 Procedure No.: PS/00197/2020

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/00197/2020, instructed by the Spanish Agency for Data Protection, to the entity, I-DE REDES ELÉCTRICAS INTELIGENTES, S.A.U (I-DE), previously known as IBERDROLA SA, with CIF: A95075578, (hereinafter before, "the entity claimed"), by virtue of the complaints filed by the entity WATIUM, S.L., with CIF.: B86459260 and by the entity ENERGIA Y SERVICIOS ABY 2018, S.L., with CIF.: B85114098, (hereinafter, "the claimant entities"), and in based on the following:

BACKGROUND

FIRST: On 03/11/19, you had a written entry to this Agency, submitted by the claimant entity, WATIUM SL, in which it filed a claim against the entity I-DE, for, among others, the sending of a series of letters to its clients by the claimed entity distracting the purpose for which the data was transferred and lacking a legal basis to contact them, failing to comply with formal reiterated the principles of purpose limitation and the principle of minimization of data. Said complaint is fully reproduced, both in the opening letter of file, dated 07/24/20, as in the draft resolution proposal, of date 11/25/20.

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the investigative powers tion granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (GDPR). Thus, on 06/25/19, informative requests were addressed to the

claimed entity.

THIRD: On 06/25/19, the claimed entity sent this Agency a written

of allegations to the complaint filed by the claimant entity, reproduced, both

in the letter of initiation of the file, dated 07/24/20, as well as in the letter of pro-

resolution, dated 11/25/20.

FOURTH: On 01/08/20, a document from the entity entered this Agency

ENERGÍA Y SERVICIOS ABY 2018, SL., in which it filed a claim against the

I-DE entity, for, among others, the illicit remittance of a series of letters to its clients

by the claimed entity. Said complaint is reproduced in its entirety,

in the letter of initiation of the file, dated 07/24/20, as well as in the letter of

proposed resolution, dated 11/25/20.

FIFTH: Dated 02/20/20, and in view of the facts set forth in the allegations

presented by the claimed entity, a request for a report is addressed to the COMMISSION

NATIONAL MARKETS AND COMPETITION, (CNMC), Deputy Directorate of

Regulation of Electronic Communications.

SIXTH: On 03/10/20, the CNMC sent an explanatory report to this Agency, in-

fully reproduced, both in the document initiating the file, dated

07/24/20, as in the draft resolution proposal, dated 11/25/20.

SEVENTH: In view of the reported facts, the documentation provided by

the parties and in accordance with the evidence available, the Director of the

Spanish Agency for Data Protection, dated 07/24/20, agreed to initiate procedures

sanctioning the entity claimed, by virtue of the established powers, for

alleged breach of the provisions of articles 5.1.b) and c) and 6.1.b) of the RGPD,

punishable in accordance with the provisions of art. 58.2 of the aforementioned RGPD, proposing a

initial penalty of 200,000 euros (two hundred thousand euros), without prejudice to the resulting

of the instruction of the sanctioning procedure.

EIGHTH: On 08/17/20, the entity claimed submitted to this Agency in writing

pleadings to the initiation of the disciplinary proceedings, reproduced in the brief

of proposed resolution, dated 11/25/20.

NINTH: On 10/21/20, the evidence practice period began, agreeing-

be in the same: a).- consider reproduced for evidentiary purposes the complaint filed

by the complainant and her documentation, the documents obtained and generated that

are part of file E/03624/2019 and b).- consider reproduced for evidentiary purposes.

torials, the allegations to the initiation agreement of PS/00197/2020, presented by the entity

ity claimed.

TENTH: On 11/25/20, the respondent entity was notified of the resolution proposal.

solution in which it was proposed that, by the Director of the Spanish Agency for Protection

tion of Data is sanctioned to the claimed entity, for infraction of the articles

5.1.b) and c) and 6.1.b) of the RGPD, with a fine of 200,000 euros (two hundred thousand euros),

in accordance with the provisions of article 58.2) of the aforementioned RGPD.

ELEVEN: After notification of the proposed resolution, dated 12/18/20, the

entity complained against presented a brief of allegations to the proposed resolution, in which

which indicated the following:

“As a preliminary matter, this part considers it necessary to show that the same

ma can only reiterate all of what was stated in his pleadings brief to the

Initiation Agreement relapsed in this file, since, in our opinion,

the content of the Motion for a Resolution hardly contains different arguments or

additional to those expressed in the aforementioned Start Agreement.

And it is that even though the Motion for a Resolution appears by its length to lead to

carried out a legal analysis of the issue raised in these proceedings, such circumstance

circumstance is purely apparent, since almost thirty of its forty-eight

pages are limited to reproducing in their entirety the allegations made by this party

to the Initiation Agreement.

In turn, with regard to the legal grounds, under the guise of a

alleged refutation of the arguments made by this party, the Proposal for Re-

solution does not even substantiate the reasons that lead to the rejection of the entire

the allegations made by my client to the Home Agreement, limited to

contradict what this party alleged in said brief through arguments that included

They do not partially reproduce, and not in their entirety, the applicable legal provisions

with the sole purpose of reinforcing the sanctioning meaning of the decision adopted even

when the citation of the precept on which they are apparently based is partial.

In this way, in the opinion of my constituent, the Motion for a Resolution even provides,

with respect to the Initiation Agreement, fewer legal bases that allow this party

adequately defend the legality of the processing of customer data by carrying out

carried out by sending the letters referred to in this procedure.

suffering, despite his appearance, from an absolute lack of motivation that

prevents my principal from making adequate use of his right to defense.

All of this implies, in our opinion, a violation by the Proposed Resolution.

tion of the principle of legal certainty, as well as their right to judicial protection

effective, established respectively by articles 9.3 and 24 of the Constitution.

Having made the foregoing considerations, and even when this implies a certain reiteration

Regarding the allegations already put forward by my client, they will try to expose,

In short, the arguments that, in the opinion of my principal, justify without any

doubt, the complete legality of his conduct. To do this, even altering the systematic

ca followed by the Motion for a Resolution, reference will first be made to the

substantive issue that constitutes the object of this proceeding, that is, to the

absolute legality of the conduct of my client in this case, to analyze later

mind the serious formal defects in which, in the opinion of my principal, the

this procedure and, finally, the inadequate assessment carried out by the AEPD

of the circumstances that occur in the case and that, in his opinion, aggravate the responsibility

bility of I-DE.

SECOND.- NON-EXISTENCE IN THE CONDUCT OF I-DE OF VIOLATION OF THE

PERSONAL DATA PROTECTION REGULATION

1. On the full conformity of the action carried out by my principal with the

Civil Code and regulations governing the electricity sector

My principal, in the second of his allegations to the Initiation Agreement, fully re-

produced in the Resolution Proposal, reasoned in detail the legality of the treatment

processing of data carried out by it as necessary for the proper development

Return of the contractual relationship that binds you to the final energy consumer

electricity, with which it signs the corresponding network access contract (in addition,

"ATR"), acting in said act the marketer as a mere agent representing

representative of said consumer.

Given the length of the aforementioned allegation and that, on the other hand, it has not

been the object of an effective contradiction in the Resolution Proposal, understands this

part that only proceeds now to reiterate the summary of the aforementioned arguments

which was included in section 7 of the aforementioned second allegation, in the following terms:

minos:

"1. Electric power consumers must sign, together with the supply contract,

supplier with a marketer, a network access contract, with the distributor that owns

of the existing network in its geographical area (in this case I-DE), being parts of di-

Cho contracted the distribution company and the final consumer. 2. The consumer will be able to

recommend the signing of said contract to the marketer with whom he had contracted

the supply, being able to sign the access contract with the distributor, but in

any case as agent or substitute for the consumer and acting in any case in

name and on behalf of the former and by virtue of sufficient power of attorney. 3. Not at all

case they will apply to the contract entered into by the marketer as mandated

client's rule the rules of the non-representative mandate, maintaining the relationship

contractual, in any case, between the distributor and the customer who owns the supply point.

tro. 4. Consequently, there would not properly be an assignment to the distributor of the data.

data of the consumer by the marketer, given that these data would be obtained by the

distributor primarily, when referring to the party with which it maintains a relationship

contract, signed by a mere agent. 5. Within the different obligations

contractual terms of the access contract is the payment of access tolls,

for which the mandatory marketer and the client would respond jointly. He in-

compliance with this obligation two months after the request for

payment of said tolls enables the distribution company to suspend the supply
electric. 6. In the present case, even though the clients had satisfied the co-
marketer the amount of the access tolls, it had not paid I-DE the
amount of these, for which my client required payment to the marketer, directed
sending the request to your address, as stated in the contract and in compliance
tion of current legislation. 7. Once the legally established term has elapsed without the
requirement was met, and thus my principal holding the right to suspend the
supply, I-DE informs its customers of this circumstance and the consequences that
this may entail, expressly stating that said writing
In no way does it imply a payment requirement to customers.8. Therefore, my hand
Dante is limited to communicating in the normal course of its contractual relationship with
its clients, highlighting the breach by its representative of the obligations
tions derived from the contract so that the clients adopt the necessary measures
that it deems appropriate. 9. The CNMC is aware of the sending of these communications
nes, at least as a result of the complaint made by the marketer.
However, said Commission agrees not to process any proceedings against my man-
but to transfer the information to the Directorate of Energy so that it can investigate
monitor the possible violation of sector regulations by the marketer.”
2. On the legality of sending communications as a result of non-compliance
payment of tariffs and the suspension of supply that can lead to
cape I-DE
The Resolution Proposal limits itself to pointing out that, even when it seems to recognize
expressly the existence of an ATR contract between my principal and the consumers
final suppliers, only the acts of communication between the parties of this that
appear expressly included in the law, being prohibited any communication
tion related to the contract itself that is not the object of that express legal reflection.

Indeed, the Proposal focuses its entire argument on considering that,

as indicated on page 43, after citing the acts of communication between the parties to the

contract that are included in the electricity legislation, "between the detailed relationship

exposed, no point is found or written about the sending of informative letters

instructions explaining to the final consumer, among other things, the alleged non-compliance

contractual agreements of the marketing company with the distribution company, such as

is the case that concerns us", later adding that "the sending of informative letters

command to the final consumers of the presumed contractual breaches of

the marketer with the distributor does not fall within the range of communications

necessary and pertinent instructions for the fulfillment of the contract by the entity.

distributorship", given that, it seems, these communications must be carried out

carried out "only and exclusively through a marketer, as this has been constituted

do as consumer agent before the distributor".

In this way, the Proposal seems to consider that even when there is a relationship

contract between the distribution company and the final consumer, no matter how much the trader

The broker signs the ATR contract as agent (with express power, that is, without

act on their own behalf) of the consumer, the development of said relationship only

allows limited communication between the parties, not being possible for them to

are related not even for such an essential aspect in the framework of the relationship with

such as the suspension of the provision of one of the parties as a consequence

consequence of the breach of contract attributable to the other, even if said breach

compliance is committed by its agent, whenever the consumer responds requesting

daily with the marketer of the payment of the rates.

