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The consultation raises the adaptation to Regulation 2016/679 of the Parliament European and Council, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data and the free circulation of these data (RGPD) and Organic Law 3/2018, of 5 December, Protection of Personal Data and guarantee of the rights digital, (LOPDGDD, on the condition that the consultant must have in connection with the services provided to a third party.

Specifically, it deals with services to Communities of Owners, among which are reading, maintenance and upkeep of meters, and issuance of liquidations of water consumption and requests a pronouncement on whether in relation to said provision of services that entails data processing personal, must be considered responsible for the treatment or on the contrary treatment manager.

I

In the first place, it is appropriate to go to the provisions of the RGPD that in its article 4 Sections 7 and 8 define the concepts of data controller and manager, respectively.

7) “responsible for the treatment” or “responsible”: the natural person or legal entity, public authority, service or other body which, alone or jointly with others, determine the purposes and means of processing; if the right of the Union or the Member States determines the ends and means of treatment, the person in charge of the treatment or the specific criteria for their appointment, they may be established by the Law of the Union or of the member states;

8) “in charge of the treatment” or “in charge”: the natural person or

legal entity, public authority, service or other body that processes data

personal on behalf of the data controller;

As already pointed out by the Group of Data Protection Authorities in article

29 of Directive 95/46/EC (GT29) in its Opinion 1/2010 on the concepts

of "data controller" and "processor", the concept

responsible was a functional concept aimed at assigning

responsibilities, indicating that “The concept of “responsible for the

treatment” and its interaction with the concept of “processor”

play a fundamental role in the implementation of Directive 95/46/EC,

since they determine who should be responsible for complying with the

data protection regulations and the way in which the interested parties can

exercise their rights in practice. The concept of data controller

data is also essential in determining national legislation

applicable and for the effective exercise of the supervisory tasks conferred on the

data protection authorities”.

Likewise, the aforementioned Opinion highlighted “the difficulties in implementing

practice the definitions of the Directive in a complex environment in which

many hypothetical situations involving the actions of those responsible and

data processors, alone or jointly, and with different degrees of

autonomy and responsibility” and that “The Group recognizes that the application

of the concepts of data controller and

data processor is becoming increasingly complex.

This is primarily due to the increasing complexity of the environment in which

use these concepts and, in particular, to an increasing trend, both in the

private and public sectors, towards an organizational differentiation,

combined with the development of ICTs and globalization, which can give

This leads to new and difficult questions being raised and sometimes

the level of protection of the interested parties is diminished".

However, at the present time, it must be taken into account that the GDPR has

supposed a paradigm shift when dealing with the regulation of the right to

protection of personal data, which is based on the principle of

"accountability" or "proactive responsibility" as pointed out

repeatedly by the AEPD (Report 17/2019, among many others) and it is collected

in the Explanatory Statement of the LOPDGDD: "the greatest novelty presented by

Regulation (EU) 2016/679 is the evolution of a model based,

fundamentally, in the control of compliance to another that rests on the

principle of active responsibility, which requires a prior assessment by the

responsible or by the person in charge of the treatment of the risk that could generate

the processing of personal data for, from said

evaluation, adopt the appropriate measures".

Within this new system, it is the data controller who,

through the instruments regulated in the RGPD itself, such as the registration of

treatment activities, risk analysis or impact assessment on

the protection of personal data, must guarantee the protection of said

law by complying with all the principles contained in the

article 5.1 of the RGPD, properly documenting all decisions

that it adopts in order to be able to demonstrate it.

Likewise, based on said principle of proactive responsibility, directed essentially to the data controller, and in order to reinforce the protection of those affected, the RGPD has introduced new obligations required not only to the person in charge, but in certain cases, also to the in charge of the treatment, who may be sanctioned in case of non-compliance with them.

On the need to clearly determine the responsibilities of each involved in the processing of personal data, Considering 79 of the GDPR remember that

The protection of the rights and freedoms of the interested parties, as well as the responsibility of those responsible and in charge of the treatment, also with regard to supervision by the authorities of control and the measures adopted by them, require an attribution of the responsibilities under this Regulation, including cases in which a controller determines the purposes and means of treatment jointly with other controllers, or in which the treatment is carried out on behalf of a person in charge.

