

□ Procedure No.: PS/00232/2020

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### FACTS

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated February 20, 2020 filed a claim with the Spanish Data Protection Agency. The claim is directed against ALTERNA OPERADOR INTEGRAL, S.L. with NIF B87075982 (ENERGY FLIP) (hereinafter, the claimed one).

The complainant states that a change of electricity supplier without your consent. The former company was Naturgy, and now it is claimed.

Provides Naturgy invoices and letters and invoices from Flip Energía.

SECOND: In view of the facts set forth in the claim and the documentation provided by the claimant, the Subdirector General for Inspection of Data proceeded to transfer it to the claimed entity and request information, in accordance with the provisions of article 65.4 of Organic Law 3/2018, of 5 December, Protection of Personal Data and guarantee of digital rights.

In a letter dated March 31, 2020, information is requested from FLIP ENERGÍA, S.L., (commercial name, ALTERNA) who responds on July 1, this year stating the following:

First, they state that the respondent does not make commercial calls in order to promote its services, but rather that this work is subcontracted with different telemarketing companies.

They add that the claimant contracted the services of the respondent through the

telemarketing company Sycgestion Global Energy, S.L., who used its own database of data to contact her and promote, as responsible for the treatment the services of the claimed, and consequently, the responsibility of the contact with the respondent was from the aforementioned entity and not from the respondent.

That the respondent terminated the contract for the provision of services with Sycgestion Global Energy, S.L., as stated in the accompanying document.

They point out that the defendant has carried out a series of actions such as the selection of suppliers that guarantee compliance with the regulations of data protection, the signing of data transfer contracts and access to data with the suppliers, where applicable, and training and awareness for

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

2/9

workers in respect of the principles and obligations contained in the regulations of data protection.

THIRD: On September 15, 2020, the Director of the Spanish Agency of Data Protection agreed to initiate a sanctioning procedure against the claimed party, with in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP), for the alleged infringement of Article 6.1.b) of the RGPD, typified in the Article 83.5 of the RGPD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent requested an extension of term and subsequently presented a brief with arguments in which, in summary, manifested what he considered opportune in defense of his interests, pointing out that the

provider processed the data of your contacts in its own name and on behalf of

through their own commercial networks by means of telephone calls

(telemarketing), acting as data controller and, when a

user was interested in contracting the services of Alterna,

transferred the call to a telemarketer who, acting as the person in charge of the

treatment of Alterna, carried out the verification and recording of the relative call

to the characteristics of the contracted service and the consent given by the client.

That Alterna's actions can only be concluded that it has been diligent and

in accordance with the personal data protection regulations, taking into account that in

In order to guarantee that the personal data flows between Alterna and SYC GESTION

were correctly regulated. That Alterna signed a mixed provision contract

of services in which the transfer of personal data and the commissioning of the

treatment, giving clear and precise work instructions to the Provider both in the

Contract and its Annexes, which are attached to this document as Document No. 1.

For this reason, they want to highlight the good faith that the Company has shown in each

moment.

That Alterna made the appropriate inquiries to clarify the facts

object of the incident and identified a series of irregularities carried out by

part of the Supplier and that allows to conclude that SYC GESTION did not follow its

instructions.

The supplier, as data controller, guaranteed Alterna the

lawful origin of the personal data object of the assignment. Specifically SYC

GESTION undertook to obtain the consent of the interested parties to carry out

out the transfer of data to the Company, for the purpose outlined.

In relation to the role of the Provider in charge of the treatment, as

could be otherwise, in the "Contract for the provision of telemarketing services" and

"Data Access Contract" signed between the parties, regulated the provision of services with access to data from the Company Provider giving rigorous compliance with the clause, to article 28 of the RGD.

The breaches of the Contract, committed by SYC GESTION, are listed.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

3/9

On the other hand, it states that the company acted with maximum speed and diligence, since at the time that the claimant's granddaughter, in representing the claimant, contacted Alterna, on the occasion of express his willingness to terminate his contract, proceeded immediately to the imminent cancellation of the debt with the claimant.