And it is that, in terms of the cause that, ultimately, justifies the referral of the communications

tions that, in the opinion of the AEPD, determines the illegality of the conduct of my client,

The Motion for a Resolution on pages 44 and 45 states the following:

“If we go into the content of the letters sent by the entity claimed to the

final consumers (point 5 of the allegations), we must indicate that the article

52.3 of the LSE, refers to the possible suspension of the supply contract

when it is the final consumer who falls into default and this is established in the aforementioned

article: “3.- (…) the supply of electricity to consumers may be suspended

meters covered by voluntary prices for small consumers or last-minute rates

appeal when at least two months have elapsed since they would have been

reliably required payment without it having been made effective. (…)”

but in the case that concerns us, this does not happen, because, in the absence of evidence to the contrary, the

final consumer if he complies with his obligation to pay the cost of the invoice to the merchant.

dealer and, it seems, it is he who fails to comply with his obligation to the distributor.

pain:”

Apart from the confusing wording of the reproduced paragraph, it causes at least per-

complexity to my client the fact that the Motion for a Resolution omits, in the re-

production of article 52.3 of Law 24/2013, of December 26, of the Electricity Sector

co (hereinafter, “LSE”) the reference made expressly in its first paragraph, se-

according to which the possibility of suspension of the supply will take place “[w]ithout prejudice to

what is established in the fourth section of this article, under the conditions

glamentarily determined”.

And said omission is essential in the present case, since article 4.4 of the

Royal Decree 1164/2001, of October 26, establishing access rates

to the electricity transmission and distribution networks (hereinafter, “RD

1164/2001”), which is the one that determines the conditions referred to in the aforementioned article.

ass 53.2, set the following:

“The distribution company may suspend the access rate contract when it has

At least two months have elapsed since he had irrefutably requested the

payment to the consumer or his representative, in accordance with the scope of application of the

access raffles established in article 1, section 1, of this Royal Decree, without

that it had become effective. For these purposes, the requirement is practiced

It will be sent, to the address that appears in the contract for communication purposes.

access fee, by any means that allows proof of receipt

tion by the interested party, as well as the date, identity and content thereof, being

the distribution company obliged to keep in its possession the accreditation of the notification

cation made. In the event of rejection of the notification, the

circumstances of the notification attempt and the procedure will be considered completed. Bliss

The communication must include the process of disconnecting the consumer from the networks of

distribution due to non-payment, specifying the date from which the disbursement will take place.

connection, if the amounts owed are not paid on an earlier date.”

That is to say, article 4.4 of RD 1164/2001, which is the one that establishes the conditions in

that the electricity supply may be suspended as a result of the

non-payment of ATR contract fees, does not limit my client's communications

with the client, but only, the possibility of requesting from the client directly the

payment of the fee (despite their status as debtor and the joint and several liability

proclaimed in the same normative body). And indeed, my principal in no mo-

The moment has required the consumer to pay said fee, which, on the other hand, has already

has satisfied the marketer, but is limited to making it clear that this

marketer has not proceeded to pay the fee, previously paid by him, and

that this may entail for that consumer the consequence, which obviously

It directly harms the suspension of the electricity supply.

Because the consequence of the trading company not paying the amount

of said rates to the distributor, regardless of its condition as agent of the

consumer at the signing of the contract, will be the suspension of the electricity supply to said

consumer. For this purpose, it is irrelevant for the application of article 52.3 of the

LSE whether or not the consumer has paid said fees to the marketer, given

that the consequence in one or another case will be the aforementioned suspension, no matter how

the AEPD pretends through the resolution that could fall in the present procedure

ment to alter the effect derived from that non-payment.

And from this indisputable conclusion, what is it that in case of neglect of the re-

demand by the marketer, the supply may be suspended

electricity to the final consumer, my principal understands that it is necessary for the

careful maintenance and development of the contract that it maintains with its client, the

final consumer, warn him of said suspension so that he can at least have co-

advance knowledge of a suspension of supply that I-DE may, in accordance with

comply with the provisions of the legislation, carry out once two months have elapsed since the

making the request to the consumer or to the marketer.

In this sense, it is necessary to show that this behavior has occurred in all

case in relation to the Claimant, Watium, S.L., to the point that my client

as expressly communicated to WATIUM in a burofax with a certificate of

content of November 2, 2018 (which appears on folios 49 to 52 and is reproduced

again on folios 87 to 89 of the administrative file), has been forced,

only in the period between the months of January and October 2018, to re-

require Watium, in accordance with the aforementioned article 4.4 of RD 1164/2001, to pay the fees

of access on FOUR HUNDRED AND TWENTY-NINE (429) occasions. each of those

429 requirements refer to remittances of unpaid bills from many mi-

of customers, in respect of whose supply contracts the procedure for

supply suspension.

Finally, in the 2018 financial year, my client had to irrefutably request

the mercantile Watium on FIVE HUNDRED AND THIRTY-SIX (536) occasions, in the fiscal year

2019 on FIVE HUNDRED AND THIRTEEN OCCASIONS (513) and so far this year

2020 on ONE HUNDRED TWELVE (112) occasions, having initiated the suspension procedure

supply pension for tens of thousands of electricity supply contracts.

Well, the AEPD understands that this communication cannot take place, even when

where there is a contractual relationship between I-DE and the consumer, since it does not appear expressly

mind collected in any norm. In other words, according to the AEPD reasons, my principal did not

it cannot only inform the consumer of the suspension of the electricity supply due to im-

payment of the ATR fees, but is obliged not to inform you, owing in all

proceed to suspend the supply without prior notice to the consumer, as another

thing supposes a violation of the personal data protection regulations. The

consumer must thus see their supply suspended without prior notice and even having

diligently satisfied its obligations derived from the ATR contract, given that in

If said warning were carried out, the AEPD would deploy against the distributor

all its coercive powers.

In this sense, it is clear that the claim that gave rise to the claim

present procedure does not come from any of I-DE's clients, who are the holders

rights of the fundamental right to the protection of your personal data, but Wa-

tium, and we also understand that this is not based on a will of said merchant

to protect the rights of the interested parties, but solely and exclusively to prevent

my principal adopts the measures that may reveal the illegality of his pro-

good conduct. In other words, in this context, one might ask whether, in view of the facts

concurrent, it is not strange to the AEPD that no I-DE client considers

violated his right, not having formulated before the same not a single claim-

tion by them and that, however, the claims are only filed by

part of those who put at risk the proper development of supply contracts

other of their clients.

In the opinion of my principal, the conclusions contained in the Motion for a Resolution do not

they can but be considered, at best, contrary to logic and sense.

common sense, since contrary to them is not being able to warn the consumer of

electrical energy from a possible interruption of supply.

Moreover, following the reasoning contained in the Motion for a Resolution, we arrive at-

I would come to the conclusion, in the opinion of my principal, completely irrational, that the con-

consumers who have the status of natural persons would see their position harmed

in the ATR contract, since I-DE could warn of the possible suspension of the

supply to its customers who are legal entities, given that in this case it would not be applicable

tion of the personal data protection regulations, but such a possibility would be prohibited

in relation to its natural person clients under penalty, in the opinion of the AEPD, of violating

said regulation.

Such an obvious conclusion could not but lead to the filing of this proceeding.

because, as indicated by the General Advocate of the Court of Justice

of the European Union, Mr. Michael Bobek, in §99 of his conclusions referring to the

Case C-13/16 (Rīgas satiksme case), filed on January 26, 2017:

"In short, common sense is not a source of law, but, of course,

It should serve as a guide for its interpretation. It would be most unfortunate if the

protection of personal data will be degraded in the obstruction of personal data

them."

In the present case, said conclusion could not be more evident, since the

protection of the personal data of the consumer, to which the Pro-

Resolution implementation leads in practice to an obstruction of these that can

lead to a suspension, at all surprises for the consumer, of the

electricity supply, with the significant damages, losses and other consequences that

from it be derived for the consumer. To this must also be added the fact that

Not a single client of I-DE has considered my client's conduct to be violent in

in any way their right to the protection of personal data and that, paradoxically,

the application of the norm would imply a more favorable treatment to the clients who have the

condition of legal persons, as these are not holders of the fundamental right.

In short, there is a contractual relationship between my principal and the consumers

recipients of the letters sent in which a situation may arise that obtains

is obviously detrimental to them as a result of a breach made

by its representative, so that the normal and adequate development of the contracted relationship

current justifies my client making all the necessary efforts to implement

knowledge of the principal the breaches made by the agent to avoid

take the consequences that will only harm the consumer.

3. Regarding the intervention of the CNMC in this case

The Resolution Proposal considers that the statement contained in the allegations

of my principal to the Initiation Agreement, according to which it was indicated that the Commission

National Markets and Competition (hereinafter, "CNMC" or "the Commission")

was aware of the letters sent by it to consumers is contradictory.

expressly stated by the aforementioned Commission, summarily concluding that:

“It follows therefore that the distributor did NOT send the CNMC any letter to

their prior review, sending the informative letters to final consumers without "the

review” of the CNMC, and, therefore, being totally impossible, “(…) to ratify the legality

of the conduct of my client (...)” by the CNMC, as stated by the entity.

ity claimed.”

However, it suffices to compare the content of the response provided by the CNMC to

that AEPD to verify that the statement contained in the Resolution Proposal

does not match the reality of the facts.

Thus, in the first place, as already indicated in the arguments of my client to the Agreement

of Initiation, the CNMC indicates with absolute clarity that it has full knowledge of the

letters referred to in the request for information, despite the fact that the AEPD does not refer to

that one copy any of them even when they were in the administrative file

tive. Thus, in the third paragraph of the CNMC's response, it is literally stated:

“Although the request received from the Spanish Data Protection Agency did not

attached sample of the informative letter referred to, according to the data

that are provided, it can be considered that it is a certain letter that would be put into

knowledge of the existence of non-payment of network access tolls."

In other words, although the AEPD does not provide a copy of the letter, its content was amply

known by the CNMC. And it is that, as was also noted in the pleadings,

tions to the Initiation Agreement, my principal informed the CNMC of the mo-

of the letter that he had prepared for these assumptions. Doesn't seem too hard

understand that my client is not going to request authorization to send the letters

every time a situation like the one we are dealing with occurs, because that would mean so-

such as making it impossible for the CNMC to exercise any other action other than auto-

curl this type of cards.

It should be remembered that, as already indicated, only in the case of the company WA-

TIUM, my client has had to carry out since the year 2018 ONE THOUSAND HUNDRED SIX-

SIXTY-TWO (1162) irrefutable payment requirements for the same number of in-

compliance with the obligation to pay access fees in. In this way, if

the reasoning of the AEPD is followed, my client should have requested the

CNMC on 1162 occasions the authorization for sending the letters to the merchant

Wattum.

The CNMC replied that what it did not know was the specific letter sent to customers

of Watium, but that, however, he did know that these letters were sent to the

I-DE customers whose marketing company did not pay the access fees after

having completed the voluntary payment period and after having been irrefutably required-

mind for this purpose, as expressly provided by the applicable legislation, in order to avoid that the supply was suspended without the knowledge of the contract holder, nor could der to have it, that his access contract was in default.

What is more, formulated by Watium complaint against my principal on the occasion of the letter to its clients, as expressly stated in the response offered by the CNMC (folio 132 of the administrative file), the aforementioned Commission not only considered sending of the same perfectly lawful and in accordance with the sectoral regulations, compared to what now seems to consider the AEPD, but also specifically agreed to give “trans- side of the information to the Directorate of Energy […] for different purposes (assess- tion of the possible breach by the marketer Watium, S.L. of the nor- applicable in terms of payment of the toll for access to the network).

In conclusion: the CNMC was not only fully aware of the existence of the letters, but, when he became aware of them (years before that AEPD and with reason for a complaint like the one we are now dealing with), his decision was, as appears in the administrative file, analyze the possible initiation of a file sanction against the company Watium for non-compliance with its legal obligations laws and regulations and in defense, among others, of the rights of customers affected ted.