Taking into account the foregoing, currently the Guidelines 07/2020 of the European Committee for Data Protection (CEPD) on the concepts of responsible for the treatment and in charge in the RGPD, assuming that the

concepts of responsible and in charge of the RGPD have not changed in

comparison with Directive 95/46/EC and that, in general, the criteria on

how to attribute the different roles remain the same (section 11),

reiterates that these are functional concepts, which are intended to assign

responsibilities according to the actual roles of the parties (paragraph 12),

which implies that in most cases the

circumstances of the specific case (case by case) according to their activities

rather than the formal designation of an actor as "responsible" or

"in charge" (for example, in a contract), as well as autonomous concepts,

whose interpretation must be carried out under the European regulations on

protection of personal data (section 13), and taking into account (section

24) that the need for a factual assessment also means that the role

of a data controller does not derive from the nature of an entity

that is processing data but of its concrete activities in a context

specific, so that the same entity can act at the same time as

data controller for certain processing operations and

as manager for others, and the qualification as responsible or manager

should be assessed with respect to each specific waste treatment activity

data.

II

Having said the foregoing, in relation to the application of the regulations for the protection of

data to the Communities of Owners, the general criterion of this Agency has been that they are responsible for the treatment, in their relations with third-party service providers, and these, also in general and except exceptions, they will be considered data processors.

This is deduced, for example, from the provision of the service performed by the Property Administrator hired for this purpose. That is, when they act on behalf of the communities of owners, are entitled to treat and have the data of the co-owners that are necessary for the ordinary management of community affairs, since they act in relation with the communities they serve as caretakers treatment.

Likewise, the communities of owners regarding the processing of data of the comuneros are legitimated, for the purposes of the causes that collects the RGPD, in compliance with a legal obligation in accordance with the articles of the Horizontal Property Law (LPH).

In this regard, it is worth mentioning Report 97/2017, which indicates This Agency has been indicating in its reports the condition of responsible for the file or treatment held by the communities of owners, as soon as they carry out various data processing of personal character to comply with the obligations that Law 49/1960, of July 21, on Horizontal Property, as well as as to guarantee the adequate exercise by the owners of the rights that correspond to them in the community. So the condition responsibility falls on the community of owners, which is who, through its governing bodies and, where appropriate, the board, resolve on issues related to the community and that, in

such quality of responsible, will be subject to all those obligations and

duties imposed by Organic Law 15/1999 and its regulations on

development, as well as the responsibilities that according to said Law

are required.

For its part, the administrator, when said position is not exercised by

an owner, but, as allowed by article thirteen of the Law of

Horizontal property, by “individuals with professional qualifications

sufficient and legally recognized to exercise said functions” or

“Corporations and other legal entities in the terms established

in the legal system”, will act as “in charge of the treatment”,

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referred to in article 3 g) of Organic Law 15/1999 and 5.1.i) of

its development regulations, that is, as the person who processes data

personal on behalf of the data controller.

(...) for the maintenance of the relationship of the various owners with

community of owners, it will be necessary for it to have

certain data of the owners, essential for that

can carry out its functions

Criterion also of the jurisprudence as stated in the Judgment of the Court

Supreme of March 25, 2014 relapse in the Cassation Appeal 3576/2011

that, although it deals with the publication on the data bulletin board

economic, builds the argument on the consideration of the

Community of Owners as responsible for the treatment and the

estate manager as manager.

In the specific case in question, we are dealing with a service that a

third lends to the Community of Owners.

Indeed, the installation and reading of individual meters or distributors of

cost is an obligation for the Communities of Owners that derives from the

Royal Decree 1027/2007, of July 20, approving the Regulation

of Thermal Installations in Buildings and Royal Decree 736/2020, of 4

August, which regulates the accounting of individual consumption in

thermal installations of buildings.

However, said meter reading may be carried out by the community itself if

has the means to do so, or where appropriate, contract with a third party as occurs in

most cases and in the supposed object of consultation. (article 6.2 of the

cited Royal Decree 736/2020).

It is, therefore, a service that the Community of Owners decides, prior

agreement and with the observance of the requirements that are applicable to

agreement with the LPH, hire a third party - in this case the consultant - the

provision of a service that entails the processing of personal data.

III

Taking into account the above, it is necessary to analyze the factual assumption that

derives from the consultation in relation to the criteria of the Directives 7/2020 of the

CEPD and the specific treatment involved in the provision of the service.

