

□ Procedure No.: PS/00025/2019

938-051119

- RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and
in consideration of the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) submits to the Spanish Agency for
Data Protection (AEPD) on September 19 and 20, 2018, two separate documents
in which it states that EDP COMERCIALIZADORA, S.A.U., with NIF A95000295 (in
hereinafter, EDP or the claimed party) has processed your personal data (name, surnames,
NIF, address and mobile phone number) without your consent linked to a
gas contract to which he is not involved.

With the letter of 09/20/2018, he provides a copy of a document bearing the rubric
"Notice of non-payment" -which the claimant calls "invoice"-, issued on
05/31/2018. The claimant explains that after receiving this document he contacted
telephoned EDP and filed a claim for "billing me for services in the
supply point located at ***ADDRESS.1 ...without having signed any contract
nor have any relationship with said address.

The aforementioned document - "Notification of non-payment" - has in the section dedicated to
the data of the recipient, bears the name, two surnames and the address of the claimant
(located in ***LOCALIDAD.1). In the "Customer data" section, they include, in addition to the
name and surname of the claimant, his NIF and a fixed number that the claimant affirms
that does not belong to you (***TELEPHONE.1). In the "Contract data" section -contract
which is electricity and gas with the number 700005852279- the address of the point of
supply: ***ADDRESS.1. On the right side of the document appears: "EDP

ENERGY, S.A.U. Plaza de la Gesta 2, 33007 Oviedo (...) CIF A-33543547”.

The claimant declares that, a few days after formulating, by means of a call telephone, claim before EDP for the bill it had received, the entity claimed sent him a contract for gas and electricity services so that he could return it signed. And he adds that in that document -of which he provides a copy to this Agency- they consist, in addition to the personal data already reflected in the "Notification of non-payment" described above, the mobile number from which you made the phone call from claim to EDP.

In the contractual document received, just above the "Conditions specific to the contract", this legend appears:

“The client contracts for the business or home premises indicated in the heading, the supply of gas with EDP COMERCIALIZADORA, S.A.U. and the supply of electricity and/or complementary services with EDP ENERGÍA, S.A.U. (hereinafter, jointly and/or individually, as appropriate, referred to as “EDP”) in accordance with the Specific Conditions listed below and

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the General Conditions that appear in the annex”. (The underlining is from the AEPD)

On the right side of the document there is:

“EDP ENERGÍA, S.A.U. Plaza de la Gesta 2, 33007 Oviedo (...) CIF A-33543547

EDP COMERCIALIZADORA, S.A.U. C/General Concha, 20 48010 Bilbao (...) CIF A-95000295”

SECOND: In view of the facts exposed, the AEPD, on 10/15/2018, in the

scope of file number E/07378/2018, under article 9 of the Real

Decree-Law 5/2018, on urgent measures for the adaptation of Spanish Law to the

European regulations on data protection -rule in force since the

07/31/2018 until its repeal by Organic Law 3/2018, of December 5, of

Data Protection and Guarantees of digital rights (LOPDGDD)- transferred

of the complaint to the DPD of the entity complained against and requested that, within a

month from receipt, inform this Agency of the circumstances that had

originated the facts exposed in the claim, of the decision adopted to put

put an end to the irregular situation caused and also proceed to communicate its decision to the

claimant, having to prove to this Agency the receipt of that communication

by the recipient.

The document in which the claim was notified to the entity claimed was

signed by the AEPD on 10/15/2018 and EDP was notified electronically in the same

date. The date of availability in the electronic office and the date of acceptance

of the communication is on 10/15/2018, as evidenced by the certificate issued by the

FNMT that works in the file.

In turn, the AEPD sent the claimant, on the same date, a letter in the

that he acknowledged receipt of his claim and informed him of the transfer to the claimed. The

notification was made by postal mail dated 10/17/2018 and was delivered on

10/27/2018.

EDP responded to the request for information through a letter sent to the

AEPD by certified mail dated 11/15/2018, which was entered in the registry of

this body on 11/20/2018. The letter is signed by the "Data Protection Officer"

"on behalf of the company EDP COMERCIALIZADORA, S.A., (...) and with CIF

A33543547" (wrong data because that NIF does not belong to the claimed entity, but

that belongs to another group entity)

In the writing, the following statements are made with relevance to the research purposes:

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That the personal data of the complainant were provided to EDP, by telephone, on 05/17/2018, by D^a B.B.B. who made the change in the ownership of the gas contract and declared acting in representation of the affected.

A recording of the telephone conversation is provided.

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The claimed entities state that “As can be verified from of minute 7:56 of the audio file called 803818026680675 of the C/ Jorge Juan, 6

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telephone recording, in accordance with the regulations on data protection in force on the date of the telephone conversation, EDP correctly informed about the treatment that is going to be carried out of the personal data of both the Representative and his represented (the now Complainant), by virtue of the processing of the change of ownership.” (The underlining is from the AEPD)

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That during the processing of the change of ownership -as can be check in the recordings provided- EDP informed D^a B.B.B. of that the DNI number of the affected person was detected by the system as

erroneous and its verification by the holder was necessary. Add that, on the day following, 05/18/2017, the person who claimed to act on behalf of the affected contacted EDP again by phone to complete the paperwork for the change of ownership and in the course of that conversation -whose recording has also been provided to this Agency - stated again that acted on behalf of the claimant.

EDP says that "it has kept all the precautions required both in terms of - regarding contracting as well as regarding the information obligation established in terms of data protection. He adds that he understands that the reason for the request made by the AEPD Inspection may be due to the fact that "...the Representative has not adequately transferred the Complainant the information regarding both the terms of the contract as data processing".