4. On the legal basis of the treatment in the present case.

It has already been amply analyzed in section 2 of this allegation that my mandate proceeded to the treatment of the personal data of its clients for the sending of the mentioned letters, as said shipment is necessary for the normal development of the contractual relationship that binds both parties, since it can only be considered It is, according to all logic, necessary to warn customers of the suspension of the supply. supply as a result of non-payment of the ATR fees instead of proceeding to suspend it without notice.

However, for the denied assumption that this AEPD, against the criterion supported

even by the energy regulator, the CNMC, considers that the legal basis of the treaty

ment cannot be considered the proper development of the contractual relationship, otherwise

There is no doubt that the communication to I-DE's clients that said sus-

pension is going to take place will result, at least, in their interest, which may

adopt the measures they deem appropriate to avoid said suspension. of this

way, it would be applicable to the assumption, at least, and although the

legal basis of the contractual relationship, the rule of prevailing legitimate interest established

Based on article 6.1 f) of the RGPD.

It should be remembered that the first paragraph of recital 47 of the RGPD states that:

“The legitimate interest of a data controller, including that of a data controller

that personal data, or that of a third party, may be communicated may constitute a

legal basis for the treatment, provided that the interests or rights do not prevail.

rights and freedoms of the data subject, taking into account the reasonable expectations of

interested parties based on their relationship with the person in charge. Such legitimate interest could

occur, for example, when there is a relevant and appropriate relationship between the interest

party and the person in charge, such as in situations in which the interested party is a client or is

at the service of the person in charge.”

Note that the GDPR considers that the prevalence of legitimate interest can be seen

reinforced in cases such as the one analyzed, given that the information provided to the interested

sado would refer to the suspension of the contract entered into by him with my boss.

tea. That is to say, not only would there be a legitimate interest of I-DE to put this circumstance in

knowledge of their clients, but even a legitimate interest of the same in not seeing

supply was suspended, moreover, when said customers would have

made the payment of the amount corresponding to said access toll to the networks of

distribution. And it should be emphasized that the aforementioned suspension may take place regardless of

dependency of the person who has materially signed the ATR contract, as

expressly follows from article 4.4 of RD 1164/2001, which develops the provisions

to in article 52.3 of the LSE and to which it literally refers.

Even though the two legitimating bases referred to with

previously could be considered, compared to what was indicated by my client, insufficient

for the purposes of enabling and legitimizing the processing of personal data to which

refers to this file, it should finally be remembered that the origin of the mentions

mentioned letters is found in the fact that the trading companies do not

have paid I-DE the amount of the ATR rates, that is, of the so-called pe-

heh

At this point, it should be remembered that the payment to I-DE of the aforementioned fees does not exceed

puts an income for it, but its mere collection as system income

electricity, we reiterate not yours, leaving said funds for the maintenance and

maintenance of said system in the terms established in the electricity legislation.

In this sense, article 13.1 of the LSE provides that:

“The actions of the Public Administrations and other subjects included in

The scope of application of this law will be subject to the principle of economic sustainability.

mica and financial of the electrical system. It will be understood by economic and financial sustainability

of the electrical system the ability to meet all the costs of

this, in accordance with the provisions of this law and its implementing regulations.”

And article 13.2 a) expressly establishes that “[t]he costs of the system will be financed

ciated through income from the electricity system, which will include […] [t]he tolls

of access to transport and distribution networks satisfied by consumers and

producers and agents for energy exports to non-community countries

rivers, destined to cover the remuneration of transport and distribution".

In turn, as provided in article 18 of the LSE:

Article 18. Collection and settlement of tolls, charges, prices and regular remuneration.

you give.

"The tolls for access to the transmission and distribution networks and the prices or charges

by other regulated services for the supply of electricity will be re-

collected by the distribution companies and, where appropriate, by the system operator,

must give the amounts entered the application that proceeds in accordance with the

general liquidation procedure provided for in this law and in its regulations

developmental. For these purposes, income from tolls or charges will be those that would have

should be billed by application of the regulations that establish them, regardless of

evidence of its effective invoicing and collection by the obligated subjects to its re-

surety."

Legal collection obligation reiterated in article 40.1. j) of the LSE when pointing out

Next:

"Article 40. Obligations and rights of the distribution companies. 1. Distributors

Operators, as owners of the distribution networks, will have the following obligations:

"j) Apply, invoice and collect tolls for access to transportation and distribution networks.

marketers or consumers, as appropriate and, where appropriate, provide

drivers connected to their networks by breaking down the billing to the user in

the manner determined by regulation.

And finally, article 14.1 establishes the following:

“Activities aimed at supplying electricity will be remunerated in the

in the manner provided in this law charged to the income of the electricity system defined

nested in article 13, to those derived from participation in the product market

tion, as well as the income from the application of the provisions of the pre-

present law and its implementing regulations. Income from the electricity system will be allocated

appointed to pay exclusively the remuneration of the activities destined to the

electricity supply and the rest of the system costs defined in article 13, without

that can be used for other purposes.

Therefore, the collection of access fees is a legal obligation that is imposed

nees the distribution companies as a way to obtain the necessary income to

defray the costs of the electricity system and thus allow users to

of the electricity supply can have access to this service of general economic interest.

general.

And to such an extent the collection of these access fees is so transcendental to

effects described, which is imposed on distribution companies not only the obligation

to collect them but also to enter into the electrical system the tariffs of

access that they charge, regardless of whether or not they charge them from those obliged to

payment, ultimately, the holders of electricity supply contracts. By

For this reason, the non-payment of the access tariffs causes a patrimonial damage in the company

distributor, which has to enter the billed rates, even if they are not paid.

To offset the transfer of business risk from a tax collection activity

legally placed on someone who is not the beneficiary of the amounts collected, the LSE and

its implementing regulations establish:

a) In the event that the customer has contracted the supply through the company

marketer (which acts against the distribution company as agent of the

client, case that concerns us), the obligation to pay the access fees under the

solidarity by the holder of the contract and the marketing company, to whom

indistinctly, the distribution company can request and demand payment, solidarity

that can only be broken by the holder of the supply contract after accreditation of this

be up to date with payments with the trading company Arts. 40.2. j), 44.2.b) and 46

1.d) of the LSE and 4.2. of Royal Decree 1164/2001.

b) The possibility of suspending the electricity supply in the event of non-payment of tariffs

of access (regardless of whether the payment of these by the holder has been accredited).

end of the contract to the trading companies). Arts. 52 of the LSE and 4.4 of the RD

1164/2001.

c) Classification of non-compliance with the obligation to pay access fees

by the trading company as a very serious, serious or minor infraction according to

amount of non-payment (in this very serious case), which may also give rise to the

Disqualification of the marketing company for the exercise of the activity Arts. 47,

64.4., 65.3 and 66.1 of the LSE.

For the reasons stated, the collection of access fees, insofar as it has

for the purpose of obtaining the amounts of said rates for their contribution to the maintenance

maintenance and proper functioning of the electrical system, is directly related

with the fulfillment of a mission of public interest, which is also imposed on the distribution companies by legal mandate, which would even allow substantiating the treatment in the provisions of article 6.1 e) of the RGPD.

In conclusion, according to what is indicated in this document, there is no doubt that I-DE is fully entitled to process the data for the purpose to carry out the aforementioned communications to its clients as a consequence of the development of the contractual relationship maintained with them. But even in the denied assumption that said legal basis was discarded again by the AEPD, the treatment would also be based on the legitimate interest of the con- electricity consumers to maintain the contracted electricity supply and in the public interest derived from the fact that the income from the payment of the ATR rates is nothing but an act of collection of said income for its contribution to the maintenance of the electric system. And ultimately, the legitimate interest of the distribution company, legally obliged to carry out this collection activity and to bear the risks of non-payment, in recovering amounts that it has been forced to enter for the electrical system despite not having charged them.

Being sufficient the concurrence of a legitimizing base to determine the conformity legality of a treatment, it turns out that, in the present case, there are ele- sufficient data to be able to assess the fit of the treatment carried out by my man- Dating in four of the legal bases established in article 6.1 of the RGPD, therefore It is certainly surprising that the Waiver complaint has not been shelved. tyum.

THIRD.- ON THE SETTING OF THE AMOUNT OF THE PENALTY IN THE AGREEMENT-DO START

My principal has already made it clear in the first of his allegations to the Agreement of Start of this sanctioning file that it incurred a substantive vice

of nullity, having been established by the sanctioning body in audita parte the im-

size of the sanction that was to be imposed on I-DE. This breaks the guarantees.

of the sanctioning process and the right of my principal to allege what is his right

proceeded prior to said determination, with the consequent causation to

the same of a blatant helplessness.

In the same way, the evident confusion between the phases of

construction and resolution, when the sanctioning body anticipates the amount of the sanction that

would proceed to impose on my client. Something that in the present procedure has been

clearly shown, when looking at the Resolution Proposal by the organ-

Instructor won an amount identical to the one already proposed to establish by the sanctioning body.

nator in the Home Agreement.

The Resolution Proposal is limited to indicating that what is alleged by my client is not

can be taken for granted. However, and even when, as anticipated, it is practical

indecipherable to know for sure what are the arguments in which the

Proposal bases such affirmation, my client understands it is necessary to carry out certain

given considerations, delving into what was already indicated in its allegations to the Agreement

Of start:

1. In the first place, contrary to what the Motion for a Resolution seems to intend

tion, neither article 64 nor article 85 of the LPACAP establish that in the Agreement of

Start, the specific amount of the sanction that proceeds must be expressly determined.

to impose on the interested party, as seems to be deduced from the Motion for a Resolution

tion, that the defendant can make use of the benefit of the reduction of the amount of

the sanction for his acknowledgment of guilt or prompt payment.

And it is that, contrary to what this part intends to point out in the Proposal

Resolution, the provisions of article 64.2 of the LPACAP do not imply any inno-

vation of the legal system with respect to the norms that had been governing

prior to the entry into force of the sanctioning administrative procedure and, in particular,

cular, the sanctioning procedure included in the data protection regulations

personal.

Indeed, this part fails to find the novel aspect of the aforementioned provision

law regarding the sanctioning regime contained in Law 30/1992, of June 26, the

Regulation of the Procedure for the Exercise of the Sanctioning Power, approved

by Royal Decree 1398/1993, of August 4 (hereinafter, "REPEPOS") and the Regula-

development of Organic Law 15/1999, of December 13, on the Protection of

personal data, approved Royal Decree 1720/2007, of December 21 (in

hereinafter, "RLOPD"), under whose validity the AEPD did not establish the aforementioned amount

in their startup agreements.

In all these regulations it was indicated that the Agreement to Initiate the sanctioning procedure

nator had to incorporate “the sanctions that may correspond, without prejudice to

whatever results from the instruction. This was stated in article 13.1 b) of the REPEPOS and

it was reiterated by article 127.1 b) of the RLOPD. However, the AEPD considered

that this did not mean more than indicating the maximum and minimum limits of the sanction that

would proceed to impose in case of appreciating the effective commission of the infraction

mentioned in the agreement without carrying out in the Start Agreement any assessment of

the concurrent circumstances in the case or the mitigating or aggravating circumstances that

should be taken into consideration to determine the final amount of the sanction to

to impose.