Regarding the analysis of the specific treatments, Report 64/2020 indicates that

In any case, a careful and in-depth analysis must be made of the

legal relationship established between the parties in order to identify who

determines the ends and the means, for which the repeatedly cited

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CEPD guidelines give different criteria that can be used to set
said positions, starting from the fact that the word “determine” implies
actually exert an influence on ends and means, for which
it is precluded that the service is defined in a specific way by the
person in charge, provided that the person in charge is presented with a description
detailed and can make the final decision on the way in which
performs the treatment and be able to request changes if necessary,
without the processor being able to subsequently introduce changes in
the essential elements of the treatment without the approval of the
responsible (paragraph 28) or that a certain margin of
maneuver the manager to make some decisions regarding the
treatment (section 35) being able to leave to the person in charge the taking of
decisions on non-essential means (paragraph 39), so that the
The person in charge must not process the data in any other way than
in accordance with the instructions of the person in charge, notwithstanding that
such instructions may leave a degree of discretion as to how
better serve the interests of the controller by allowing the controller
choose the most appropriate technical and organizational measures (paragraph
78).

Likewise, another criterion to consider is whether the entity involved in the
treatment does not pursue any purpose of its own in relation to the treatment,

but simply paid for the services rendered, since, in

In this case, it would act, in principle, as a manager rather than as

responsible (section 60).

For this reason, although as indicated in our Report 11/2020, the figure

of the person in charge of the treatment obeys the need to respond

to phenomena such as the outsourcing of services by

companies and other entities, the CEPD recalls that not all

service providers that process personal data in the course of

the provision of a service is an "order" in the sense of the RGPD, since

that does not depend on the nature of the entity that is dealing with the

data, but of their concrete activities in a specific context, of

so that if the treatment does not constitute a key element of the service,

the service provider may be in a position to determine

independently the purposes and means of that processing that is

requires to provide the service, in which case it may be

considered as a person in charge and not as a person in charge, and, for the

to the contrary, but reiterating the EDPB that a

case-by-case analysis to determine the degree of influence that each

entity actually has to determine the ends and means of the

treatment (paragraph 80) since it will be able to continue acting as

in charge even if the processing of personal data is not the

main object of the service, provided that the customer of the service determines the purposes and means of processing in practice (paragraph 81).

IV

Regarding the specific processing of personal data, according to the consultant, the contracted service consists of "from the Community of Owners, a list is sent with the identification data of the neighbors of the farm to Ullastres so that it proceeds to read the meters or cost allocators, and comply with the purpose of the provision of services that they have been entrusted to him.(...) once the reading of the accountants, Ullastres issues informative settlements on consumption to the Community of Owners itself, being its president or the administrator of farms that it has designated, to whom the consultant issues the invoice for the contracted service. Consequently, it is this president or administrator of farms, who receives the informative consumption settlements and a list summary of them. Based on these settlements, the amounts to be collected from each neighbor and that same President or Administrator of the Community of Owners passes them to the collection (...) internally, without any intervention on the part of Ullastres, which has already proceeded with the assigned task."

The consultant provides an Annex II referring to the contracting model of the service object of analysis and that entails data processing personal, and with respect to which the following aspects should be highlighted:

The consultant is instituted in parts on one side and the Community of Owners referred to as CLIENT, and among the services it is indicated "Reading, liquidation and maintenance service".

For its part, clause 2.2 indicates that:

Once the reading is done and according to the measurements of each meter

divisional, settlements will be issued for each user (...) according to the blocks and

rates determined by the supplying company or indicated by the client,

Likewise, summary lists will be edited (...) that will be sent to the Client or to

who is expressly determined.

Clause 4.1 states that:

the agreed reading and maintenance fees will be paid by the

customer by direct debit (...)

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Well, the first aspect to highlight is that the Community of Owners,

decides the contracting of the service and based on that premise exercises a

decisive influence on treatment.

Paragraph 24 of the Guidelines indicates that

In the absence of control derived from legal provisions, the qualification of

a party as controller should be established on the

basis of an assessment of the factual circumstances surrounding the

treatment. All factual circumstances must be taken into account

relevant to reaching a conclusion as to whether an entity

determined exerts a determining influence with respect to the

processing of personal data in question.

In effect, influence is derived because it chooses or determines the purpose of the

treatment, has agreed through the corresponding agreements, that the

meter reading and cost allocators is a service that you are going to hire,

and that goes through the communication of a list of personal data of the

neighbors for the corresponding reading, and once it has been produced, it will receive the

individual measurements and subsequently according to certain criteria,

proceed to collect them. There is therefore no doubt about the influence

has the Community in data processing revealed.