- States that, once received the informative request of the Data Inspection, contacted the claimant by letter addressed to your address dated 11/15/2018 of which you provide us with a copy. In the letter sent to the claimant, stating that "...the contracting of the electricity supply with EDP Comercializadora, S.A. (hereinafter EDP) is BBB ..." (underlining is from the carried out by telephone by Doña AEPD) Explanation that we consider wrong because the document contract that he sent to the claimant and that he has provided to the Agency clearly states that the customer contracts the "gas supply" with EDP Comercializadora, S.A.U., and the electricity contract with another group company,

EDP Energia, S.A.U.

It indicates that “Mrs. B.B.B., .. stated that she was acting with her knowledge and

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on their behalf, proceeding with the change of ownership of the supply

corresponding to the address located at ***ADDRESS.1”. He adds that the

contracting was carried out “following all the precautions required, and

complying with the duty of information (...), being necessary that the

themselves become part of the customer database for the

correct management of the signed contract”.

On 11/30/2018, in accordance with the provisions of article 9.5 of the Real

Decree-Law 5/2018, signing the agreement for admission to processing of this

claim.

Under article 11 of Royal Decree-Law 5/2018, once admitted to

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processing the claim and before the adoption of the initiation agreement, within the framework of the

prior investigation, by the Inspection service of this Agency,

Diligence dated 02/14/2019 by virtue of which it is incorporated into the file

E/7378/2018 the general information of the entity, extracted from the Mercantile Registry in

on the same date: The subscribed and paid-up share capital amounts to 1,487,898

euros. The company began its operations on 11/19/1998.

THIRD: The facts object of this claim are subject to the

provisions of Regulation (EU) 2016/679, of the European Parliament and of the Council,

of 04/27/2016, regarding the Protection of Natural Persons with regard to the Treatment of Personal Data and the Free Circulation of these Data, which entered into effective 05/25/2018.

The respondent affirms that she obtained the personal data of the claimant and gave register a gas contract in your name on 05/17/2018, through a call telephone number of a person who claimed to be his representative.

Thus, the processing of the personal data of the affected party began before that Regulation (EU) 2016/679 came into force -which happens on 05/25/2018- and when the Organic Law 15/1999 on Personal Data Protection was still in force.

Personal Character, LOPD. However, the conduct of EDP in which the infringement, the processing of the claimant's data linked to a gas contract without legitimacy for it, has been maintained in time until the present or, at the same time, least, until 11/15/2018 as it is documented as such.

The infringement for which EDP is held responsible is of the nature of the of the so-called permanent infractions, in which the consummation is projected in time beyond the initial fact and extends, violating the regulations of data protection, during the entire period of time in which the data is subject to treatment. In the present case, despite the fact that on the date on which the infringing conduct the applicable norm was the LOPD, the norm that results from application is the one that is in force when the infraction is consummated, because it is in that moment when it is understood committed.

The Supreme Court has ruled on the rule to be applied in those cases in which the infractions are prolonged in time and there have been a normative change while the infraction was committed. The STS of 04/17/2002 (Rec. 466/2000) applied a provision that was not in force at the initial moment of commission of the infraction, but yes in the subsequent ones, in which the conduct continued

offending The Judgment examined a case that dealt with the sanction imposed

to a Judge for breach of her duty to abstain in proceedings

Previous. The sanctioned alleged the non-validity of article 417.8 of the LOPJ when

the events occurred. The STS considered that the infraction had been committed

from the date of initiation of the Preliminary Proceedings until the moment in which the

Judge was suspended in the exercise of her functions, so that rule was of

app.

The SAN of 09/16/2008 (Rec.488/2006) pronounces in the same sense

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FOURTH: On 03/21/2019 the Director of the Spanish Agency for the Protection of

Data agreed to initiate sanctioning proceedings against the claimed entity, 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.a) of the GDPR.

FIFTH: On 04/09/2019 the allegations are received in the AEPD Registry

of the one claimed to the agreement to initiate the sanctioning file in which it requests

that the proceedings be archived “for having acted ... in accordance with

Law” and, subsidiarily, that the sanction be imposed in its minimum amount.

Provides as documentary evidence a CD with a recording, of which there is no evidence

date, in which a person who identifies himself with the name, surnames and NIF of the

claimant, makes a call to EDP and states that they have cut off the supply, to the

time asking what is the amount owed adding what sounds like they are

€140.77. The entity, after asking him about the supply point, informs him

that he owes 170.80 euros and that he can pay by card.

The defendant, in support of her claims, put forward in the brief of

arguments to the initial agreement the following arguments:

- That "he has kept all the required precautions" and that the "contracting has been at all times in good faith on the part of EDP, complying at all times with the provisions of current regulations on data protection.

It adds that for the reasons it alleges -which we will detail further on- "the contractual relationship with the Complainant is perfectly valid, the collection of data was carried out in accordance with law and the treatment of the data of the complainant is perfectly valid."

- In the event that the AEPD does not agree to file the proceedings, it alleges that the sanction established in the agreement to initiate the disciplinary proceedings violates the principle of proportionality. He maintains that there was no guilt or unlawfulness in its action and that "the sanction to be imposed would have to correspond to a minor infraction, in its minimum amount", because, it says, "it does not only the alleged aggravating factors would not apply, but would apply practically all of the extenuating circumstances included in the sanctioning regime".