The difference between the action just mentioned and the one carried out

carried out in the present procedure is evident, given that in the first case the action

situation of the sanctioning body when agreeing to start the file did not imply the realization

tion on your part of evaluative activity any of the concurrent circumstances

in the specific case nor did it anticipate to the investigating body what was, in its opinion, the way

that he should act in setting the amount of the penalty within the limits

legally established, which was limited to remembering by a direct application and without va-

any waiver of the regulatory norm of the sanction.

However, in the present procedure, without having modified one iota, we must

We reiterate it, the regulatory regime of the procedure, the sanctioning body is not li-

limited to remembering what the applicable sanctioning rule is, but rather it effectively assesses

you, without paying attention at any time to what the defendant could invoke, what concrete

sanction, within the limits established by the norm, should be imposed. That is, the

objectivity of the sanctioning body at the time of initiating the procedure is

called into question for his assessment, in audita parte, of the facts and circumstances and

more necessarily influences the performance of the examining body, given that it tends to

will have to send to that a resolution proposal that adjusts to that predetermined criterion.

do.

2. Secondly, reference must be made to what, despite its more than confusing

wording seems to want to indicate the Motion for a Resolution when on pages 41

and 42 thereof states the following:

“It is therefore not true, as the respondent entity affirms, that article 85 establishes

ca: “(…) To this end, it should be remembered that, according to article 85, the amount of the sanction

pecuniary may be determined "started the sanctioning procedure (...)" because the litigator

of said article refers to the acknowledgment of the responsibility of the offender and

not to the decision of the amount of the sanction since it is literally established that: “1.-

Once a sanctioning procedure has been initiated, if the offender acknowledges his responsibility,

may resolve the procedure with the imposition of the appropriate sanction” and thus,

must interpret, that is, according to the proper meaning of the words, and not the discretion of

the part. (…)

Regarding the statement made by the respondent entity when indicating that, “in the present

case, said amount is set in the very act of initiating said procedure and is not

when this is already "started", it could not be considered true, because in the

“agreement” to initiate the case, it is expressly stated that, “for the purposes of

seen in art. 64.2 b) of the LPACAP, the corresponding sanction would be

a fine of 200,000 euros (two hundred thousand euros), without prejudice to what results from the

instruction","

Despite the less complex wording reproduced, this part intuits that

wants to refute by the same what has already been alleged by my client in the sense of remembering

that article 85.1 of the LPACAP provides that “[i]nitiated a sanctioning procedure

dor, if the offender acknowledges his responsibility, the procedure may be resolved with

the imposition of the appropriate sanction” (emphasis ours) and that the first in-

section of article 85.3 of the LPACAP adds that “[i]n both cases, when the sanction

has a pecuniary nature only, the competent body to resolve the procedure

The procedure will apply reductions of at least 20% on the amount of the pro-

set, these being cumulative with each other” (emphasis is ours)

As can be seen, from the literal nature of the precept to which Pro-

Resolution does not follow, as it seems to indicate, that the profits

seen in it require the quantification of the sanction in the Initiation Agreement, for

how much:

 First, article 85.1 of the LPACAP does not require that prior determination,

given that it does not refer to a pre-established sanction, but to the imposition of the sanction

tion that proceeds. That is to say, the norm, which in any case is applicable “once the process has started

proceeding”, foresees the possible acknowledgment of responsibility that may be determined by the

imposition of the “proper” sanction, so that this fixation seems to be foreseen with

after acknowledgment of responsibility.

 Secondly, article 85.3 provides that the reductions must be adopted based on

about the “proposed” sanction, which requires that it has actually been determined in the

procedure what that amount is, and the diction of the precept itself seems effectively-

refer to the proposed resolution as the ideal place for the determination

tion of the aforementioned amount.

 In any case, as has already been indicated, the application of the precept, which supposes a

benefit for the accused cannot in any case imply a bankruptcy of their rights.

rights under the excuse of granting the aforementioned benefit.

In short, the fact that admission of guilt can be

produce “once the procedure has started” (something that is obvious, given that the

defendant cannot have prior knowledge of the existence of the defendant

tion) in no way implies that the Home Agreement is the place where you should determine

undermining the amount of the specific sanction “that is appropriate” to impose, even though that sanction should be determined at a later time, that article 85.3 seems assimilate to the proposed resolution, since the sanctioning body could not, in accordance with the principles of the sanctioning administrative procedure “propose” that sanction, as such power corresponds to the examining body.

And this conclusion is not contradicted by the fact that it is the initial agreement place where, in accordance with the final paragraph of article 85.3 of the LPACAP, manifest to the defendant the discounts that in his case would proceed to impose in case acknowledgment of responsibility and advance payment of the penalty, whenever that both are benefits granted to the same person who must know from the moment from the beginning of the procedure, even when the sanction cannot be found when notified, as said defendant could not be heard in the processing of the file, that has not started.

It only remains to reiterate here that the actual processing of this proceeding ment does nothing but show the effects that the decision adopted by the body sanctioning has produced in the performance of the examining body, which mimetically reproduces in its Resolution Proposal what was argued by the sanctioning body in its Initiation Agreement both in the quantification of the sanction and in the enumeration tion of the concurrent circumstances in this case.

3. Thirdly, the Resolution Proposal, again in terms that in the opinion of this part are, respectfully, completely confused, it seems to give tend that the fixing of the amount of the sanction in the Initiation Agreement is clearly adequate, since my principal has had the opportunity to express himself on the concurrent circumstances in the case both before and after at the initiation of the sanctioning procedure.

Thus, in relation to the activity prior to the aforementioned Agreement, the Proposal for Re-

solution (emphasis added):

“Regarding the statement made by the entity complained of: “IDE has not had occasion to

no time to reveal before the aforementioned body what could be the

circumstances that could be applicable in the present case”, it must be remembered

that, on 05/23/19, this Agency notified the entity claimed,

the complaint filed by the claimant entity, in the reference file

E/3624/2020, requiring the entity, then called IBERDROLA

DISTRIBUCIÓN ELÉCTRICA, S.A.U., to proceed with its analysis, respond and

submitted to this Agency, within a month from its notification,

all the information deemed appropriate for this purpose. Information that the entity re-

claimed filed on 06/24/19, one day after the deadline granted for this purpose, through

through the electronic registry of the General State Administration”

The aforementioned transfer, under the heading "transfer of claim and request for information",

was carried out, as indicated in the document itself (folio 69 of the administrative file).

vo) “[i]n accordance with article 65.4 of Organic Law 3/2018, of December 5,

bre, Protection of Personal Data and guarantee of digital rights” (in addition,

before, “LOPDGDD”), which refers to article 37.2 of the regulation itself in which it is established.

establish the following:

“When the affected party files a claim with the Spanish Agency for Protection

tion of Data or, where appropriate, before the regional data protection authorities,

those may send the claim to the data protection delegate so that

He responds within a month. If after this period the delegate of pro-

data protection had not communicated to the competent data protection authority

If the response given to the claim is confirmed, said authority will continue the procedure

in accordance with the provisions of Title VIII of this organic law and its rules of

developing."

From the provisions of said rule, it is unequivocally inferred that the transfer carried out

firstly, it has a completely optional character, being carried out in

any case prior to the processing of the procedure and without its purpose being,

on the other hand, the making of any allegation as to the changed circumstances

of the responsibility of the entity to which it is addressed, given that such responsibility

liability has in no way been determined by opening the procedure

sanctioning

Regarding the fact, invoked later in the Motion for a Resolution, that

my principal has had the opportunity to refute what was stated in the Initiation Agreement, by doing

be granted to it a term for the issuance of allegations, which effectively

performed at the appropriate procedural moment, such a circumstance in an al-

no one can remedy the helplessness caused to it as a result of va-

assessment carried out in audit part of the concurrent circumstances in the event or

supposes an enervation of the vice consisting in the confusion of the phases of instruction.

tion and resolution and the consequent "contamination" of the first as a consequence

of the content of the initiation agreement.

All this supposes a breach of the inspiring principles of sanctioning law

that cannot be corrected by the mere fact that it has been required by

that AEPD to report the facts contained in the claim, not because my

principal holds the right, as it could not be otherwise in accordance with the provisions

cided in article 53.1 e) of the LPACAP, to formulate allegations.

For all these reasons, my client considers that by determining the amount of

sanction and determination of aggravating and mitigating circumstances in the Agreement of

Home, their right to defense has been violated, with the consequent cause of indepen-

offense, proscribed by article 24 of the Constitution, also breaking the

principle of impartiality of the sanctioning body. All this must necessarily derive

mind in the nullity of full right of the present procedure.

FOURTH.- APPLICATION IN THE PRESENT CASE OF THE PRINCIPLE OF PROPORTION

TIONALITY AND THE MODIFYING CIRCUMSTANCES OF THE LIABILITY

DAD CONCURRENT IN THE SAME

Although reference has already been made to the absolute lack of motivation for the Proposal for

Resolution, in which hardly any different or additional arguments are offered to the con-

had in the Start Agreement compared to what was stated by my representative in his

allegations to it, this lack is evidenced even more clearly when

the Proposal appears to clarify what my client indicated in relation to the circumstances

concurrent circumstances in this case. Indeed, the Proposal for a Resolution repro-

duces at this point in an almost mimetic way what is stated in the Start Agreement without

carry out a minimum exercise of analysis of what is alleged by this party.

This would justify a mere reference to said arguments, with the legitimate expectation

that they are effectively analyzed by the Control Authority. No ob-

However, in order to facilitate this task, reference will be made again, albeit summarized, in

this writing, to the reasons why my principal understands that he does not concur in this

case not a single one of the aggravating circumstances that the AEPD mentions in the Proposal:

1. Regarding the volume of letters sent, the AEPD seems to continue without assessing

really if they refer to natural or legal persons, because it does not seem to

In another sense, the reference to the total number of letters sent to the clients of Wa-

tium, even when it is recognized that in reality it would only be referring to

reference to just over half of those included in the Start Agreement.

However, this circumstance seems irrelevant for the AEPD, given that the reduction

Changing the number of cards from 2,598 to 1,462 has no effect on the determination.

degree to which the conduct would be aggravated, since the sanction is still

being the same as the one included in the Start Agreement.

For this, the AEPD seems to hide behind the fact that "in addition, the other claimant entity,

ENERGÍA Y SERVICIOS ABY 2018, SL., denounces that all its clients have received

the informative letters of the claimant entity". However, nowhere

refers to what the aforementioned total amount can be or if said clients are personal

physical or legal entities, with the AEPD being responsible for proving

how many shipments could have taken place, which doesn't seem to have taken place given

that nowhere in the Motion for a Resolution, other than in the fourth of the foregoing

assignors of the same and in its sixth fact, reference is made to these shipments, which without

However, they are taken into account to aggravate the sanctioning reproach against my principal.

In this sense, it is important to bear in mind that neither the inspection actions carried out

(folios 187 to 189 of the administrative file), nor the request for information to

the CNMC nor any of the reasoning of the Initiation Agreement or the Proposal for Re-

solution make any mention of Energía y Servicios ABY, S.L., except for this mention

brief aimed at maintaining the aggravation of my client's conduct without

provide any accreditation related to such shipments.

2. The AEPD affirms that in the present case the facts have been denounced by the

interested parties, noting that "the entity claimed, by making illicit use of the data

of the clients of the marketing entities, this Agency has had

knowledge of the alleged infringement through the representatives of the interested parties

(sic.)".

