.A.Procedure No.: PS/00074/2019

RESOLUTION R/00211/2019 TERMINATION OF THE PROCEDURE BY

VOLUNTARY PAYMENT

In sanctioning procedure PS/00074/2019, instructed by the Agency

Spanish Data Protection Agency to ENDESA ENERGÍA XXI, S.L.U., given the complaint

presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On April 9, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate sanctioning proceedings against ENDESA ENERGÍA

XXI, S.L.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00074/2019

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data before ENDESA ENERGÍA XXI, S.L.U., by virtue of a claim filed by

Ms. A.A.A. on its own initiative and based on the following:

FACTS

FIRST: Ms. A.A.A. (hereinafter, the claimant) on 10/08/2018 filed

claim before the Spanish Data Protection Agency. The claim is

directed against ENDESA ENERGÍA XXI, S.L.U. with NIF B82846825 (hereinafter,

ENDESA). The grounds on which the claim is based are, in short, that there was

received a charge to his ENDESA bank account whose beneficiary was B.B.B. (in

hereinafter third), convicted of the crime of coercion in the family order,

imposing a restraining order on the claimant, her home or work for

two years; said person called the company to make a change in his contract

of company, in which she appeared as proxy; however, the acting agent

mistakenly modified the claimant's contract file by deleting her data and

filling in the data of the third party.

Provides:

Copy of ID

Rental contract

Census

Claim to Endesa

Sentencing Order of Restraining

Bills

Endesa's DPD email

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

SECOND: Upon receipt of the claim, the Subdirectorate General for

Data Inspection proceeded to carry out the following actions:

On 10/31/2018, the claim submitted was transferred to ENDESA for its

analysis and communication to the complainant of the decision adopted in this regard and in the

same date the claimant was informed of the receipt of the claim and its

transfer to the claimed entity.

ENDESA, in a letter dated 11/29/2018, stated:

That at first they offered the complainant compensation

for the damages suffered consisting of the payment of the electricity supply during a

year, being rejected for considering it insufficient and finally presenting

claim before the Spanish Data Protection Agency.

That on 07/04/2018 the claimant received a charge in her bank account whose

beneficiary was the third party, the claimant requested that the address of

email associated with the contract of your supply point confirming that

it corresponded to the third party and that therefore the last invoice related to the contract

from its supply point was sent to the e-mail address of said gentleman.

That on 05/07/2018 the third party contacted the customer service

client to carry out a contractual management consisting of requesting that it be given

Register an electricity contract for the supply point located at ***ADDRESS.1,

Madrid, on behalf of the company ERGOSISTEMAS.

That the agent-telemarketer informed the third party that the claimant was listed as

contact person of the aforementioned company, to which he indicated that said person no longer

had an employment relationship with the company, although he made a mistake when deleting the data

of the claimant that appeared in its supply contract, putting in its place the

personal data of the third party. Therefore, by an occasional mistake, they were replaced in

the entity's systems the personal data of the claimant by the data of the

third party in the contract relating to the claimant's supply point.

That in order to prevent events such as those from happening again in the future,

claimed, the measures aimed at verifying that the persons who

carry out transactions on behalf of a company are effectively authorized to

it; reinforce the training of telemarketers to avoid this type of error

human resources and introduce mechanisms that allow subsequent validation of requests or

contractual changes registered by the telemarketing agents in the

business systems.

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD,

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The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

The facts denounced are specified in the charge made in the account

claimant's bank account corresponding to a receipt from ENDESA whose

beneficiary is a third party; that is, the entity has disclosed data to a third party to

charging your bank account with a gas bill that does not belong to you.

II

Said treatment could constitute a violation of article article

5, Principles related to the treatment, of the RGPD that establishes that:

"1. The personal data will be:

(…)

f) treated in such a way as to ensure adequate security of the

personal data, including protection against unauthorized or unlawful processing and

against its loss, destruction or accidental damage, through the application of measures

appropriate technical or organizational ("integrity and confidentiality").

(…)"

Article 5, Duty of confidentiality, of the new Organic Law 3/2018, of 5

December, Protection of Personal Data and guarantee of digital rights

(hereinafter LOPDGDD), states that:

"1. Those responsible and in charge of data processing as well as all

people who intervene in any phase of this will be subject to the duty of

confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section will be complementary

of the duties of professional secrecy in accordance with its applicable regulations.

