

□ Procedure No.: PS/00132/2020

938-300320

RESOLUTION OF PUNISHMENT PROCEDURE

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

FIRST: D.A.A.A. (hereinafter, the claimant) dated July 10, 2019

filed a claim with the Spanish Data Protection Agency.

The claim is directed against EDP Energía, S.A.U., with NIF A33543547 (in
later, the claimed one).

The claimant states that he was the holder of a contract for the supply of
electricity with the company Endesa Energía S.A.U., (hereinafter "Endesa Energía")
associated with the supply point located on the street *** ADDRESS.1 from the 21st of
February 2017 through December 19, 2018, the date you were terminated
due to a change of trading company and there was also a change of
ownership in the aforementioned contract, ignoring the name of the latter.

Subsequently, in relation to the point of supply mentioned above,

The claimant entered into a new contract on January 3, 2019.

Provide, among others, the following documents:

Last Endesa Energy bill (from 11/08/2018 to 12/19/2018).

- Notification from Endesa Energía dated 12/20/2018, participating in the cancellation of the
street electricity contract ***ADDRESS.1.

- Copy of the complaint filed with the Provincial Citizenship Service and

Social Rights of the Government of Aragon filed on 01/24/2019 and

reply to it. He states: "that they have withdrawn him from the electricity bill

in Endesa Energía and they have put it in the name of another person in EDP. Without

your consent and that you have been re-registered with Endesa on the date

03/01/2019".

SECOND: In accordance with article 65.4 of the LOPDGDD, which has provided for a mechanism prior to the admission for processing of the claims that are formulated before the AEPD, consisting of transferring them to the Data Protection Delegates designated by those responsible or in charge of the treatment, for the purposes foreseen in article 37 of the aforementioned rule, or to these when they were not designated, it was given transfer of the claim to the claimed entity so that it proceeded to its analysis and respond to the complaining party and to this Agency within a month.

As a result of this process:

C/ Jorge Juan, 6

28001 – Madrid

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2/9

1st.-

Endesa Energía states in its letter of July 10, 2019, that when they receive a communication from the distributor in the sense of "activation of change of marketer" with respect to one of their clients, they initiate the procedure internal "Deregistration due to Change of Marketer", proceeding to attend the request for the distributor.

On the other hand, they are recorded in their internal company systems, that the claimant was the holder of an electricity supply contract with Endesa Energy, for the aforementioned supply point, from February 21, 2017 to December 19, 2018 and currently as of January 3, 2019.

That yes, according to the procedure established by the CNMC, in the relative case

to the claimant, Endesa Energía acted as an outgoing marketer, not having
Therefore, verifying the consent of the owner before the request for a change of
marketer received by the distributor, but said obligation to
Verification of consent falls on the incoming marketer as new
holder of the supply contract with the customer.

2nd.-

The respondent states to this Agency, dated March 18,
2019, that the claimant is not, nor has he been, at any time a client, therefore
There is no data related to it in its database.

The electricity supply for said supply address was marketed
for the one claimed between December 20, 2018 and January 2, 2019, although,
the contract was signed by a third party other than the claimant, without said
contracting was collected nor could any data of the claimant be identified.

That, since January 3, 2019, the indicated supply point has not
figure marketed by this marketer.

THIRD: On June 5, 2020, the Director of the Spanish Agency for
Data Protection agreed to initiate a sanctioning procedure against the claimant, with
in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the
Common Administrative Procedure of Public Administrations (hereinafter,
LPACAP), for the alleged infringement of Article 6.1 of the RGPD, typified in Article
83.5 of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the party complained against submitted a written
allegations in which, in summary, it states that after the contracting process
regarding the point of supply, the technical data of the contract were loaded into the
EDP's commercial system in order to check the database of the
distributors the technical and location data, processed the request for access to the

corresponding distributor, who accepted it. At this time they activated the contract, passing the client to have the supply marketed by EDP, request that sent to Endesa by the distributor as a request for passive removal.