- It states that, as it proved in procedure E/7378/2018, "there is a valid contractual relationship" between EDP and the claimant. He claims that the legitimacy of the treatment of the data of the claimant and the confirmation of a valid contractual relationship between the claimant and EDP is justified by two extremes that the Agency itself has considered proven in the agreement of beginning although, with respect to them, he also affirmed that they were irrelevant from the beginning. point of view of the assessment that it is responsible for making. Namely, "that the data

of the claimant obtained them through Mrs. B.B.B. and that this lady
stated on several occasions, during the course of telephone conversations, that
acted on behalf of the claimant.

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- States that we are dealing with an example of a representative mandate regulated in

the Civil Code (articles 1709-1739) which leads him to state emphatically that

“...therefore no rule has been broken by EDP in the

hiring ...”. He adds that the mandate can be verbal, "provided that of the

circumstances the veracity and granting of the same can be deduced "and that

It can be express or implied, deduced from the principal's own acts. Is

doctrinal exposition on the mandate contract puts it in connection with

facts such as the recording you attach to your pleadings; what

for EDP it constitutes a ratification of the contract and of the mandate. to such

effect invokes the STS, First Chamber, of 01/09/1964, according to which the principal

that takes advantage of the acts of the president tacitly ratifies the mandate;

the prohibition of abuse of rights (former article 7.2 C.C.) -every time, it affirms,

the “Complainant” would have enjoyed the supplies provided- and would be

also contrary to the good faith that should preside over the exercise of rights

(former article 7.1 C.C.)

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It emphasizes that “the consequences of a possible negligent action by

part of Mrs. B.B.B., ..., can in no case affect the validity

contractual, .. The contractual relationship between the parties is perfected and is fully legitimate."

Invokes article 83 of Royal Decree 1955/2000, which regulates the activities of transport, distribution, commercialization, supply and authorization procedures for electric power installations, in which, says, the consumer who is up to date with the payment is granted the power to transfer your contract to another consumer who is going to use it in identical conditions. He insists that "the change of ownership occurs under the same contractual conditions, that is, without the change being considered a new registration and therefore a new contract".

- Given the exposure made by the Agency in the initial agreement regarding the fact that no evidence had been provided that the claimant had granted his representation to the person who claimed to act on your behalf (Mrs. B.B.B.) nor that the entity displayed the minimum diligence required to verify that Indeed, her interlocutor had the representation that she claimed to hold EDP counters that "there is no such obligation" and that "the C.C. admits the freedom of form in the figure of the mandate, this being able to be verbal..."

SIXTH: On 11/18/2019 a trial practice period is opened in which agree, as the only evidentiary proceedings, the incorporation to PS/25/2019 of the documents that make up file E/07378/2018 -whose incorporation for this purpose is already it was announced in the Agreement to Commence the procedure-: The claim briefs; the documentation generated by the AEPD; the response of the respondent to the request for information and the Diligence dated 11/18/2019, raised during the proceedings of previous investigation, with the information obtained on that date through AXESOR related to the result of the activity of the claimed during the year 2018-.

Likewise, the allegations of the

claimed to the initiation agreement and its attached documents.

SEVENTH: On 11/27/2019, a resolution proposal is formulated in the following

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terms:

<<FIRST: That the Director of the Spanish Agency for Data Protection

sanction EDP COMERCIALIZADORA S.A., with NIF A95000295, for an infraction

of article 6.1 of the RGD, typified in article 83.5.a) of the RGD, with a fine

of 75,000.00 euros (seventy-five thousand euros). (...)

SECOND: That, in accordance with article 58.2 of the RGD, EDP is imposed

COMERCIALIZADORA, S.A.U., the ADOPTION OF THE MEASURES that result

INDISPENSABLE to adapt your telematic contracting protocols to the

provisions that on the legality of the processing of personal data establishes the

GDPR; in particular in contracting through a representative in which you must

be in a position to prove both the reality of the representation granted by the

owner of the data such as the identity of the person who holds the condition in the contract

of represented. Also, if you do not have them implemented, you must adopt them

in the face-to-face contracting protocol. Measures that, where appropriate, must be

be adopted within a period of one month from the date on which the resolution

sanctioning be executive.>>

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

date of availability on 11/26/2019 and the date of acceptance on the same day.

Pursuant to article 73 of the LPACAP, the term to formulate allegations is

ten days computed from the day following the notification.

EIGHTH: On 12/12/2019, the electronic headquarters of this Agency have the allegations of the respondent to the proposed resolution in which he requests that proceed to file the procedure for having acted, he says, in accordance with the law.

In defense of her claim, the respondent reiterates the allegations to date formulated -at the agreement to initiate the sanctioning file and in the informative procedure prior- and, in summary, adduces the following arguments:

- It states in the first allegation that "the evidence presented by this representation mark the proactive performance of the representative in contracting in name of his client, confirming the existence of the point of supply and therefore the existence of the contract. Consider that the treatment that EDP has made of the personal data of the complainant is legitimate because in his opinion there is a valid contractual relationship between the two.

- In her second allegation, the respondent maintains that she is the victim of a situation of "legal defenselessness" as a result of the actions of the AEPD every time that this Agency has admitted "accredited the origin of the data, provided in BBB, the call at the time of hiring made by Ms.

However, they are irrelevant in terms of proving due treatment.

of the same when -argues the claimed- it is precisely that point that that justifies the legitimacy of the processing of the complainant's data, since the existence of a valid contractual relationship between the parties is confirmed"

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Regarding the sound document that EDP provided to this Agency annexed to its allegations to the initial agreement, after reproducing the assessment that that test was made by the instructor of the file in the proposed resolution, adds the following statements, despite the fact that neither in the sound document provides a date and neither in it nor in any other is what it now alleges justified:

“That this representation not only indicates that the recording collects the consent of the natural person who calls to proceed with the payment of the invoices, the date of the call being collected on August 10, 2018, but that said payer is the son of the Complainant knowing the latter as contract holder. (The underlining is from the AEPD)

The respondent says that, in her opinion, "recruitment by representation..., has been carried out in accordance with law, not only requesting the required documentation and obtained proof of the contracting carried out, but it is ratified at a later time.