Secondly, and in relation to contracting the service, your

maintenance and subsequent modification, section 29 of the Guidelines

7/2020, tells us that

According to the factual approach, the word "determines" means that

the entity that actually exercises influence over the purposes and means

of the treatment is responsible. Normally, an agreement

manager establishes who the determining (responsible) party is and

the instructed party (in charge). Even if the manager offers a service

which is preliminary defined in a specific way, the responsible

must be presented with a detailed description of the service and

must make the final decision to actively approve the way in which

performs the treatment and to be able to request changes if necessary. What's more,

the maintainer cannot at a later stage change the items

essentials of the treatment without the approval of the person in charge.

In the present case, according to the consultant, she is not in

conditions of modifying the contracted service in the sense of changing

elements of the treatment, (which as we will see below is key in the

provision of the same) without the approval of the person in charge, since it would be a

unilateral modification of the contract.

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On the other hand, it must be taken into account that the treatment constitutes a

key element of the service, the service provider, the consultant, is not

in a position to independently determine the ends and means of

that treatment that is required to provide the service.

The aforementioned Guidelines give the example of hiring a

law firm to conclude that it will be held responsible for the

treatment, because treatment is not the key to the service, but to the

contracted service, data may be processed but it is not essential, and

that said firm will act with a significant degree of independence,

for example when deciding what information to use and how to use it, and there is no

customer instructions on the processing of personal data. The

treatment that the law firm carries out to fulfill the task of

legal representative of the company is, therefore, linked to the role

function of the law firm to be held responsible

of said treatment. Therefore, as indicated above, with character

In general, the Community of Owners is responsible for the treatment

when you contract the services of a third party, but it can happen, as in the

For example, this is not always the case.

In the case analyzed, data processing is a key element

of the service, both because a list is provided -with personal data-

to attribute a certain consumption, as for the information object of

treatment, in the sense that energy consumption in itself is a

information that should be considered personal data. This is indicated by the

Judgment of the Supreme Court of July 12, 2019 relapsed in the Appeal

of Cassation 4980/2018, based on the pseudonymization of the data of

CCH (hourly load curve database) and CUPS (universal code

of supply points) and the simple reversal and subsequent identification, therefore

that, if in that case they have that consideration, in the present case there will be no

doubt because consumption is expressly linked to the identity of the

individual owners.

Therefore, the processing of personal data is essential, and not

merely accessory, in the provision of the service.

In this regard, it is necessary to indicate another criterion proposed by the Report

64/2020, that the entity involved in the treatment does not pursue any purpose

own in connection with the treatment, but is simply paid for the

services provided, since, in this case, it would act, in principle, as

manager rather than responsible. That is, as happens in the

present case.

Thirdly, the consultant does not establish direct relationships with the

owners, in the sense that, without prejudice to the specialties that

held by the Communities of Owners in relation to the comuneros, the

service is billed by the consultant to the Community of Owners

which is the recipient of the provisions of the Royal Decrees above

mentioned, in the case of the horizontal property regime and the one that decides
hire the service. This is the holders of the data subject to treatment
have a legal relationship with the consultant, but it is the Community that
that the service is provided to the owner of said relationship. In this aspect it is
It should be noted that, if the entity provided the service, for example, to a
private person, a single-family dwelling outside the LPH would be considered
data controller, as indicated in report 64/2020
referring to the assumption that an individual goes to the Post Office to lend him a
determined service.
Another aspect that deserves analysis is the contract in which the service is covered.
object of analysis. Regarding the contract, Guidelines 7/2020 indicate in their
paragraph 27 that
In many cases, an assessment of the contractual terms between
different stakeholders can make it easier to determine what
party (or parties) acts as responsible. Even if a contract saves
silence about who is responsible for the treatment, may contain
sufficient elements to infer who exercises a decision-making function
decisions regarding the purposes and means of processing. Too
it may be that the contract contains an explicit statement about the
identity of the person in charge. If there is no reason to doubt that this
exactly reflects reality, there is nothing against the stipulations
in the contract. However, the terms of a contract are not
decisive in all circumstances, since this simply
would allow the parties to assign the responsibility they deem
convenient. It is not possible to become responsible or avoid the
obligations of the person in charge simply by configuring the contract of

a certain way when the circumstances actually say something

plus.

In the case analyzed, in addition to the characteristics of the service that have been

revealed during this report, the contract contains a

Annex referring to the processing of personal data and that complies with the

provided in article 28.3 of the RGPD. It assigns responsibilities

and roles in terms of responsible and in charge and they do not exist or, at least of the

information and statements made by the consultant, can not

affirm that the reality of the service contravenes these roles.