3. The obligations established in the previous sections will remain

even when the relationship of the obligor with the person in charge or person in charge had ended

of the treatment".

On the other hand, article 83.5 a) of the RGPD, considers that the infringement of "the

basic principles for processing, including conditions for consent

in accordance with articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the

mentioned article 83 of the aforementioned GDPR, "with administrative fines of €20,000,000

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

maximum of the overall annual total turnover of the previous financial year,

opting for the highest amount.

On the other hand, the regulation of infractions in the LOPDGDD is more precise

regarding the situations that give rise to an infringement and their consideration, so

make it much easier to know the statute of limitations for that infraction (it is

that is, if it is considered minor, serious or very serious) and in the face of the administrative sanction

to impose for non-compliance.

The LOPDGDD in its article 72 indicates: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

a) The processing of personal data violating the principles and guarantees

established in article 5 of Regulation (EU) 2016/679.

(…)"

III

The documentation in the file offers clear indications that

ENDESA violated article 5 of the GDPR, principles relating to processing, in relation to

with article 5 of the LOPGDD, duty of confidentiality, when disclosing to a third party,

convicted of the crime of coercion in the family and who had been

imposed, among other measures, a restraining order for two years, the data

included in the claimant's supply point invoice as a result of

the alteration of the data of the contract of the mentioned supply by the agent of the

company at the request of the third party, and confirm that the email address

linked to the aforementioned contract was that of the third party and that therefore the billing generated

by the point of supply was sent to the account of that.

This duty of confidentiality, previously the duty of secrecy, must

understood that its purpose is to prevent leaks of data not

consented to by their owners.

Therefore, this duty of confidentiality is an obligation that falls not

only to the person in charge and in charge of the treatment but to everyone who intervenes in

any phase of the treatment and complementary to the duty of professional secrecy.

In this sense, the National High Court ruled in a sentence of

01/18/02, in which Second Law Basis, stated: "The duty of secrecy

professional that is incumbent on those responsible for automated files, ..., involves that the person in charge -in this case, the recurring banking entity- of the data stored -in this case, those associated with the complainant- may not reveal or give know their content having the "duty to keep them, obligations that will subsist even after ending their relations with the owner of the automated file or, in its case, with the person in charge of it... This duty of secrecy is essential in the today's increasingly complex societies, in which advances in technology place the person in areas of risk for the protection of fundamental rights, such as privacy or the right to data protection set out in article 18.4 of the EC. In effect, this precept contains an "institution to guarantee the rights to privacy and honor and the full enjoyment of the rights of citizens who, moreover, it is in itself a fundamental right or freedom, the right to freedom in the face of potential attacks on the dignity and freedom of the person from an illegitimate use of mechanized data processing" (STC 292/2000)…"

In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

IV

"1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. 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 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) 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 infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, “Sanctions and corrective measures”, establishes that:

"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

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

of personal data.

commission of the offence.

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."

data.

In accordance with the transcribed precepts, and without prejudice to what results from the

instruction of the procedure, in order to set the amount of the sanction of fine to

impose in the present case for the infringement typified in article 83.5.a) of the RGPD

for which ENDESA is held responsible, in an initial assessment, it is estimated

concurrent the following factors:

The merely local scope of the treatment carried out by the entity

claimed.

Only one person has been affected by the offending conduct.

The damage caused to the claimant, taking into account the

situation with respect to the person who made the change, from whom he had an order to

remoteness.

The respondent entity has adopted measures to prevent the occurrence of

similar incidents.

There is no evidence that the entity had acted maliciously, although

the performance reveals serious lack of diligence.

The link between the activity of the offender and the performance of treatment of

personal data number of people affected.

The entity claimed is considered a large company.

Therefore, as stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1. INITIATE PUNISHMENT PROCEDURE against ENDESA ENERGÍA XXI,

S.L.U. with NIF B82846825, for the alleged violation of article 5.1.f) of the RGPD,

sanctioned in accordance with the provisions of article 83.5.a) of the aforementioned RGPD.