They add that the defendant has limited herself to complying with her legal obligations and expressly defined at the time of operating the communication of the request of your client.

C/ Jorge Juan, 6

28001 – Madrid

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3/9

They also point out that the respondent has not processed the personal data of the claimant.

They request the file of the actions corresponding to the Procedure

Sanctioning party, rejecting the imposition of any sanctions on the party

claimed, for having acted correctly and in accordance with the law in relation to the facts subject to analysis in this proceeding.

Subsidiarily, the reduction of the sanction that proceeds to impose to its minimum expression.

FIFTH: On July 10, 2020, the test practice period began,

remembering: 1. Consider reproduced for evidentiary purposes the complaint filed by the claimant and their documentation, the documents obtained and generated that are part of the file and 2. Consider reproduced for evidentiary purposes, the allegations to the initiation agreement of PS/00132/2020, presented by the entity reported.

SIXTH: On September 9, 2020, a resolution proposal is formulated in the

following terms:

That by the Director of the Spanish Agency for Data Protection

sanction EDP Energía, S.A.U., with NIF A33543547, for an infraction of Article

6.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of 50,000 euros

(fifty thousand euros).

The proposed resolution was notified electronically to the respondent, being the

date of making available on September 9, 2020 and the date of acceptance that

the same day.

SEVENTH: On September 23, 2020 they have access to the electronic headquarters of this

Agency the allegations of the respondent to the proposed resolution in which

requests that the proceeding be archived for having acted, he says, according to

to Law.

In defense of her claim, the respondent reiterates the allegations to date

made to the initial agreement and, in summary, adduces the following arguments: "In the

case that concerns us, as in all similar ones, EDP has limited itself to complying in

at all times with the specific indications of the CNMC, not counting on the

ability to request the consent required by the AEPD.

It adds that EDP, as a marketer, has no possibility of accessing

information of the owner of the Property, and does not even have the capacity to know the current

service marketer.

For all these reasons, it has the consent of the client, complying with said

obligation. Obligation that does not extend to the investigation of the holder and in this case

complainant".

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28001 – Madrid

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Of the actions carried out in this proceeding and of the documentation in the file, the following have been accredited:

PROVEN FACTS

FIRST: The claimant was the holder of an electricity supply contract with the company Endesa Energía S.A.U., (hereinafter "Endesa Energía") associated with the supply point located on the street *** ADDRESS.1 since February 21, 2017 until December 19, 2018, the date on which he was discharged due to change of marketing company and there was also a change of ownership in the mentioned contract, not knowing the name of the latter.

SECOND: There is a notification from Endesa Energía dated 12/20/2018, participating in the cancellation of the electricity contract for the street ***ADDRESS.1

THIRD: It is confirmed in the complaint filed with the Provincial Service of Citizenship and Social Rights of the Government of Aragon that have discharged him from the electric bill at Endesa Energía and they have put it in the name of another person in EDP, without your consent and that you have been re-registered with Endesa on the date 03/01/2019.

FOUNDATIONS OF LAW

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

II

The defendant is charged with the commission of an infringement due to infringement

of Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the assumptions in which the processing of third party data is considered lawful:

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

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

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the

interested party is a party or for the application at the request of the latter of measures pre-contractual;

(...)"

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

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

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C/ Jorge Juan, 6

28001 – Madrid

5/9

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

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

global total annual turnover of the previous financial year, opting for

the largest amount:

a) The basic principles for the treatment, including the conditions for the

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

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

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

considered very serious" provides:

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

2016/679 are considered very serious and the infractions that

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

particularly the following:

(...)

b) The processing of personal data without the concurrence of any of the

conditions of legality of the treatment established in article 6 of the

Regulation (EU) 2016/679."

III

The documentation in the file offers evidence that the party

claimed violated article 6.1 of the RGPD.

In this sense, it is proven that the respondent processed the personal data of the

claimant without legitimacy to do so. It is clear that the defendant (marketer

incoming) had to manage the termination of the claimant's contract with the

outgoing marketer (Endesa Energía), which is done through the number of

CUPS that is associated with housing.