- In his third allegation he tries to refute the total lack of diligence in his action attributed to it by the motion for a resolution and in this regard it says: "... however, my principal acted in compliance with the requirements demanded by the civil and commercial regulations, ensuring the identification of the old and new holder, as well as to translate the operation carried out into a durable medium" and highlights - appears written in bold - that the AEPD "not only hinders and inhibits the legal traffic, but completely annuls the figure of the representative and the mandate, not considering this administrative body these operations performed by third parties as legitimate acts"

- In the fourth allegation -in response to the statement made by the proposal

of resolution that the entity completely lacks a protocol of

action for telematic contracting when the person who facilitates

the data is not the owner, but a third party who claims to act on his behalf- says:

“ We are not facing a contract; which has a double process

verification implemented for new hires” and that the supposed

analyzed supposes "a mere modification of the holder of the contract already signed

previously” which leads him to affirm that it is not applicable “nor the

contracting procedure” “neither the double verification supposes a guarantee

legal mandatory implementation by my client”. And he concludes by saying: “...the

AEPD requires accreditation of the granting of representation through

an element of evidence for my client, such as a minimum duty of diligence

necessary, a requirement that the regulations do not include. Therefore, in this case and

the AEPD sanctions for not complying with this requirement would mean a resolution

not in accordance with law”.

- In his allegation

the fifth declares: “The different

viable possibilities, both technically and operationally speaking, to

reinforce contracting procedures when such procedures are

processed by a third party on behalf of the owner.

Of the actions carried out, the following have been accredited

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FACTS

1.- Mr. A.A.A., with NIF ***NIF.1 and address in ***LOCALIDAD.1 (***CCAA.1)

***ADDRESS.2, declares to have received the document "Notification of non-payment" (which he refers to as "invoice") that bears the EDP anagram and is signed on 05/31/2018. In the aforementioned document, EDP requires the payment of a debt derived from a contract that he denies having signed. Contract to which it claims to be totally unrelated and that corresponds to a supply address with which it has no relationship.

2.- In the document mentioned in Fact 1, "Notice of non-payment", of which the claimant provided a copy to the AEPD with his claim, they require the payment of a debt amounting to 79.81 euros derived from a gas and electricity contract.

The document provides the following "Contract data": As "Type of contract", "Gas + electricity formula plan"; as "Account No./Contract" 70000852279; What "Supply Address" "****ADDRESS.1".

In the document they appear as "Customer data", in addition to the name and two surnames of the claimant, his address, located in a town other than the point of supply; your NIF and a landline number of which the claimant denies being the owner, ***TELEPHONE 1.

3.- Work in the file, provided by the claimant, the copy of the "Contract of energy and/or services", which EDP sent to your address. At the bottom of the document, in the section for the signature of the entity, it states "EDP ENERGÍA, S.A.U. and/or EDP COMERCIALIZADORA, S.A.U."

Above the heading "Specific conditions of the contract" appears this legend:

"The client contracts for the business or home premises indicated in the heading, the supply of gas with EDP COMERCIALIZADORA, S.A.U. and the supply of electricity and/or complementary services with EDP ENERGÍA,

S.A.U. (hereinafter, jointly and/or individually, as appropriate, referred to as

“EDP”) in accordance with the Specific Conditions listed below and

the General Conditions that appear in the annex”. (The underlining is from the AEPD)

4.- The "Energy and/or services contract" provided by the claimant, described in the

Proven fact 3, offers the following information:

- In the “Client” section: as “Holder of the contract”, “Mr. A.A.A.”; What

“Address” “***ADDRESS.2 ***TOWN.1 ***CCAA.1”. In section

“NIF” the ***NIF.1. And in the “Phone 1” section the mobile number

***PHONE.2. The box “Telephone 2” and “Fax” does not contain any data.

There is also no record of the landline number that appeared on the notification document of non-payment (see proven fact 2)

- In the “Supply data” section, the “Supply address

(***ADDRESS.1” and CUPS numbers for electricity and gas.

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- In the section “Account No. Contract” “70000852279 Gas+Light Formula”

- In the section “Duration and billing” “Issue date: 05.18.2018”

5.- The claimant has declared that, after receiving the “invoice” at his address -the

document "Notification of non-payment" - made the corresponding claim before EDP

by phone call from your mobile phone. He explained that a few days later

received at home the copy of the contract for the supply point on which

Verse the notification of non-payment and your claim, in order for you to sign it. underlines that,

without your consent, the contractual document received incorporates your

mobile phone, number from which you made the telephone claim to EDP.

6.- EDP, within the framework of E/7378/2018, in its response to the informative request of the Agency, affirmed that the claimant's personal data was provided to him on the 05/17/2018, by telephone, by D^a B.B.B. "Whoever declares to act in a condition of representative of the Complainant (hereinafter the "Representative") during the processing of the change of ownership of the supply corresponding to the address located in ***ADDRESS.1" (the underlined is from the AEPD)

7.- EDP, within the framework of E/7378/2018, sent this Agency a CD containing two documents (1 and 2) Document 1 is made up of two audio files (i) 803818026680675 and (ii) 803818026680926.