2. APPOINT R.R.R. Instructor and Secretary to S.S.S., indicating that

any of them may be challenged, where appropriate, in accordance with the provisions of the

Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Sector

Public (LRJSP).

3. INCORPORATE to the disciplinary file, for evidentiary purposes, the complaint

filed by the complainant and her documentation, the documents obtained and

generated by the Inspection Services during the preliminary investigation phase, as well as

such as the report of previous inspection actions; documents all of them

make up file E/07458/2018.

4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1

October, of the Common Administrative Procedure of the Public Administrations

(LPACAP), and art. 127 letter b) of the RLOPD, the sanction that could correspond for the

described infraction would be 100,000 euros (one hundred thousand euros), without prejudice to what

result of the instruction.

5. NOTIFY this Agreement to ENDESA ENERGÍA XXI, S.L.U. with NIF

B82846825, expressly indicating their right to a hearing in the proceeding

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

Propose the tests you consider appropriate. In his pleadings

You must provide your NIF and the procedure number that appears in the heading

of this document.

Likewise, in accordance with articles 64.2.f) and 85 of the LPACAP,

informs that, if it does not make allegations within the term of this initial agreement, the

The same may be considered a resolution proposal.

You are also informed that, in accordance with the provisions of article

85.1 LPACAP, may acknowledge its responsibility within the term granted for the

formulation of allegations to this initial agreement which will entail a

reduction of 20% of the sanction to be imposed in the present

procedure, equivalent in this case to 20,000 euros. With the application of this

reduction, the sanction would be established at 80,000 euros, resolving the

procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of the

present procedure, carry out the voluntary payment of the proposed sanction,

in accordance with the provisions of article 85.2 LPACAP, which will mean a

reduction of 20% of the amount of the same, equivalent in this case to 20,000

euros. With the application of this reduction, the penalty would be established at 80,000

euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the sanction is cumulative to the one

It is appropriate to apply for the acknowledgment of responsibility, provided that this

acknowledgment of responsibility is revealed within the period

granted to formulate arguments at the opening of the procedure. The pay

volunteer of the amount referred to in the preceding paragraph may be made at any

time prior to resolution. In this case, if it were appropriate to apply both

reductions, the amount of the penalty would be established at 60,000 euros.

In any case, the effectiveness of any of the two reductions mentioned
will be conditioned to the withdrawal or renunciation of any action or resource in via
administrative against the sanction.

In the event that you choose to proceed with the voluntary payment of any of the
amounts indicated above (80,000 euros or 60,000 euros), in accordance with the
provided for in article 85.2 referred to, we indicate that you must make it effective by
your deposit in the restricted account number ES00 0000 0000 0000 0000 0000 open to
name of the Spanish Data Protection Agency at CAIXABANK Bank,
S.A., indicating in the concept the reference number of the procedure that appears in
the heading of this document and the reason for the reduction of the amount to which
welcomes

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

The procedure will have a maximum duration of nine months from the
the date of the start-up agreement or, where applicable, of the draft start-up agreement.
Once this period has elapsed, it will expire and, consequently, the file of
performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the
LPACAP, there is no administrative appeal against this act.

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Director of the Spanish Data Protection Agency

SECOND: On May 6, 2019, the respondent has proceeded to pay the

sanction in the amount of 60,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on the Procedure

Common Administrative of Public Administrations (hereinafter, LPACAP),

under the heading "Termination in sanctioning procedures" provides the

Next:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his

responsibility, the procedure may be resolved with the imposition of the sanction

to proceed.

2. When the sanction is solely pecuniary in nature or fits

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified

the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in

any time prior to the resolution, will imply the termination of the procedure,

except in relation to the replacement of the altered situation or the determination of the

compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature,

the competent body to resolve the procedure will apply reductions of, at

least 20% of the amount of the proposed sanction, these being cumulative

each. The aforementioned reductions must be determined in the notification of

initiation of the procedure and its effectiveness will be conditioned to the withdrawal or

Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased

regulations."

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: DECLARE

in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to ENDESA ENERGÍA XXI, S.L.U.

the termination of procedure PS/00074/2019, of

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

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

Against this resolution, which puts an end to the administrative procedure as prescribed by

the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative before the Contentious-administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-Administrative Jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

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