Although it is difficult to understand the real content of such a statement, given

that the recipients are clients not only of the marketers, as seems to indicate

not only from the AEPD, but also from the distributors, the truth is that not even in their letter of re-

claim nor in the query made at the time to the Legal Office of the AEPD

nor in the complaint made at the time before the CNMC Watium claims to act in

representation of its clients (who are also clients of my client), but only and ex-

exclusively in his own name.

And understand this part that the AEPD cannot take as true or assume in any way

some a representation that not only is not accredited in any case, but that

furthermore he refuses, since Watium always claims to act on his own behalf. By

Therefore, there is no doubt that this entity holds the status of interested party for the purposes

provided for in the data protection regulations, it is completely inadmissible the

application of such an aggravating circumstance.

3. Thirdly, the AEPD says that I-DE acted “knowing that there were different

claims filed and reports issued by different public bodies

rejecting such action, the entity continued to send informative letters to the

final clients, and, therefore, could constitute an illegal act”.

My principal can only reiterate that he does not know what those reports and resolutions are.

tions that she was supposed to know when she carried out the treatment of the

data. Indeed, given that obviously they cannot be the ones that are the object of

of this procedure there are only two possibilities: that the AEPD refers to the decision

complaint filed by Watium with the CNMC or that it is the report requested by

that entity to the Legal Office of the AEPD.

Well, as a first consideration, both the complaint and the request for a report

were after the treatment, so it could hardly be done at

knowing the "resolution" issued or the report issued.

In addition, with respect to the claims made mentioned in the Proposal for

Resolution, it is necessary to show that the complaint made by Watium

before the CNMC (the only one to which reference could be made) was inadmissible through

limits, as stated in the administrative file, beginning on the contrary

an investigation into Watium herself. Therefore, there was no reproach of the

CNMC to the behavior of my principal.

It is true that this reproach is contained in the report of the Legal Office in res-

put to the query raised by Watium, but it is that my client has not had co-

knowledge of said report until the Start Agreement of this procedure

made mention of this. All this, without prejudice to the fact that, as we understand that it must be

given sufficiently accredited, said report lacks an admissible legal basis

in right.

In other words, and paraphrasing what was stated in the Proposal, my principal issued the letters

without knowing that later a claim would be formulated that was inadmissible and

would be issued by that AEPD (not by different bodies) a single report, not communicated

do to I-DE, which rejected such action.

All this without prejudice to the fact that, as was carefully analyzed in the allegations to

the Resolution Proposal and it has been insisted in the present writing, the criterion

done by the Legal Department in the aforementioned report is not only inconsistent

with the personal data protection regulations, but even contravenes the

criteria that in relation to the interpretation of the precepts that it performs

adopted by the National Energy Commission.

In any case, as can be contrasted, what is stated in the Motion for a Resolution

tion and the reality of the case with regard to the intention of my client or

bear the slightest relation.

4. Regarding the categories of data subject to treatment, the Resolution Proposal

mentions, in our opinion in a completely surprising way, that “in this

case, when the claimed entity makes use of the name, surname, address, etc., of

customers illegally, it is clear use of data protected by the RGPD and, therefore,

therefore, subject to aggravation in application of section g) of article 83.2 of the RGPD”.

In the first place, my client only processed the name for sending communications.

name, surname and address of its clients, so it is unknown what the information intends to indicate.

Proposal with the inclusion of the term "etc."

But it is that, in addition to what is literally stated in the Proposal, it can be deduced that

the use of “data protected by the RGPD” necessarily implies the aggravation of the

sanction. Well, if the data is not protected by the RGPD, it is not that it does not proceed.

gives the aggravation of the sanction, is that the conduct would not be subject to the RGPD, as

it is manifest and evident. In this way, what the Proposal indicates, and let us

To say that this causes enormous perplexity to this part is that the use of data per-

personal, subject to the RGPD implies the aggravation of the sanction for application of the art.

Article 83.2 g) of the RGPD, referring to the categories of data affected by the alleged

infringement, since all categories of data are protected by the aforementioned text.

legal act.

5. In relation to the supposed economic benefit, the Resolution Proposal was

mita to reiterate what is indicated in the Start Agreement. Suffice it to add at this point that

As stated in section 4 of the third allegation of this writing, the

income referred to in the Proposal are not owned by I-DE, but are collected

by it for the maintenance and support of the electrical system, in accordance with the

articles 13, 14 and 18 of the LSE, so my principal does not know what benefit was obtained

vo with the sending of the communications.

6. And finally, regarding the link between my client and the execution of treat-

data, the Proposal is limited to indicating the volume of customers and employees

of I-DE to indicate that such a relationship exists.

We must point out first of all that, now, it seems that finally the AEPD,

albeit with the intention of aggravating the sanction imposed, recognizes that consumers

The consumers to whom the communication was directed are, in fact, I-DE clients and

that it maintains a contractual relationship with them.

But having said this, my principal understands that the treatment that is the object of this proceeding

is not an essential part of its activity, which is none other than electricity distribution.

trica in the terms established in the LSE and its implementing regulations.

And it must be reiterated here that in the opinion of my client, the AEPD carries out an interpretation

completely maximalist tation of the aggravating factors established in the RGPD and the

LOPDGDD, every time, as we already said in the allegations to the Initiation Agreement, "se-

According to its criteria, the treatment of any data, even if it is merely identifying,

constitutes, by itself, an aggravating circumstance and, on the other hand, any entity that has as stable clients to natural persons will see their activity linked to the treatment of personal data". Suffice it to add at this point that this conclusion applies likewise to any entity that had employees.

By virtue of all of which,

REQUESTS THE SPANISH DATA PROTECTION AGENCY that, having by presenting this writing, please admit it, consider formulated the allegations to the Resolution Proposal in Procedure PS/00197/2020 and, after the legal procedures legally established, issue a resolution declaring the nullity of full right of the procedure for the reasons described in the Second allegation of this brief or, failing that, on the merits of what is stated in the body of the same, the ar- subject of the aforementioned procedure or, failing that, the imposition of a warning

notice or warning or a significant reduction of the amount established in the Initiation Agreement, in view of the numerous concurrent mitigating circumstances- you in the event of fact prosecuted.

Of the actions carried out in this procedure, of the information and do- documentation presented by the parties, the following facts have been accredited: boys:

PROVEN FACTS

1.- WATIUM, S.L., an electricity trading company, has signed with the energy distribution company, I-DE REDES ELÉCTRICAS INTELIGENTES, S.A.U.

(I-DE), a network access contract (ATR), by means of which it performs functions of agent or substitute of the final customers, as established in articles 3.2 and 3.3 of Royal Decree 1435/2002, of December 27, which regulates the basic conditions of contracts for the purchase of energy and access to low voltage networks.

2.- The entity WATIUM S.L. Provides a copy of the "Network Access Contract" model between the trading company (WATIUM SL.) and the supplying company (I-DE). Said contract includes, among other data, the identification and contact of the client end, the logo of (Iberdrola Distribución Eléctrica, currently I-DE) and the identification of the company WATIUM, S.L.

The contract is signed by, on the one hand, the marketing entity, and on the other, the entity distributor. There is no place for the final consumer's signature. stands out in the text of the contract the following:

“The undersigned acting as agent and substitute of the client for the purposes of the art. 3.2 and 3 of RD 1435/2002 of December 27, contracts with IBERDROLA ELECTRICAL DISTRIBUTION, S.A.U. access to the grid for electricity supply in point of supply outlined, being obliged to keep the documentation that accredits him as agent and substitute of the client and to make it available to the distribution company if it is required, forcing both parties to comply with the Specific, Special and General Conditions included in this policy, all of them in accordance with current legal requirements, signing on the day of the date in duplicate and to a single effect.” In the "Payment Term" section states: "The Client or his representative will pay this company the amounts of the electrical energy supplies within a period of 30 days from the issuance of the invoice."

3.- According to a complaint, in mid-January 2018, WATIUM, S.L. He had

knowledge of the remission, by I-DE, of a series of letters (more than 2500,

according to the complaint), to the clients of WATIUM, S.L. These letters were of character

informative and exposed the contractual breaches committed by WATIUM S.L.

regarding I-DE, and invited them to contact WATIUM S.L.,

to urge it to pay the amount of the contract for access to the distribution network,

also indicating that the lack of payment by WATIUM, SL, to I-DE, could

lead to power outage.

3.- In the letters sent by IBERDROLA (currently I-DE), to WATIUM customers

SL, the following text can be read:

“Dear Consumer: By means of this letter we inform you

that, on February 8, 2018, we were forced to send to your

electricity marketer WATIUM, SL., in accordance with the regulations

in force (art. 4.3 and 4.4 of Royal Decree 7764/2007, of October 26), a

irrefutable request for payment, given that, after the voluntary payment term

established by law, the amount of the invoice for third party access to the

network corresponding to the contract and supply point of which you are the owner, which,

detailed below, is unpaid: (...)

The non-payment of fees for third party access to the network may give rise, in accordance

with current regulations (art. 4.4. of RD 7764/2007, of October 26), to the

suspension of electricity supply.

For all these reasons, we ask you to contact your company urgently.

marketer to correct this situation without in any case this letter

informative supposes a requirement of payment towards you by this company

distributor. Without another particular, carefully".

4.- As indicated by the entity WATIUM S.L., on 01/22/18, it informs, through

of a complaint, the facts before the National Commission of Markets and the

Competition (CNMC) and before this Data Protection Agency, on 02/19/18.

5.- In the legal report issued by this AEPD, dated 07/23/18- N/REF

059338/2018, contains, among others, the following:

"Consequently, without it corresponding to this AEPD to pronounce on these

legal aspects that may emerge from the letter, it could be concluded that the

processing of personal data carried out by the distribution company subject to

the query has violated the data protection regulations both what it does

reference to the legal basis of the treatment as in relation to the principles

relating to treatment. As for the first, the appropriate legal basis for the

treatment of these personal data of consumers would be that which allows

the execution of a contract in which the interested party is a party (art. 6.1. c) RGPD), but

We will have previously stated that the processing of the personal data of the

consumers acting through an agent is not necessary to

fulfillment of said contract, since precisely the existence of the agent

means that communications relating to compliance with the

contract.

On the principles relating to treatment, therefore, it could be concluded that the

processing of said personal data would have been carried out in a manner

incompatible with the specific, explicit and legitimate purposes for which they were

collected (limitation of the purpose), which, as has also been stated, was for

the supply of electrical energy to the supply point for which the contract was contracted

access. This also implies that it could be understood that the provisions of art.

5.1 letter c) GDPR. because or said personal data processed are neither adequate

nor pertinent in relation to the purposes for which they are processed (principle of

data minimization.

6º.- On 01/08/20, the entity ENERGIA Y SERVICIOS ABY 2018, S.L.,

marketer of electricity supplied by IBERDROLA (I-DE),

denounced before this Agency the sending of identical writings, by IBERDROLA (I-

DE), to its customers, informing them of the non-payment by the marketer, and

inviting them to get in touch with it so that it proceeds to correct

of said problem.