It must be taken into account, notwithstanding the foregoing, that the

claimed provides the contract for the change of ownership, for the aforementioned point of

supply, but it is observed that it is completed by a person as

representative of the new owner. They provide the DNI of the representative and the signed contract

by it, but in no case the consent of the new owner.

And, for these purposes, Law 24/2013, of December 26, on the electricity sector (in

hereinafter, "Electricity Sector Law"), establishes the consumer's right to change

of a trading company in accordance with the provisions of the European directives of the

internal electricity market.

For this, the regulations establish the general process that must be carried out

between the new marketer or incoming marketer, the distributor and the existing marketer or outgoing marketer. This change implies the discharge of a new energy supply contract with the incoming marketer and the cancellation of the existing contract with the outgoing marketer, through an agent that executes the change that is the distributor.

C/ Jorge Juan, 6

28001 – Madrid

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6/9

Likewise, article 46 of the Electricity Sector Law establishes among the obligations of marketers, in its section 1 letter g) that of "Formalize the supply contracts with consumers in accordance with the regulations that is applicable". The mention by the Law of the obligation to formalize the contract between the obligations of the marketers shows that it is the marketer the holder of the supply contract with the consumer. So, corresponds to the marketer and, in the event of a change of marketer, to the incoming marketer, check the identity and the voluntary, correct and informed provision of consent by the consumer, who is his counterpart in the supply contract.

In this sense, the new marketer (the claimed one) will have to manage cancellation of the claimant's contract with his outgoing marketer (Endesa Energía), which is done through the CUPS number that is associated with the home. In Ultimately, it treats your personal data.

Thus, having been proven that the respondent processed the data personal data of the claimant, who denies his consent to the treatment, and as long as the

first has not provided any evidence to disprove such evidence, it is estimated that the facts that are submitted to the assessment of this Agency are constitutive of a infringement of article 6.1 of the RGD, infringement typified in article 83.5 of the aforementioned Regulation 2016/679.

IV

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

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

Regulation indicated in sections 4, 9 and 6 are in each individual case effective, proportionate and dissuasive.”

“Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in the Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation in question as well as the number of stakeholders affected and the level of damage and damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that have applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

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28001 – Madrid

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7/9

- f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement, in particular if the person in charge or the person in charge notified the infringement and, in such case, to what extent;
- i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;
- j) adherence to codes of conduct under article 40 or mechanisms certificates approved in accordance with article 42, and
- k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.”

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

“Sanctions and corrective measures”, provides:

“two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of treatments

of personal data.

- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when it is not mandatory, a delegate for the protection of data.
- h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested."

v

When deciding to impose an administrative fine and its amount, in each case individual will take into account the aggravating and mitigating factors indicated in art. 83.2 of the RGPD, as well as any other that may be applicable to the circumstances of the case.

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

In the present case we are before negligent action, not intentional, but significant (article 83.2 b GDPR).

The evident link between the business activity of the respondent and the processing of personal data of customers or third parties art. 83.2 k) of the RGPD, in relation to art. 76.2 of the LOPDGDD.

C/ Jorge Juan, 6

28001 – Madrid

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8/9

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

FIRST: IMPOSE EDP ENERGIA, S.A.U., with NIF A33543547, for a violation of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of 50,000 euros (fifty thousand euros).

SECOND: NOTIFY this resolution to EDP ENERGIA, S.A.U., with NIF A33543547

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is is between the 1st and 15th of each month, both inclusive, the term to carry out the voluntary payment will be until the 20th day of the following month or immediately after, and if is between the 16th and last day of each month, both inclusive, the term of the

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

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

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

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

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

LPACAP, the interested parties may optionally file an appeal for reconsideration

before the Director of the Spanish Agency for Data Protection within a period of

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

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

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

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

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

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

aforementioned Law.

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

LPACAP, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

C/ Jorge Juan, 6

28001 – Madrid

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9/9

through the

Electronic Registration of

introducing him to

the agency

[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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