7.1. In audio (i) of document 1, the person making the call requests to make a change of owner and is identified as "old owner". The operator says: "Say-me first, if you are so kind, ID of the holder in force right now, yours". They are calling her- He tells you: "Okay, it's a CIF, it's a company, okay? B24292534". The name of the company The one that facilitates is "Hydraulic works and paving". as delivery address that you want to change the owner, the ***ADDRESS is provided.1. Mrs. B.B.B. I know identifies as "representative" of the former contract holder and claims to be responsible ble of Administration of the company.

At minute 2:38 the operator says: "Now tell me the name of the new headline". The dialog is as follows:

- "A.A.A. (...)"
- "DNI of Mr. A.A.A.?"
- "****NIF.1"
- "****LETTER.1 of ***LOCATION.2, right?"
- "Wait a minute, because you have written me a ***LETTER.1 but it looks like a ***LE-TRA.2. And how he wrote it to me. Let's see, I'll confirm it right now... ***LE-

TRA.1.”

- "Tell me the phone number of Mr. A.A.A...."

- “***PHONE.2”

At minute 5:21 of the recording you can hear: “Being 4:51 p.m. on the 17th of

May 2018 Mrs. B.B.B. has called and wants to contract with EDP for which

Let's make the next recording accordingly. Do you agree?

- Yes

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-Mrs. B.B.B., with DNI ***NIF.2 as administrator and on behalf of the owner

A.A.A., with DNI ***NIF.1, telephone ***TELEFONO.2, accepts EDP's offer for the

address ***ADDRESS.1, which consists of a gas + electricity formula plan ... for CUPS

of light (...) with a CUPS of gas (...) In his name and that of his representative, after sur-

analyze the risk of the operation, we will take the necessary steps to activate

change the access contracts, at which time the new contract will come into force.

treatment being resolved the above (...) Are you satisfied with the above information AND

contract conditions?

- Yes

- (...) Your personal data and those of your representative will be processed for the management of

these contracts by EDP Energía, S.A.U., with CIF A 33543547 and EDP Comercializado-

ra, S.A.U., with CIF A 95000295 (...)

At minute 8:35 of the recording the caller says:

– “Yes, I want to ask you something. Regarding the validity of the change, well,

I'm not really worried, because he's been renting for quite a few months now and he's not going to

Nothing will happen..., but, really, the next invoice is going to arrive in his name.”

7.2. In audio (ii) of document 1, the teleoperator informs Mrs. B.B.B. “...,

you see, is that since we have had problems with the national identity document,

Could you confirm that it was exactly an M?, because the system has given me the wrong

theme. To which doña B.B.B. replies: well no, because it is written by hand.

- Of course we can prove that it is an H. But of course, without confirming...

be a national identity document and we can make a serious mistake... It remains

to call back.

8.- The CD provided by EDP to the Agency in the framework of E/7378/2018, contains two

documents. Document 2 is, in turn, made up of two audio files: (i)

803818026691798 and (ii) 803818026691972.

8.1. Audio (i) document 2: The caller says:

-Hello good day. Yesterday I called to make a change of ownership. we did i think

that the whole process because the recording was made and such. But in the end no, well not when-

draba because the DNI of the new holder, ... well the letter. We were not 100% clear and

we do not continue (...)

At minute 6:15 you hear:

- “The billing shipping address. Home. Where do you want me to send it?

mos? To the supply?”

-"Yes"

-"Perfect. Supply point address.

8.2. Audio (ii) document 2: At minute 2:44 of the recording, it is indicated:

-"It is now 1:46 in the afternoon of May 18, 2018.

Mrs. B.B.B. calls us. ... with DNI... and wants to contract with EDP for which pro-

we give in to make the next recording of agreement, okay?”

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- "Yes"

- “Very well, Mrs. B.B.B. ...with DNI ... as a representative and on behalf of the owner, Mr. Mr. A.A.A....with DNI telephone..... accepts EDP's offer to the supply point...”. Mrs. B.B.B. nods to the question.

At minute 6:32 you hear:

- “The reason why we have to make the recording again is that if the DNI does not is valid the recording is invalid”

9.- Work in the file, provided by EDP, copy of the letter dated

11/15/2018, and in compliance with the request made by the AEPD in the letter of information request (E/7378/2018), addressed to the claimant. In it he states the following:

- That the contracting of electricity supply with EDP Comercializadora,

S.A.U., "was carried out by telephone by Doña B.B.B., who stated

act with their knowledge and on their behalf,..."

- “That said hiring was carried out following all precautions required...”.

10.- Work in the file, provided by EDP - allegations to the start-up agreement- the

recording of a telephone conversation, of which no date is provided, held

between the entity and a person who identified himself with the data of the claimant -name,

two surnames and NIF-. The person making the call says to call to pay a

pending invoice, because the supply has been cut off.

The EDP employee asks about the pending amount and answers: “I

it sounds like it is 140.77 euros". After asking for the supply point they report that he owes 170.80 euros and that he can pay by card. The caller is interrogated for a phone number and facilitates the ***PHONE.2.

FOUNDATIONS OF LAW

Yo

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 RGPD dedicates article 5 to the principles that should govern the treatment and, among them, he mentions those of "legality, loyalty and transparency". The provision provides:

"1. The personal data will be:

Treated in a lawful, loyal and transparent manner with the interested party;"

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(The underlining is from the AEPD)

Article 6 of the RGPD -under the heading "Legality of the treatment"- details in its section 1 the cases in which the processing of third party data is considered lawful:

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

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

for one or more specific purposes;

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

is part of or for the application at the request of the latter of pre-contractual measures;

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the

data controller;

d) the treatment is necessary to protect the vital interests of the interested party or another

Physical person;

e) the treatment is necessary for the fulfillment of a mission carried out in the interest

public or in the exercise of public powers vested in the data controller;

f) the treatment is necessary for the satisfaction of legitimate interests pursued

by the person in charge of the treatment or by a third party, provided that on said

interests do not override the interests or fundamental rights and freedoms of the

interested party that require the protection of personal data, in particular when the

interested is a child.