7º.- For its part, the entity claimed, at the request of this Agency, reported what

following points:

a) That the access tariffs are charged by the distributors, but are not

own income, but from the national electricity system.

b) That the WATIUM client is the holder of the ATR contract signed with IBER-

DROLA.

c) That the client, as holder of the ATR contract, is obliged to pay

pay the fees for access to the distribution company.

d) That the distribution company sends the access invoices to the commercial company

who passes them on to customers in their supply bills. That

the customer must pay these invoices.

e) That the distribution company cannot demand payment of the direct access toll.

straight to the consumer.

f) That both the client and the marketing company are obliged to

two jointly and severally to the payment of access fees to the distribution company.

g) That the marketing company must pay the distribution company the

access fees, even if those have not been paid by your client.

h) That in the event that the access fees are not paid within the deadlines

established in current regulations, the distribution company can initiate the

supply suspension procedure. (art. 52 LSE, 4.4 RD 1164/2001,

art 85 RD 1955/2000.).

i) That the causes that have motivated the incident are a consequence of the non-compliance

payment by WATIUM in the payment term in each remittance of invoices

of ATR, for which they are forced to reliably require the payment of di-

these tariffs, warning of the start of the procedure for the suspension of supplies.

electric trio.

j) That given that WATIUM collects these access fees from its clients, trans-

certain days have elapsed since the remission of the irrefutable request by

non-payment of the access fees, IBERDROLA sends the holders of the contract

of ATR an informative letter to report the situation since to maintain-

the same, the WATIUM customer who has paid the access fees to the

trading company may suffer the consequences of a suspension

of supply. The purpose of the letter is also that the holder of the ATR contract

carry out the actions it deems appropriate and, where appropriate, accredit the

IBERDROLA, which has already paid these access fees to the trading company

dora, assumption in which the client would avoid having the su-

electrical minister.

k) That the informative letter is essential to protect the rights of the

users and that have been subject to review by the regulatory body, the Commission

National Regulation of Markets and Competition and that comply with the regulations

is valid.

l) That they have been forced to send 1,462 informative letters to date.

m) That the legal basis for the processing of personal data of

WATIUM's clients is: Contractual. The WATIUM customer has subscribed

with IBERDROLA, ATR contract. That the trading company does not have

the condition of party, but of mere representative. Consent of the owner of

the data. That in the ATR contract it gives express authorization of the clients of

WATIUM for the processing of personal data. What is authorized

tion and express manifestation of consent is imposed by the regulations

is valid. Legal. That the processing of data by the company is a legal obligation

sa distributor for contract management. That such management includes the obligation

ment of informing ATR holders of the possibility that

supply is suspended. d. Legitimate interest. That of being able to fulfill

to its legal and regulatory obligations, such as those of informing the holders

ATR officials of the incidents that affect your contract, the management of this and

the collection of access tariffs for the National Electric System.

n) They conclude that the only solution to this dispute is that WATIUM

comply with its obligations since this situation is causing important

You harm your customers, the distributor and the National Electric System.

8.- For its part, the CNMC states, regarding the allegations made by the entity claimed:

a) That IBERDROLA (I-DE) has not addressed the CNMC before sending the clients of WATIUM, S.L. the aforementioned letters.

b) That the CNMC has reported neither favorably nor unfavorably the reality lization of said shipments.

c) That on 01/22/18 the CNMC received a written complaint from WATIUM, SL for the reasons stated above.

d) That, after analyzing the complaint, the CNMC Competition Directorate considered that it could not be concluded that IBERDROLA (I-DE) incurred in fraction of art. 3 of Law 15/2007, of July 3, on the Defense of Competition cia for carrying out acts of unfair competition.

e) That the information was transferred to the Directorate of Energy for the assessment of the possible breach by WATIUM, S.L. of the regulations applicable to the payment of the toll for access to the network.

FOUNDATIONS OF LAW

I- Competition.

The Director of the Spanish Agency is competent to resolve this procedure. Data Protection, in accordance with the provisions of art. 58.2 of the RGPD in the art. 47 of LOPDGDD.

II- Response to the allegations to the Resolution Proposal.

The joint assessment of the documentary evidence in the procedure brings to knowledge of the AEPD, a vision of the denounced action that has been re-

reflected in the facts declared proven above reported. However, about the

allegations presented by the claimed entity, the following must be indicated:

- On the non-existence in the conduct of I-DE of violation of the regulations of

protection of personal data, (first and second points of the allegations)

nes):

The electricity trading companies (the claimant entities) have

have signed with the electricity distribution entity, (the entity claimed),

a network access contract (ATR), by means of which it performs functions of agent-

rio or substitute of the final clients, as marked in articles 3.2 and 3.3 of the Real

Decree 1435/2002, of December 27, which regulates the basic conditions

of contracts for the purchase of energy and access to low-voltage networks. In

said contract, there is the following clause:

“The undersigned, acting as agent and substitute for the client for the purposes of

art. 3.2 and 3.3 of the RD. 1435/2002 of December 27, contracts with IBERDROLA DIS-

ELECTRICAL TRIBUTION, S.A.U. access to the grid for electricity supply in the

point of supply outlined, being obliged to keep the documentation that

accredits as agent and substitute of the client and to make it available to a single

distributor if it is required, forcing both parties to comply with the Conditions

Specific, Special and General conditions included in this policy. All of them

in accordance with current legal requirements, signing on the date of the date

in duplicate and to a single effect.

The signatories of the contract are, on the one hand, the marketing company and on the other

part of the supplier company, the contract administrator and the Head of distribution

zone tion.

In article 3.2 of RD 1435/2002, cited in the contract, it is established, on the finality

nature of the processing of personal data, the following: “2. (…) The supply contract

between the consumer and the marketer, must be formalized in writing. In it you must

include an authorization so that the marketer can act as agent

of the consumer, contracting with the distributor the access rate and transferring to the distributor

buidor the necessary data for the supply. The collection, treatment and transfer of

These data must comply at all times with the provisions established in the regulations.

applicable personal data protection policy”.

Well, according to the principle of "limitation of the purpose", contained in article 5 of the

RGPD, personal data will be treated only and exclusively for purposes determined

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

ble for these purposes.

This principle has two parts, on the one hand, it requires that the data be treated with

one or several specific, explicit and legitimate purposes, that is, the purpose of the

treatment must be clearly defined, in such a way that it allows the interested party

or to the control authorities to know what type of activities are included in it and why

On the other hand, it prohibits that the data collected for certain, explicit and legal purposes

legitimate rights are subsequently processed in a manner incompatible with those purposes.

Therefore, it is not possible to process the data initially collected for any other purpose than

are not compatible with the first. This means that the GDPR does not prevent

Data is processed for purposes other than the one that justified the original treatment.

river, what it prohibits is a treatment for purposes that are not compatible with the initial one.

Article 3.2 of RG 1435/2002 alluded to in the contract signed between the commercial entity

cializadora and the distributing entity establishes that the personal data that the entity

marketer will "transfer" to the "distributor" entity, they will be solely and exclusively

for it to provide the final consumer with electricity supply: "(...) transfer to the

distributor the necessary data for the supply (...)", that is, the necessary data

so that the electricity distribution entity can reach the final point

the electricity supply (identification of the final consumer, address of supply, pos-

contract tenure, etc. This purpose or another compatible with it, are the only ones for the

that the distribution entity can lawfully process personal data

that the merchant has provided to you.

In the case at hand, the letters sent by the distributing entity to consumers

Final midores said verbatim:

"March 13, 2018.- Dear consumer: By means of this letter, it states-

We inform you that, on February 8, 2018, we were forced

to send to your electricity marketer WATIUM, SL., in accordance with the

regulations in force (art. 4.3 and 4.4 of Royal Decree 7764/2007, of October 26), a re-

irrefutable request for payment, given that, after the voluntary payment period required,

statutorily established, the amount of the invoice for third party access to the network

corresponding to the contract and point of supply of which you are the holder and that,

Then, it is detailed, it is unpaid: (....).

The non-payment of fees for third party access to the network may give rise, in accordance

with current regulations (art. 4.4. of Royal Decree 7764/2007, of October 26), to the

suspension of electricity supply. For all these reasons, we ask you to urgently

mind in contact with your marketing company to correct this situation without

that in no case does this informative letter suppose a payment requirement towards

you by this distribution company. Without another particular, sincerely.”

Therefore, it is evident that the processing of personal data carried out by the

distribution company, when sending informative letters of the presumed breaches

contracts of the trading company, to final consumers, in addition to

"beg" them to contact the marketing entity so that it

“proceed to correct the problem”, is not compatible with the stated purpose

in article 3.2 of the R.D. 1435/2002.

Moreover, this irregular data processing carried out by the distribution entity implies

Failure to comply with the provisions of art. 5.1.c) of the RGPD, since the personal data

final treaties for sending the aforementioned letters are neither adequate nor pertinent,

in relation to the purpose and scope for which they were collected (principle of mini-

data mization). What this principle establishes is that personal data must-

They will be, in any case, limited to the purpose for which they were collected. Purpose

established in the terms and conditions agreed in the signed contract.

On the other hand, article 3.3 of the aforementioned Royal Decree 1435/2002, establishes that: “In the

case in which the consumer chooses to contract the energy and access to the networks through

Instead of a marketer acting as a surrogate for the consumer, the marketer

The seller must have sufficient power granted by the consumer in favor of the seller.

cializer. In this case, the marketer's position in the access contract

signed with the distributor will be for all purposes that of the corresponding consumer.

In any case, the distributor will maintain with the final consumer all obligations

tions relating to the access contract and in the event of termination of the contract between the co-

marketer and the consumer, the latter will be the holder of the guarantee deposit, as well as

of any other right associated with the installation, without being enforceable, by

part of the distributor, any update due to the contract renewal".

According to this precept, if the distributor wishes to address the final consumer who has agreed

treated the supply of electricity through a marketer, you can only di-

be governed by it through the marketer, for having been constituted as agent

of the final consumer acting before the distributor as a "substitute for the consumer".

The cited article does not contemplate, therefore, the direct action between the distributor and

the final consumer, since he has appointed a representative for his relationship with

that, not existing in any case, a direct contractual relationship between the distributor

dor and the final consumer but through marketing, whose position in the contract of

access signed with the distributor is, as established in the aforementioned article: "(...) to all

the effects that of the final consumer".

The claimed entity accepts article 4.4 of RD 1164/2001, which establishes

the conditions for suspending the electricity supply, as a result of non-payment

of the tariffs, to be invested with sufficient power to address the final consumer

with a purpose other than that established in article 3.2 of RD 1435/2020, this

is, to send them informative letters with the "request" that they get in touch with

the marketing entity so that it fulfills its contractual obligations.

Well, the cited article establishes the following: "4. The distribution company may

suspend the access fee contract when at least two

months from when he had irrefutably required payment to the consumer or his maintenance

data, in accordance with the scope of application of the access rates established in

Article 1, section 1, of this Royal Decree, without it having been

cho cash. For these purposes, the request will be made by referral, to the di-

address that for communication purposes appears in the access rate contract, for

any means that allows proof of receipt by the interested party, as well

as of the date, identity and content of this, leaving the distribution company

obliged to keep in its possession the accreditation of the notification made. in the su-

notification refusal post, the circumstances of the attempt to

notification and the procedure will be considered completed. Said communication must include the

process of disconnection of the consumer from the distribution networks due to non-payment, precisely

setting the date from which the disconnection will take place, if not paid on fe-

above the amounts owed (...)".

Well, as established in this article, when the distribution company is forced to

to suspend the electricity supply service to the final consumer due to non-payment, it is

when it can be addressed to the final consumer, but only for the purpose of request

payment of the electricity tariff, in accordance with the scope of application established in the

Article 1.1 of the aforementioned Royal Decree. In addition, the requirement will be practiced in the di-

address that for communication purposes appears in the signed contract and in it only

will include: "the process of disconnection of the consumer from the distribution networks by

non-payment, specifying the date from which the disconnection will take place, if not

pay the amounts owed on an earlier date.