Therefore, according to the information provided by the

consultant on the legal relationship with the Community of Owners that

covers the service under analysis, the former must be considered as

in charge of the treatment and to the aforementioned Community as responsible for the

treatment.

However, the indicated conclusion is for the sole purpose of the service

contracted derived from the analysis that has been carried out with the information

provided to the query, so depending on the specific case there may be

Other cases in which the consultant acts as responsible for the

treatment. Thus, for example, Report 64/2020 indicated that,

“Likewise, there may be cases in which Correos processes the data

for your own purposes, such as handling claims

of the recipient for a defective provision of the service and for the purpose of

demand the pertinent compensation, including the geolocation of the

shipment, or for the provision of additional services, such as the app

"Correos", in which it will hold the status of responsible".

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Having said that, it is necessary to remember that the status of person in charge of the

treatment entails the fulfillment of the obligations that derive from the

RGPD and the LOPDGDD.

As indicated, the RGPD has introduced new enforceable obligations

not only to the person in charge, but in certain cases, also to the person in charge

treatment, who may be sanctioned in case of non-compliance with the

themselves.

In this regard, Guidelines 07/2020 of the European Committee for the Protection of

Data (CEPD) on the concepts of data controller and processor

in the RGPD make special reference (section 91) to the obligation of the

responsible for ensuring that the persons authorized to process data

personal data have agreed to respect confidentiality or are

subject to a confidentiality obligation of a statutory nature (article

28, paragraph 3); keeping a record of all categories of activities

of treatment carried out on behalf of a person in charge (Article 30.2); that of

apply appropriate technical and organizational measures to ensure a level of

security appropriate to the risk (article 32); to appoint a delegate of

data protection under certain conditions (article 37) and to notify

to the data controller without undue delay violations of the

security of the personal data of which it becomes aware (article 33

(two)). In addition, the rules on data transfers to third countries

(chapter V) apply to both those in charge and those responsible.

And for this reason, the EDPB considers that article 28 (3) of the RGPD imposes

direct obligations to those in charge, including the obligation to help the

data controller to ensure compliance.

Regarding compliance with the principles of treatment contained in the

Article 5 of the RGPD, it is appropriate to highlight those of limitation of purpose and

minimization.

Section 1 b) indicates that the data will be collected for specific purposes,

explicit and legitimate, and will not be further processed in a manner incompatible

for said purposes; according to article 89, paragraph 1, the treatment

subsequent use of personal data for purposes of archiving in the public interest, purposes of

scientific and historical research or statistical purposes shall not be considered

incompatible with the original purposes ("purpose limitation");

Indeed, the consulting entity may not use the personal data of

which you have access for purposes other than the provision of the

service. In this aspect it is necessary to remember what is indicated in article 33.2

of the LOPDGDD that provides that:

You will be considered the person responsible for the treatment and not the person in charge.

who in his own name and without stating that he acts on behalf of another,

establish relationships with those affected even when there is a contract or act

legal with the content set out in article 28.3 of the RGPD.

(…)

It will also have the consideration of responsible for the treatment who

appearing as manager used the data for their own purposes.

For its part, section 1 c) provides that personal data will be

adequate, pertinent and limited to what is necessary in relation to the purposes for

those that are processed ("data minimization");

In the present case, it is necessary to show that in the contract

provided in clause 6 under the name "Clause for the protection of

data and confidentiality" in section 6.1 c) it is stated that the person in charge will treat

the following data: address, floor, name of the holder, name of the payer,

bank account, phone, email.

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Well, these seem to exceed the minimum necessary for the

provision of the service as described by the consultant. I mean, yes

the entity providing the service only needs to know the consumption by

dwellings, it would be enough either to assign an identifier to each one, or

know the data of the floor and door of the house. It is strange that

need data such as the name of the payer and bank account, when such

As stated repeatedly in the query, the service is billed to the

community of owners and not individually to each neighbor.

Just as there is no justification in the treatment of the telephone and the

e-mail, because in principle smart meters allow the

remote reading and failing that, it can be done outside the contact

individual with each neighbor because in practice the meters are in

a space enabled for this purpose by the community of owners, that is, outside

primarily to the owners.

In conclusion, the treatment of the data that has just been indicated does not seem

justified in relation to the service provided by the consultant in the terms

informed to this Agency and, therefore, would be contrary to the principle of

minimization.