Consequently, the claimant remained registered in their systems as client only for ten days as she was discharged on January 11, 2020.

In this regard, she was discharged from Alterna on January 21, 2020, having been registered in another marketer by the claimant.

It indicates that there was no type of penalty for the termination of the contract or for the return of their receipts, with the Company taking charge of the consumption that was invoiced. A flow of continuous and fluid communication was established with the claimant, responding at all times to their requirements and once they are personal data ceased to be necessary for the purpose of the management of the incident, proceeded to block the personal data of the claimant. In the same

At the time that Alterna became aware of a suspected incident, it contacted

SYC Management requesting information and documentation in this regard, through

different channels of communication, without obtaining any response, which adopted the appropriate measures in order to avoid that, in the future, other clients reveal facts such as those reported by the claimant and terminated the contract with SYC MANAGEMENT on June 26, 2020.

It adds, the measures it has implemented to guarantee quality in the management of the contracting process.

On the other hand, it considers that there was a valid pre-contractual relationship, all once there was a contest of wills and carrying out a series of measures pre-contractual, in accordance with article 6.1b) RGPD or in accordance with article 6.1 a) GDPR.

Likewise, it states that the breach would be attributable to SYC GESTON, which the supplier repeatedly failed to comply with the instructions provided by Alterna, treating the data for which the Company was responsible for the treatment, and must in this case, SYC Management acquires the status of data controller.

Lastly, it points out that in the event that the filing of the proceedings in this proceeding, the qualified decrease in culpability and illegality in the conduct of Alterna, who acted with the greatest possible diligence, and that, consequently, apply in a subsidiary manner the article 83 RGPD and 76 LOPDGDD.

FIFTH: On October 16, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigative actions, E/03187/2020, as well as the documents provided by the claimant.

SIXTH: On November 19, 2020, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

sanction the claimed party, for an infringement of article 6.1 of the RGD, typified in the article 83. 5) of the RGD, with a fine of 50,000 euros.

SEVENTH: Once the proposed resolution was notified, the party complained against submitted a written of allegations ratifying those made to the Home Agreement, that is: "there is no but to conclude that the action of my client in this case has been diligent and in accordance with the personal data protection regulations and this part wants to highlight Both the quick action and the good faith that ALTERNA has shown in each time, fulfilling the duty of diligence required, without prejudice to the corresponding responsibilities that, if applicable, may correspond to the Supplier. SYC GESTION's action was carried out not only in breach of flagrantly the contract signed with the Company, but rather, this party considers accredited contractual bad faith of the aforementioned telemarketing entity, as well as a fraudulent and potentially fraudulent attitude, which is why this party has filed the pertinent complaint against the Provider.

In addition, the repeated non-observance of ALTERNA's instructions, in its capacity as in charge of treatment, necessarily convert SYC GESTION into responsible for the treatment. My client was the victim of a deception and understood that there was a contractual relationship with the complainant. However, the error was corrected with absolute speed, proceeding with total diligence: the data of the complainant is remained active in the systems for only ten (10) days, proceeding my represented, as soon as he became aware of the claimant's intention to change of marketer, to cancel its debt and, subsequently, to block its

personal information. The Company has acted with the highest level of due diligence, in accordance with its internal procedures, substituting the services of the Provider by those of other partners who, like the Supplier did, guarantee the strict compliance with data protection regulations and that are more rigorous in their task that SYC GESTION. In this sense, my client is immersed in a audit of processes in order to carry out robust audits of their suppliers and collaborators. In any case, it should be understood that there is no of ALTERNA a subjective element of guilt for what would be appropriate decree the file of this sanctioning procedure. Personal information affected, correspond mainly to contact and character data identification, without including in any case, data from special categories of data or criminal offenses. It is obvious and common sense that the activity of the Company (like that of any other company) is linked to the treatment of Personal data. Notwithstanding the foregoing, ALTERNA's activity is not linked to the infringing treatment of personal data, if not to the supply energetic. The Company's actions have in no case been intentional, or fraudulently, nor has he received any type of benefit. Furthermore, he had no intention any of infringing the data protection regulations, nor of causing damage or harm to the complainant. That he considers that this writing of allegations, be served to admit it, and after the appropriate procedures agree to the file of the referenced file, leaving without effect the procedure initiated against this trade".