The provisions of letter f) of the first paragraph shall not apply to the processing

carried out by public authorities in the exercise of their functions. (...)"

It should be remembered that article 5 of the RGPD, after alluding in its section

1 to the principles relating to the processing of personal data -among them, as

exposes in previous paragraphs, to the one of "legality" -, adds in section 2:

"The person responsible for the treatment will be responsible for compliance with the

provided in section 1 and able to demonstrate it (<<proactive responsibility>>)"

(The underlining is from the AEPD)

The infringement of article 6.1 of the RGPD is typified in article 83

of the RGPD that, under the heading "General conditions for the imposition of fines

administrative", says:

"5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of 20,000,000 Eur 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."

It should also be noted that Organic Law 3/2018, on Data Protection Personal and Guarantee of Digital Rights (LOPDGDD), for the purposes of prescription, qualifies in its article 72.1.b) as a very serious infraction "The treatment

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of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of Regulation (EU) 2016/679"

III

The person claimed in this sanctioning procedure is attributed a violation of article 6.1 RGPD. The respondent processed the personal data of the unlawful claimant. It has not been able to prove that the data processing carried out had its legal basis in any of the circumstances detailed in the article 6.1 of the RGPD.

A.- It has been accredited through the documentation that is in the file administrative process -essentially described in the Proven Facts- that EDP dealt with the personal data of the claimant (name, surnames, NIF, address and number of

mobile phone) linked to a gas contract of which the affected party denies having been party and without the respondent having provided documentation of any kind that is evidence that the treatment of the data was covered by any of the conditions of legality that article 6.1 RGPD relates.

In accordance with article 6.1 of the RGPD, the processing of personal data of third parties must be "lawful", for which it must, in principle, comply with any of the conditions described in sections a) to f) of the precept.

B.- In the case analyzed, EDP attributes to the claimant the status of party to the gas contract for the supply point located at ***ADDRESS.1. The

The claimant denies having signed the aforementioned contract and denies knowing that point of supply. The claimant is domiciled in another Autonomous Community.

The respondent asserts that the claimant is a party to a supply contract energetic gas held with her through whoever identified herself as her representative, Mrs. B.B.B., implying that the legal basis of the treatment is the execution of the contract (article 6.1.b, of the RGPD).

However, to protect the treatment carried out by EDP in the article 6.1.b) of the RGPD it is necessary that the condition of contracting party of the affected is accredited. The *raison d'être* of this cause of legitimation of the treatment is precisely that, to the extent that the owner of the data grants the consent to the contract, you also consent to your personal data being processed necessary for its execution and fulfillment.

Thus, the question is whether EDP has provided evidence showing that the affected party consented to contract with that entity; which transferred to the assumption that we are dealing with will consist of assessing whether evidence has been provided that Mrs. B.B.B. actually held the representation of the claimant or, in other words, that

As stated by the respondent, the claimant had agreed with Mrs. B.B.B. a

representative mandate to contract the gas supply on their behalf.

EDP argues that this is enough evidence to demonstrate that the claimant had

granted its representation to Mrs. B.B.B. to sign with her, in her

name, a gas contract the sound document that you have provided to this Agency: a

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CD with the recordings of the telephone conversations held between that

entity and a third person (Mrs. B.B.B.) in which she “states”

“repeatedly” that holds the representation of the claimant to register his

name (or change the ownership of the supply contract that appeared in the name of

a company on whose behalf Mrs. B.B.B. acts) an energy contract

for the supply point of the ***ADDRESS.1.

The recordings sent to the Agency by EDP (described in Facts

proven 7 and 8) do prove, exclusively, that a person, Mrs.

B.B.B., insistently stated that they represent the claimant for

contract on your behalf with EDP. The aforementioned recordings do not prove that the

claimant will grant his representation to the aforementioned lady to contract on his behalf

the gas supply nor do they provide any evidence to that effect.

However, the recordings sent by EDP (four audios, of which two of

they make up document 1 and the rest make up document 2 of those provided with the

response to the information request) do prove the origin of some of the

personal data of the complainant that EDP processed associated with a contract that he denies

having celebrated: we refer to the data of the name, surnames and DNI of the claimant.

Data that, as evidenced by listening to the recordings, were

provided by Mrs. B.B.B. to EDP.

However, the recordings do not explain the origin of other data in the

claimant that EDP also treated linked to a contract to which the holder of the

personal data is external: your address in ***LOCALIDAD.1, ***CCAA.1, which does not

coincides, as has already been highlighted, with that of the supply point and the number

of the complainant's mobile phone that EDP included in the copy of the contract that it sent to

home.

The recordings also show these extremes: That the aforementioned lady

BBB -which in the opinion of EPD acted on behalf of the claimant- requested that the

invoicing was sent to your representative at the address of the supply point

-***ADDRESS.1- but at no time did he provide another address than the

corresponding to the point of supply and provided only as a mobile number of

the person whom the ***TELEPHONE.2 said to represent.

