXTH: On October 8, 2019, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency sanction

VIAQUA XESTIÓN INTEGRAL DE AUGAS DE GALICIA, S.A., with NIF A66141185, by an infringement of article 6 of the RGPD, typified in article 83.5 of the RGPD, with a fine of €60,000.00 (SIXTY THOUSAND euros).

SEVENTH: On October 29, 2019, the respondent in the process of hearing made

the following manifestations:

It is considered that it has not taken into account that we are not dealing with an ordinary civil contract, but before a drinking water supply contract, where, in compliance with the current regulations, it is possible to make changes to the personal data of the beneficiary of the service without the consent of the contract holder, as detailed below.

These rates, as municipal taxes that they are, are regulated by a fiscal ordinance approved by the Council of Poio. The regulations applicable to their management, and therefore, to the collection of the service by VIAQUA, is the "Regulatory Ordinance of the rate for distribution service of water, gas, electricity and other public supplies, including the rights to hook up lines and placement and use of meters and similar facilities, when said services or supplies are provided by

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local entities" published in the Official Gazette of the Province of Pontevedra on the 19th of December 2013, in which article 3 establishes the following:

"1-The taxpayers of this Rate, in concept of taxpayers, are natural persons and legal entities and the Entities referred to in article 33 of the General Tax Law that be:

a) In the case of the granting of a network access license, the owner, usufructuary or owner of the useful domain of the property.

b) In the case of provision of services of number 1, b) of the previous article, the occupants or users of the farms of the municipal term beneficiaries of the

mentioned services, whatever their title: owners, usufructuaries,

tenants or tenants, including precarious occupants.

2-In any case, they will be considered as a substitute passive subject of the occupant or user of the homes or premises the owner of the real estate, which may affect, where appropriate, the fees paid on the respective beneficiaries of the service.”

Based on this precept, the respondent entity considers that the claimant as is the owner of the property, responds as a substitute taxpayer in the event of non-payment of your tenant.

Therefore, it considers that it can process the claimant's data for the purpose of claim a debt corresponding to your tenant, and you should not appreciate a behavior negligent on your part in it for not having your consent, since the treatment derives from compliance with the regulations applicable to the management of a fee.

It also indicates that when the owner of the property and the occupant of the dwelling do not coincide in the same person, have a direct relationship with the concessionaire of the water service and can carry out procedures with it independently, depending on of the position conferred by the Municipal Ordinance.

PROVEN FACTS

FIRST: The respondent has proceeded to change the data that appeared in the contract, without having the authorization or consent of the claimant, holder of the contract.

It provides as evidence, the recording in which the change in the number of account, where a third party identifies himself with a name and surname that has nothing to do with the tenant of the house.

SECOND: The respondent alleges that the petitions of the claimant lack legal basis, and derive from a dispute between the latter, the tenant and VIAQUA, on issues related to the nature of the water supply contract and the assumption payments subsidiary.

It also indicates that although the claimant appears in the contract, it appears only as jointly and severally liable, and that your consent to modify the contract data, is not necessary, in accordance with a fiscal ordinance approved by the City Council Poio, since the modification was made in relation to the personal data of the tenant of the property, as the direct beneficiary of the supply, and not with respect to the data of the claimant.

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FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and according to what is established in arts. 47 and 48.1 of the LOPDPGDD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

In the present case, the defendant is accused of committing an infraction for violation of article 6 of the RGPD, which states that: "The treatment will only be lawful if it is meets at least one of the following conditions:

- a) the interested party gave his consent for the processing of his personal data for one or more specific purposes;
- b) the treatment is necessary for the execution of a contract in which the interested party is part or for the application at the request of the latter of pre-contractual measures;
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the

data controller;

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

Physical person;

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

public or in the exercise of public powers vested in the data controller;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by

the data controller or by a third party, provided that said interests are not

prevail the interests or the fundamental rights and freedoms of the interested party that

require the protection of personal data, in particular when the interested party is a

little boy."

III

In the present case we are talking about an infraction for violation of the

article 6 of the RGPD for the illicit treatment of the personal data of the claimant by not

have your consent as established by said precept, repeatedly influencing

the absence of infraction by the claimed party because her conduct is endorsed by a

ordinance, specifically the "Regulatory Ordinance of the fee for distribution service of

water, gas, electricity and other public supplies, including down payment rights

of lines and placement and use of meters and similar installations, when said

services or supplies are provided by local entities" published in the Bulletin

Officer of the Province of Pontevedra on December 19, 2013.