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

5/9

## FACTS

FIRST: A change of electricity marketer has been carried out without the consent of the claimant. The previous company was Naturgy, and now it is the claimed.

SECOND: The invoices provided by the claimant show the change of trading company.

THIRD: The personal data of the claimant were incorporated into the systems information of the company, without proving that it had contracted legitimately, had your consent for the collection and treatment of your personal data, or there is any other cause that makes the treatment carried out.

## FOUNDATIONS OF LAW

Yo

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

II

The defendant is charged with the commission of an infringement due to infringement of Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the assumptions in which the processing of third party data is considered lawful:

"1. The treatment will only be lawful if at least one of the following is met conditions:



a) the interested party gave their consent for the processing of their data

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;

(...)"

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

"5. Violations of the following provisions will be sanctioned, in accordance

with section 2, with administrative fines of a maximum of EUR 20,000,000 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

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

6/9

consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the

Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements

considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.)

2016/679 are considered very serious and the infractions that

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

particularly the following:

(...)

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

III

The documentation in the file shows that the claimed, violated article 6.1 of the RGPD, since it processed the data claims of the claimant without having any legitimacy to do so. The data personal data of the claimant were incorporated into the information systems of the company, without proving that it had contracted legitimately, had of your consent for the collection and subsequent processing of your data personal, or there was any other cause that made the treatment carried out lawful.

The personal data of the claimant were recorded in the files of the claimed and were processed for the issuance of invoices for services associated with the claimant. Consequently, it has processed personal data without that has accredited that it has the legal authorization to do so.

It should be noted that the complainant did not adopt any kind of measure or caution with the subcontracted company to which it entrusted the realization of contracts, and in this case the inactivity of the claimed party was proven, in the lack of adoption of measures or precautions.

Article 6.1 RGPD says that the treatment "will be lawful if it is necessary for the performance of a contract to which the interested party is a party.

It was therefore essential that the respondent accredit before this Agency that the claimant had contracted the electricity supply with her; that at the time of recruitment had displayed (through its treatment manager) the diligence that the circumstances of the case required to ensure that the person who provided

as his bank details and other personal data was effectively his

headline.

The defendant has not provided any document collected from the client at the time of the contract that allows their identification.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

IV

7/9

In determining the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

“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 as the number of stakeholders affected and the level of damage and

damages they 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 if the person in charge or the person in charge notified the infringement and, in such case, to what extent;

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 relation 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 realized or losses avoided, direct or indirectly, through 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 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.

- 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

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

8/9

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 data.

- 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."

v

In accordance with the provisions of the RGPD in its art. 83.2, when deciding to impose an administrative fine and its amount in each individual case shall be taken into account aggravating and mitigating factors 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 intentionality or negligence of the infraction (art. 83.2 b).

-

- Basic present identifiers are affected (name, address, bank account number, cups) (art. 83.2 g)

-

The evident link between the business activity of the respondent and the treatment of personal data of clients or third parties (art. 83.2 k of the RGPD in relation to art. 76.2 b of the LOPDGDD)

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE ALTERNA OPERADOR INTEGRAL, S.L., with NIF B87075982, for an infringement of Article 6.1.b) of the RGPD, typified in Article 83.5 of the RGPD, a fine of 50,000 euros (fifty thousand euros).

SECOND: NOTIFY this resolution to ALTERNA OPERADOR INTEGRAL, SL

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

Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account

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

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case Otherwise, it will be collected in the executive period.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

9/9

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

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

It 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 art. 48.6 of the

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

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

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

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

Contentious-administrative jurisdiction, within a period of two months from the

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

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](https://sedeagpd.gob.es)