Therefore, the aforementioned article limits the communications of the distribution entity with the

end customer for the sole purpose of requiring payment of the fee, when this is the

direct debtor, and as the respondent entity indicates in its pleadings: “in no

At some point, the consumer has been required to pay said fee, which, on the other hand,

he has already satisfied the marketer”, but merely informs him that his co-

marketer has not satisfied the payment of the electricity rate, previously paid by

him in addition to "begging" him to contact the marketing entity

so that it solves the problem of non-payment.

Therefore, the conclusion reached by the respondent entity cannot be taken into account.

consideration because it is not correct to apply this article to take on the power

sufficient for the processing of personal data of final consumers and possibly

order to send them informative letters with the “request” to get in touch with the institution.

marketing entity in order for it to fulfill its contractual obligations with

the distributing entity, without entering to value this Agency the other allegations where

the possible consequences of the trading company not satisfying the

pay its contractual obligations because these valuations are not the responsibility of this

Organism.

3.- Regarding the intervention of the CNMC in the present case, the entity now recognizes

claimed, changing its initial argument that: “The CNMC is aware of the

sending these communications, at least as a result of the complaint

formulated by the marketer (...).”

Well, it must be remembered that, on 06/25/19, the entity claimed affirmed to

this Agency textually that: “These letters have already been subject to review by the

Regulatory body, the National Commission of Markets and Competition and

strictly conform to the aforementioned regulations in force (...)”.

Report requested from the Regulatory Body on the statements made by the

entity claimed, on 02/26/20, the CNMC sent this Agency a report where

These assertions were roundly refuted:

“Regarding this letter, the following must be reported according to the data

in the Directorates of investigation of this Commission: - Iberdrola Distribución

Electrical, S.A.U. it has not been addressed to the CNMC before sending to Watium clients,

SL the cards in question. The CNMC has not reported, neither favorably nor

unfavorably, the realization of such shipments. - On January 22, 2018,

received a complaint from Watium, S.L. at the CNMC. because of the letters

that is (…).

As a conclusion to the report issued by the Competition Directorate of the CNMC, it was

considers that: “(…) it could not be concluded that Iberdrola Distribución Eléctrica, S.A.U.

incurs in infringement of article 3 of Law 15/2007, of July 3, of Defense of the

Competition, for carrying out acts of unfair competition. Attached to

In this regard, communication dated April 19, 2018 sent to the complainant by

of the Competition Directorate. It remains to clarify that, although the communication of 19

mentioned April 2018 alludes at the end to a transfer of the information to the Directorate

of Energy, this occurs for different purposes (assessment of the possible

Non-compliance on the part of the marketer Watium, S.L. of the applicable regulations

regarding the payment of the access toll to the network).

It is striking to see how the claimed entity, in order to justify the processing of the data

personal data of final customers for sending informative letters, "begging them"

also that they contact the marketing entity, excuse themselves

initially in the approval made by the CNMC, indicating to this Agency that the

"letter" conformed to current regulations as it had been endorsed by the Organism Regulator and that after he denied it by denying knowledge of the existence of the letters, the claimed entity will change its argumentation now, with these new allegations, justify that: (...) The CNMC did know that those letters were sent to I-DE clients whose marketing company did not pay access fees after the voluntary payment period has ended and after having been reliably requested for this purpose, as expressly provided by the legislation applicable, in order to prevent the supply from being suspended without the knowledge of the holder of the contract, nor being able to have it, that his access contract was in a situation of non-payment".

It is true, as the entity complained against affirms, that the CNMC was aware of the existence of the letters long after they were sent, but it was not through the distribution entity, if not through the complaint filed by the marketing entity before said Organism.

In short, it is not true that the CNMC knew of the existence of the letters through of the distribution entity: "(…) Iberdrola Distribución Eléctrica, S.A.U. it has not been addressed to the CNMC before sending clients Watium, S.L. the letters that are about (…)". Nor is it true that said Agency reported favorably. Other different thing is that said Organization was aware of the letters sent a long time later, through the complaint filed by the entity marketer before said Body but the fact that later the CNMC decided to inform the Directorate General of Energy of the facts is an issue that this Agency cannot assess, since it falls outside the scope of its competence, so it remains impossible to take into account the repeated allegations presented by the entity claimed in section 3 of the Point 2.

On the legal basis of the treatment in the present case (paragraph 4 of point 2 of

the allegations).

The claimed entity now accepts the legitimate interest established in article 6.1 f)

of the RGPD for sending the letters, without even substantiating the reasons that

lead to it, limiting themselves to indicating that:

"(…) In this way, it would be applicable to the assumption, at least, and although

considers the legal basis of the contractual relationship sufficient, the rule of interest

prevailing legitimate established in article 6.1 f) of the RGPD (...)", not providing

no legal basis to weigh, even minimally, the legality of the

treatment of the data of the final consumers, by sending the letters to

referred to in this proceeding, suffering from an absolute lack of

motivation, since only recital 47 of the RGPD is transcribed at this point

for your defense.

Therefore, if the claimed entity now avails itself of the legitimate interest for the

processing of the personal data of end customers, the rule requires you to carry out

an exercise of weighting between said legitimate interest and the fundamental rights

of those affected. In this sense, the Judgment of the Court of Justice declared

expressly the direct effect of Article 7 f) of Directive 95/46/EC, according to which:

Member States shall provide that the processing of personal data may only be

be made if (...) it is necessary for the satisfaction of the legitimate interest pursued by

the person in charge of the treatment or by the third party or third parties to whom the data is communicated.

data, provided that the interest or fundamental rights and freedoms do not prevail

of the interested party that require protection in accordance with article 1.1 of this

Directive".

Therefore, to determine if the application of the aforementioned provision proceeds, it will be necessary to

apply the weighting rule provided for therein; that is, it would be necessary

Assess whether in the specific case under analysis there will be a legitimate interest

pursued by the data controller (marketing company) or by the

third party or third parties to whom the data is communicated (distribution company), which

prevail over the interest or fundamental rights and freedoms of the data subject

that require protection in accordance with the provisions of article 1 of the RGPD, or if, for

On the contrary, the fundamental rights or interests of the interested parties to whom

refers to the processing of the data must prevail over the interest in which the entity

claimed intends to substantiate the processing of personal data.

In this way, in order to carry out the necessary weighting required, you must

consider whether, taking into account the specific circumstances that occur in the

present course, the interest pursued by the distributing entity by sending the letters

informative and "request" to final consumers, treating their personal data

must prevail over the right to data protection of those affected.

In the present case, from reading the letter sent to final consumers,

It follows that the purpose pursued by the distribution entity is, in the first place,

inform the final consumer of an alleged breach of contract by your entity

marketer with the distributing entity to then "beg" the consumer

end user who contacts the marketer with the ultimate goal of

he pays what is allegedly owed, because otherwise the continuity of the

power supply to your home may be in danger, observing a possible

intimidating background towards the final consumer, although the distributing entity

keep in affirming that said letter is not, at all, a request for payment to the

final consumer because he recognizes that he complies with his obligation to pay the

billing of electricity consumption to the marketing entity.

Therefore, it is evident that the ultimate interest, which moves the distribution entity to

sending the letters to the final consumers is that the marketer pays them what

owed, even though, from reading the letter, final consumers can

feel "pressured" to contact the marketing entity, under the

"threat" to suspend their electricity supply if the marketing entity does not

pay what is owed.

Therefore, it is not possible to consider the processing of personal data as legitimate interest.

personal data of final consumers by the distributing entity for

send them informative letters of the breaches of the marketing entity and

"begging" them to get in touch with it so that it corrects the problem, since

In this case, the rights and freedoms must undoubtedly prevail.

fundamentals of the interested party.

However, it is entirely correct that the distribution company has the right to

“recover some amounts that it has been forced to enter for the electrical system

despite not having collected them”, by the legal means it deems appropriate, but

should not confuse, the claimed entity, this right with the alleged "interest

legitimate” to which it accepts for the illicit treatment of the personal data of the

final consumers

- Regarding the setting of the amount of the sanction in the initial agreement, (point three-

ro of the allegations).

Indicate, once again, that Law 39/2015, of October 1, on the Procedure

Common Administrative of Public Administrations, (LPACAP), establishes, in its

article 53.2:

In addition to the rights provided for in the previous section, in the case of

administrative procedures of a punitive nature, the alleged

Those responsible shall have the following rights: a) To be notified of the facts that

imputed to him, of the infractions that such facts may constitute and of the

sanctions that, if applicable, could be imposed on them (...)".

For its part, article 64 of the aforementioned LPACAP establishes, with respect to the

Agreement to initiate proceedings of a punitive nature, which:

1. The initiation agreement will be communicated to the instructor of the procedure, with transfer

of how many actions exist in this regard, and the interested parties will be notified,

understanding in any case by such the accused. Likewise, the initiation will be communicated

to the complainant when the rules governing the procedure so provide. 2. The

initiation agreement must contain at least: a) Identification of the person or

persons allegedly responsible. b) The facts that motivate the initiation of the

procedure, its possible qualification and the sanctions that may correspond, without

prejudice to what results from the instruction

Therefore, that the sanctioning body anticipates the amount of the sanction that would proceed

impose, and always depending on what ultimately results from the procedure and that, in the

Motion for Resolution, if proposed, an amount identical to that indicated by the body

sanctioning in the Start Agreement, it has nothing particular, nor does it attempt against
no established rule, so it is not appropriate to consider what is alleged by the entity
claimed at this point, even more so when it only records the fact,
without even substantiating in the slightest the reasons that lead him to put in between
said the legality of the sanctioning procedure carried out.

On the other hand, it is not true, as stated by the respondent entity that: “(…) the body
The sanctioning officer is not limited to remembering which is the applicable sanctioning norm, but
effectively assesses, without paying attention at any time to what could be invoked by the
accused, what specific sanction, within the limits established by the norm,
it is appropriate to impose (...)" because in the document initiating the sanctioning file,
you can read verbatim, in your “agreement”: “THAT: for the purposes provided in art. 64.2
b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the
Public Administrations, the sanction that could correspond would be a fine of
200,000 euros (two hundred thousand euros), without prejudice to what results from the investigation”,
and therefore, the sanction to be imposed is made conditional on the result of the instruction of the
process. The fact of indicating a specific numerical data of the sanction in the
start agreement is simply in application of the provisions of article 64.1.b) of
LPACAP cited above and in application of the provisions of article 68 of the
LOPDGDD, according to which it will suffice to specify the facts that motivate the
opening, identify the person or entity against whom the procedure is directed, the
infraction that could have been committed and its possible sanction.

Therefore, the statement made by the entity cannot be taken into consideration.
claimed when it indicates that the possible sanction that could correspond for the
imputed infractions is determinant of defenselessness or that supposes a rupture

of the principle of separation of the investigation and resolution phases. On the contrary, with

This fulfills one of the requirements set forth in the standards outlined.

For its part, article 85 of the LPACAP contemplates the possibility of applying

reductions in the amount of the sanction if the offender acknowledges his responsibility

and in case of voluntary payment of the penalty. This precept establishes the obligation to

determine those reductions in the notification of initiation of the procedure, which

entails the need to set the amount of the sanction corresponding to the acts

imputed and it is not true, as affirmed by the respondent entity, that this article

establishes that the amount of the sanction is determined once the

procedure, since the acknowledgment of responsibility and the voluntary payment of the

sanction what has to take place after that moment, and not the fixation of the

amount of the penalty.