In this sense, it should be noted that if we relate said ordinance with

Regulation (EU) 2016/679, the second prevails over the first, according to the principle

primacy of European Union law.

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This is so since in repeated judgments of the CJEU, Van Gend & Loos, Simmenthal or the Costa-ENEL judgment, it was declared that Community law is a true legal system, something more than an International Law Agreement, and reaffirmed the obligation of States to comply with original and derived law, declaring that the primacy of EU law is a fundamental rule for the existence of EU from which it is concluded that it is an existential condition with effect exclusionary, making inapplicable the internal norm that is incompatible with the right community.

IV

The infringement of article 6 of the RGPD is typified in article 83.5 of the RGPD, which consider as such:

“The infractions of the following dispositions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of of a company, of an amount equivalent to a maximum of 4% of the turnover global annual total of the previous financial year, choosing the highest amount:

- a) the basic principles for the treatment, including the conditions for the consent under articles 5, 6, 7 and 9;
- b) the rights of the interested parties according to articles 12 to 22;
- c) transfers of personal data to a recipient in a third country or a international organization under articles 44 to 49;
- d) any obligation under the law of the Member States that is adopted under Chapter IX;
- e) Failure to comply with a resolution or a temporary or definitive limitation of the treatment or suspension of data flows by the control authority with

under Article 58(2) or failing to provide access in breach of Article 58,

Paragraph 1".

v

This infraction can be sanctioned with a maximum fine of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the volume of total annual global business of the previous financial year, opting for the one with the highest amount, in accordance with article 83.5 a) of the RGPD.

SAW

Article 72.1.b) of the LOPDGDD states that "according to what is established in the article 83.5 of Regulation (EU) 2016/679 are considered very serious and will prescribe the three years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment in article 6 of Regulation (EU) 2016/679."

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In accordance with the provisions of the RGPD in its art. 83.2, when deciding to impose a administrative fine and its amount in each individual case will take into account the factors aggravating and mitigating circumstances that are listed in the aforementioned article, as well as any other that may be applicable to the circumstances of the case.

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

-The nature, scope or purpose of the treatment according to article 83.2 a) of the

RGPD, since the claimed entity repeatedly requires the claimant to pay

a debt that is not yours.

-The negligence in the infringement; under article 83.2 b) of the RGPD, since the

entity claimed, in response to the request of the AEPD, alleges that it is lawful

claim of said debt, as jointly and severally liable, according to the applicable ordinances

to the water supply in the Concello de Poio

-No corrective measures have been adopted, according to article 83.2 c) of the RGPD, since

that the entity claimed, does not inform this Agency, about the measures adopted or the

proceedings in the claimant's case.

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 VIAQUA XESTIÓN INTEGRAL DE AUGAS DE GALICIA, S.A.,

with NIF A66141185, for an infringement of article 6 of the RGPD, typified in article

83.5 of the RGPD, a fine of €60,000.00 (sixty thousand euros).

SECOND: NOTIFY this resolution to VIAQUA INTEGRAL MANAGEMENT OF

AUGAS DE GALICIA, S.A.

THIRD: Warn the sanctioned person that he must make the imposed sanction effective once

that this resolution is enforceable, in accordance with the provisions of art. 98.1.b)

of Law 39/2015, of October 1, of the Common Administrative Procedure of the

Public Administrations (hereinafter LPACAP), within the voluntary payment period

established in art. 68 of the General Collection Regulations, approved by Real

Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of 17

December, through its entry, indicating the NIF of the sanctioned and the number of

procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Spanish Agency

of Data Protection at Banco CAIXABANK, S.A. Otherwise, it will

its collection in executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

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

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

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

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

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

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Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of

the LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the Director

of the Spanish Agency for Data Protection within a period of one month from the

day following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

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 two months from the day following the notification of this act,

according to the provisions of 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 decision may be provisionally suspended in administrative proceedings if the interested party

states its intention to file a contentious-administrative appeal. If this is the

In this case, the interested party must formally communicate this fact in writing addressed to

the Spanish Agency for Data Protection, presenting it through the Registry

Electronic 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 1

october. You must also transfer to the Agency the documentation that accredits the

effective filing of the contentious-administrative appeal. If the Agency did not have

knowledge of the filing of the contentious-administrative appeal within two

months from the day following the notification of this resolution, I would consider

The precautionary suspension has ended.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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