Therefore, from the foregoing we must conclude that it was not Mrs. B.B.B. who

provided EDP with the details of the claimant's address - an address that has nothing to do

with the supply point, since it is located in another Autonomous Community,

***CCAA.1, in the town of ***LOCALIDAD.1, ***ADDRESS.2-, address to which

EDP sent the document called "Notification of default" described in the Facts

Tested and later a copy of the contract to send it signed.

Also, the mobile number of the claimant, ***TELEFONO.2, which EDP

incorporated into the contractual document that was sent to your address, it was not provided either

by Mrs. B.B.B.. Let us recall the explanation that the claimant has offered. That

made a telephone claim with EDP through his mobile number and that the

The result was receiving from the entity a contractual document to be returned

signed in which appeared his mobile number, from which he made the call of

claim. Well, in that contractual document, surprisingly,

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not even the landline telephone number that appeared in the Non-Payment Notice, the

***TELEPHONE.1 -regarding which the claimant stated in his writing of

claim that did not belong to her - nor the mobile number that Mrs.

BBB provided to EDP in the course of the recordings such as the telephone number of his

assumption represented: ***TELEPHONE.2.

And finally, it is striking that this mobile number is curiously

(***TELEPHONE.2) the same one that will later be provided to EDP by a person who

will contact the entity as a result of a cut at the supply point and ask

How much is the amount owed? Recording that EDP has contributed with its writing

of allegations to the initial agreement (see Proven fact 10) that in his opinion would serve

to justify the legality of the data processing on which the claim is based

occupies us.

In short: EDP has not provided this Agency with any document that

proof of the condition of representative of the claimant that Mrs. B.B.B. he claimed

hold when he contacted the entity by telephone and changed the ownership of the

contract in the name of the claimant, providing in that act the name, two surnames and

NIF of your supposed represented. EDP has also not proven what the legitimacy is

to process other data of the claimant, such as their address or mobile phone; data that

Mrs. B.B.B. did not provide to EDP.

To this should be added another circumstance of great significance. In the light of

documentation provided by EDP -four audios with the calls made between that company and Mrs. B.B.B. on September 17 and 18, 2018 in order to manage the registration of the contract in the name of the claimant- it is verified that in no At that time, the entity demanded that the third party (Mrs. B.B.B.) who provided the data of the claimant and said to hold his representation would provide some document that I would credit that point.

Nor is there any knowledge that the entity, before registering the gas supply contract in the name of the claimant -and despite the fact that the legitimization of EDP to process the claimant's personal data was supported, exclusively, in that they had been provided by his supposed representative - would have taken some measure to verify the reality of that representation.

Outside contacting directly with the owner of the data or articulating some other mechanism, the truth is that EDP has not shown that it had deployed a minimum diligence in verifying that, indeed, the owner of the data had granted his representation to the third party who provided them (Mrs. B.B.B.). Likewise, there is no evidence that this entity has implemented an ad hoc protocol.

C-. Respect for the principle of legality that must govern the processing of personal data. third parties and referred to in article 6.1. of the RGPD, it implies that the person in charge be able to demonstrate compliance (principle of proactive responsibility, article 5.2 of the RGPD)

In the present case -in which the respondent affirms that the legality of the treatment is justified by the existence of a contract in which the affected party was a party- it is transferred the person responsible for the processing of personal data bears the burden of proof of the

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hiring; or at least the burden of proof that he displayed the diligence that was proceeding to comply with such obligation.

We refer to article 5.2 of the RGPD. In similar terms, it was pronounced the, currently repealed, Directive 95/46, which was transposed into domestic law Spanish through Organic Law 15/1999, on Data Protection (LOPD) and that clearly reflected the Regulations for the development of the LOPD, approved by the Royal Decree 1720/2007. Regulations in force when EDP started data processing which is the object of assessment in this disciplinary proceeding and which is currently find repealed.

The Administrative Litigation Chamber of the National High Court, in cases such as the one proposed here, has been considered under the previous regulations that When the owner of the data denies the contract, the burden of proof corresponds to who affirms its existence, and the data controller must third parties collect and keep the necessary documentation to prove the owner's consent.

We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Basis of Fourth Right: "On the other hand, it is the data controller (for all, Judgment of this Chamber of October 25, 2002 Rec. 185/2001) to whom it corresponds ensure that the person from whom consent is requested actually gives it, and that the person who is giving the consent is effectively the owner of those personal data, having to keep proof of compliance with the obligation to provision of the Administration, responsible for ensuring compliance with the Law.

D.- EDP also invokes, in defense of its statement that it acted in accordance with Law and respected the principle of legality when processing the claimant's data, which, the

change of ownership of the gas contract managed by Mrs. B.B.B. -as representative of the company that was the holder of the energy contract for the point of supply of ***ADDRESS.1- did not require him to prove that the alleged representative held the representation of the new client and owner of the data treated. It justifies such an affirmation in that article 83 of Royal Decree 1955/2000 grants the consumer who is up to date with the payment the power to transfer his contract to another consumer who is going to make use of it under identical conditions. And it also adds that in the present case "the change of ownership occurs under the same contractual conditions, that is, without the change being considered a new registration and therefore a new contract".

In response to such allegation, regarding the alleged enabling rule for the treatment carried out (the R.D. 1955/2000), it is enough to point out that article 6.1 of the RGPD, in its section c) contemplates as one of the assumptions of legality of the treatment that this is necessary for the fulfillment of a legal obligation applicable to the responsible for the treatment.

However, the obligation in such a case must be imposed by a rule with formal rank of Law. The requirement that the enabling norm have the formal rank of Law was also established in the previous data protection regulations. Us we refer to article 10.2 of the Regulations for the development of the LOPD, currently repealed, but in force when EDP started processing the complainant's data.