If this acknowledgment of responsibility or voluntary payment does not occur, which

would determine the termination of the procedure, the same is instructed and it is dictated

subsequently the resolution proposal, in which they must be set in a reasoned way

the facts that are considered proven and their exact legal qualification,

will determine the infraction that, if applicable, they constitute, the person or persons

responsible and the proposed sanction, the evaluation of the tests carried out,

especially those that constitute the basic foundations of the decision. Is

must be notified to the interested party, granting him a term to formulate

allegations and present the documents and information deemed pertinent.

In no case shall a resolution be adopted without the interested party having the opportunity to manifest itself on all extremes considered.

Therefore, it is not true that the claimed entity has seen its rights diminished and it cannot be said that the determination of the amount of the fine in the agreement of opening supposes no reduction of said guarantees causing defenselessness.

Nor does this circumstance break the impartiality of the examining body, which has of all the powers attributed to it by the regulations in question and full freedom to deliver your motion for a resolution. All you have to do is go to the Agency's website, at that all resolutions issued in sanctioning procedures are published, to verify the large number of them that end with a file resolution of actions, following the proposal issued by the instructor of the procedure, as well as well as those others in which said proposal increased or decreased the amount of the sanction set in the opening agreement or even proposed the application of a power corrective measure other than the sanction of a fine.

- On the application in the present case of the principle of proportionality and the modifying circumstances of the concurrent responsibility in the same (fourth point of the allegations):

a).- Regarding the number of letters sent to clients, indicate that, for this Agency there is the same rejection of an illicit treatment of 2,598 personal data as a illicit treatment of 1,462 personal data, so it is not appropriate to reconsider the aggravating circumstance of section a), of article 83.2 of the RGPD.

b).- On the statement made by the entity complained against when it alleges that:

“(…) understands this part that the AEPD cannot take as certain or assume in in any way a representation that not only is not accredited in any case, but also refuses, since Watium always claims to act on his own Name. Therefore, there is no doubt that this entity has the status of

interested for the purposes provided in the data protection regulations, it is

The application of such an aggravating circumstance is completely inadmissible.

It should be remembered that, for example, in the claim itself filed by the entity

Watium SL., in this Agency, stated verbatim:

“A claim is filed against Iberdrola Distribución Eléctrica, S.A.U. (business

electricity distributor) by sending a series of letters (we have

evidence of 2,598 letters) to clients of Watium, S.L. (trading company

electricity) distracting the purpose for which the data was transferred from

the marketer to the distributor (purpose: supply) lacking legal basis

to contact customers of Watium, S.L.

c).- Regarding the statement made by the entity complained against when it indicates that: “3. He says,

thirdly, the AEPD, which I-DE acted "knowing that there were different

claims filed and reports issued by different public bodies

rejecting such action, the entity continued to send informative letters to the

final clients, and, therefore, could constitute an illegal act”.

My principal can only reiterate that he does not know what those reports are and

resolutions that she was supposed to have known when she carried out the treatment

of the data. Indeed, given that obviously they cannot be the ones that are

object of this procedure there are only two possibilities: that the AEPD refers to the

complaint filed by Watium with the CNMC or that it is the report requested

by that entity to the Legal Office of the AEPD.

Well, as a first consideration, both the complaint and the request for a report

were after the treatment, so it could hardly be done at

Knowing the "resolution" issued or the report issued (...).

Well, as stated in the disciplinary file, there is a certificate issued by the

Electronic Notification Service and Electronic Address, dated

acceptance 05/23/19 and being the recipient ***NIF.1 A.A.A. in representing

IBERDROLA DISTRIBUCIÓN ELÉCTRICA SA, with NIF A95075578, this Agency

sent to the claimed entity the complaint filed with this Agency by the entity

Watium SL, including: - Network access contract model signed between the two

entities. - Sample letter sent by Iberdrola to WATIUM SL customers. - Letter

sent to the Markets and Competition Commission on 01/22/18. - Written

sent to Iberdrola on 01/23/18. - Request for legal report to the AEPD, dated

02/19/18. - Response from the legal office of the AEPD, dated 07/24/18.- Request

from the DPD of WATIUM SL to the DPD of IBERDROLA, dated 10/24/18. - Burofax to

IBERDROLA, to stop sending the letters, 10/24/18. - Service Response

of IBERDROLA, dated 11/02/18. - Examples of letters sent by

IBERDROLA, Q1 2018, Q3 2018 and Q1 2019.

Notwithstanding the foregoing, and knowing that there were different claims

filed and reports issued by different public bodies that put into question

doubt said action, dated 09/05/19, (3 months later), the entity claimed

sends to the customers of the marketer ENERGÍA Y SERVICIOS ABY, SL the

same letters that I sent some time before to the clients of the marketer

WATIUM SL.

Therefore, it is not true, as the claimed entity tries to justify that it was unaware

the reports and resolutions that questioned the processing of personal data of

end customers, thus evidencing the negligence of the entity's conduct

claimed, since his action was carried out without the due level of due diligence.

d).- On the alleged seriousness derived from the processing of data categories limited only to those of a merely identifying nature, remember that the Article 1.2 of the RGPD establishes that: “This Regulation protects the rights and fundamental freedoms of natural persons and, in particular, their right to protection of personal data”, defining in its article 4.1, the “personal data” as: “all information about an identified or identifiable natural person, whose identity can be determined, directly or indirectly, in particular by means of a identifier, such as a name, an identification number, etc.”, and by Therefore, in this case, when the claimed entity makes illicit use of the name, surname or address, is sufficiently clear evidence of illicit use of data protected by the RGPD and therefore, subject to aggravation in application of the section g) of article 83.2 of the RGPD.

d).- Regarding the alleged illicit use of the data to avoid losses to I-DE, indicate that, From the letters sent to end customers, it is clear that the objective purpose of the claimed entity, as stated above, was to avoid the losses that the breach of contract by the marketers was producing in the distributor, so it is not appropriate to consider the allegations made at this point.

e).- Regarding the link between I-DE and data processing, indicate that it is notorious that an entity such as I-DE handles personal data of more than 6 million

direct and indirect customers, through the marketers, in addition to having a

workforce of more than 35,000 employees, so an entity like her is owed

require a maximum level of due diligence in the processing of personal data and

its management, both of the personal data of direct customers and the data

information that marketers provide you with in order to send them

the electrical supply.

Therefore, the interpretation made by this Agency of the aggravating factors established in the

RGPD and the LOPDGDD is totally in accordance with the infractions committed by the

claimed entity.

III

Thus, the known facts constitute an infraction, attributable to the

entity claimed, for violation of the articles:

- Art. 6.1.b) of the RGPD, which establishes that: “data processing will only be lawful

to if it 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”.

- Art. 5.1.b) of the RGPD that establishes that: “personal data will be collected

for specific, explicit and legitimate purposes and will not be processed further

in a manner incompatible with said purposes, (limitation of the purpose).

- Art. 5.1.c) of the RGPD, which establishes that: “The personal data will be the appropriate

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

that are processed, (data minimization).

For its part, article 72.1.a and b) of the LOPDGDD considers as “very serious”,

purposes of prescription, the treatment of personal data if, "it violates the

principles and guarantees established in article 5 of the RGPD” and if it is carried out, “without

any of the conditions of legality established in article 6 of the RGPD concur”,

respectively.

IV

These infractions 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

global total annual turnover of the previous financial year, opting for the

of greater amount, in accordance with article 83.5.a) of the RGPD.

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

instruction of the procedure, in order to set the amount of the sanction to be imposed in

the present case, it is considered appropriate to graduate the sanction to be imposed in accordance

with the following aggravating criteria, established in article 83.2 of the RGPD:

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The nature, seriousness and duration of the offence, taking into account the nature

nature, scope or purpose of the processing operation in question, as well

such as the number of affected parties and the level of damages

that they have suffered, when performing an improper treatment of personal data,

(section a).

The intentionality or negligence in the infringement. In the present case we are

before negligent action, because even having knowledge of the interposition

of claims before different public bodies, by the company

Watium, Iberdrola continues to send letters to the clients of the entities claiming

blankets, (section b).

The categories of personal data affected by the infringement, whether

that the data processed, in this case, is customer identification data

ends of the marketing entities and their location, (section g).

The way in which the supervisory authority became aware of the infringement,

that the AEPD was aware of the infraction through the claim of the

interested, (section h).

Losses avoided, directly or indirectly, through the infringement, in

this case, trying to use the mediation of the clients of the entities

marketers, with the illicit treatment of their personal data for the

ensure that the marketing entities pay the debt contracted with the

distribution entity, (section k).

It is also considered that it is appropriate to graduate the sanction to be imposed in accordance with the

following aggravating criteria, established in article 76.2 of the LOPDGDD:

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

personal data, (section b).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with

regarding the infraction committed by violating the provisions of articles 5.1.b and c) and

6.1.b) allows a penalty of 200,000 euros (two hundred thousand euros) to be set, considered

as "very serious", for the purpose of prescription of this, in article 71.1.a and b)

respectively, of the LOPDGDD.

In view of the foregoing, the following is issued:

:

RESOLVE

FIRST: IMPOSE on the entity, I-DE INTELLIGENT ELECTRICAL NETWORKS,

S.A.U (I-DE), formerly known as IBERDROLA SA, with CIF: A95075578 a

penalty of 200,000 euros (two hundred thousand euros), for violation of articles, 5.1.b)

and c) and article 6.1.b) of the RGPD.

SECOND: NOTIFY this resolution to the entity I-DE REDES ELÉCTRI-

CAS INTELIGENTES, S.A.U and INFORM the claimants about the result of the

claim.

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

Once this resolution is executed, in accordance with the provisions of art.

Article 98.1.b) of Law 39/2015, of October 1, of the Administrative Procedure Co-

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

points out article 68 of the General Collection Regulations, approved by Royal De-

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

December, by depositing it in the restricted account number ES00 0000 0000 0000 0000

0000, opened in the name of the Spanish Agency for Data Protection in the Bank

CAIXABANK, S.A. or otherwise, it will be collected in the executable period.

crop.

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

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 82 of Law 62/2003, of December 30,
bre, of fiscal, administrative and social order measures, this Resolution is
will make public, once it has been notified to the interested parties. The publication is made
will be in accordance with the provisions of Instruction 1/2004, of December 22, of the Agency
Spanish Data Protection on the publication of its Resolutions.
Against this resolution, which puts an end to the administrative procedure, and in accordance with the
established in articles 112 and 123 of the LPACAP, the interested parties may interpose
have, optionally, an appeal for reconsideration before the Director of the Spanish Agency
of Data Protection within a period of one month from the day following the notification
fication of this resolution, or, directly contentious-administrative appeal before the
Contentious-administrative Chamber of the National High Court, in accordance with the provisions
placed in article 25 and in section 5 of the fourth additional provision of the Law
29/1998, of 07/13, regulating the Contentious-administrative Jurisdiction, in the
two months from the day following the notification of this act, according to
the provisions of article 46.1 of the aforementioned legal text.
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 interested party
do states its intention to file a contentious-administrative appeal. Of being
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 Re-
Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronicaweb/], or to
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
that proves the effective filing of the contentious-administrative appeal. If the

Agency was not aware of the filing of the contentious-administrative appeal

tive within 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

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