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STC/292/2000 had an impact on this issue at the time regarding the

article 6.1, in fine, of the LOPD, which mentioned the Law as an exception to the consent principle. The Constitutional Court warned that a limitation to a fundamental right or the exercise of the faculties that comprise it requires that carried out through a Law in the formal sense, without the possibility of introducing limitations or restrictions to the content of a right of that nature through a regulatory standard.

In any case, and without prejudice to the preceding exposition, the regulatory norm invoked by EDP has as a factual assumption that the consumer was at the payment stream. And as revealed by listening to the recording provided with the allegations to the initiation agreement - in which a person who is identified with the data of the claimant contacts EDP to ask about the amount owed since it have cut off the electricity supply - three bills were due.

Regarding the second reflection of the claimed one -that there was no discharge new with the data of the claimant but a subrogation of the claimant in the previous contract - it is a question of a civil/commercial nature on which this Agency should not pronounce itself. What is relevant for the purposes at hand is that, regardless of whether we are facing a subrogation or a new contract,

In both cases, the claimant would have, as claimed by the claimant, the contracting party status. And as such, to assert as a legal basis of the treatment article 6.1.b) of the RGPD, it is essential that the owner of the data had given his intended representative consent to act in such condition, an extreme that in no case has been accredited by EDP.

This Agency reiterates that none of the documents that EDP has provided proves what is substantial in the matter examined: that the owner of the data granted to Mrs. B.B.B. his representation so that on his behalf he could manage the change in the ownership of the electricity contract of the supply point of ***ADDRESS.1.

Nor has the respondent provided documents or evidence that show that the entity, in such a situation - a telematic contracting through who claims to be the representative of the owner of the data-, displayed the diligence minimum requirement to verify that your interlocutor actually had the representation that he claimed to hold.

Respect for the principle of legality, before the principle of consent, which is in the essence of the fundamental right to protection of personal data, requires prove that the owner of the data consented to a third party holding a contract with EDP or, at least, that the data controller deployed the essential diligence to prove that point. Not to act like this - and not to demand it Thus, this Agency, which is responsible for ensuring compliance with the regulations regulating the right to protection of personal data - the result would be empty the content of the principle of legality and in particular article 6.1 of the LOPD.

E.- Confirmed that EDP processed the personal data of the claimant and verified also that this entity has not provided the AEPD with any document that demonstrates that the claimant granted his representation to the person who entered into the contract with

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her and affirmed to act on her behalf -which would have allowed the treatment to be lawful under article 6.1.b, of the RGPD- it must be assessed if the fault of the claimed entity or if it omitted the due diligence, attending the circumstances of the case, essential for the behavior analyzed to be subsumable in the offending type of article 83.5. of the GDPR.

This, because our sanctioning law governs the principle of culpability, that prevents the imposition of sanctions based on the strict liability of the alleged offender. The presence of the element of culpability in the broad sense, as condition for the sanctioning responsibility to arise, has been recognized by the Constitutional Court, among others, in its STC 76/1999, in which it states that the Administrative sanctions share the same nature as criminal ones, since they are one of the manifestations of the *ius puniendi* of the State and that, as a requirement derived from the principles of legal certainty and criminal legality enshrined in the articles 9.3 and 25.1 of the C.E., its existence is essential to impose it.

Law 40/2015 on the Legal Regime of the Public Sector provides in the article 28, under the heading "Responsibility":

"1. They may only be sanctioned for acts constituting an infraction.

natural and legal persons administratively, as well as, when a Law recognize capacity to act, affected groups, unions and entities without legal personality and independent or autonomous estates, which result responsible for them by way of fraud or negligence." (The underlining is from the AEPD)

In the case analyzed, not only is the element of guilt present - extreme that the respondent denies in its allegations to the initial agreement - but rather appreciates a very serious lack of diligence on the part of the respondent that has a consequence directly in determining the amount of the penalty to be imposed.

In compliance with the obligations that the RGPD imposes on the person responsible for the treatment, it must display the minimum diligence required by the circumstances of the case. The SAN of 04/29/2020 is illustrative -which, although it was issued in a matter of fraudulent contracting and under the previous regulations, it is perfectly extrapolated to the that occupies us- whose sixth Legal Basis says:

"The question is not to clarify whether the appellant processed the personal data

of the complainant without her consent, such as whether or not she used due diligence reasonable in trying to identify the person with whom you signed the contract". (The underlining is from the AEPD)

For this reason, even when there is unlawful conduct, when the person responsible for the treatment certifies having acted with the diligence that the circumstances of the case required to comply with the obligations imposed by the data protection regulations. data, as strict liability is proscribed in our Administrative Law sanctioning party, the AEPD proceeds to file the file.

In the case that we examine, it is verified that the EDP entity did not deploy the the least diligence in order to be in a position to prove that the holder of the personal data had granted its representation to the person who claimed to act in

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your name on the contract. The respondent did not verify before managing the change ownership of the gas supply contract in the name of the claimant if whoever said acting on his behalf effectively held it.

To such an extent, the lack of diligence shown by EDP in the course that concerns us that the recordings of the conversations held between the entity and the person who identified himself as the claimant's representative I manifest that the supposed representative did not obtain the data of the DNI of the affected by checking the document. Rather, as Mrs. B.B.B. explained in the conversation with EDP whose recording is in the file, the data had been handwritten by the person it claimed to represent. It is also striking that

despite the incidents arising in telephone contracting regarding the letter of the DNI of the represented -which forced Mrs. B.B.B. I had to call a second once to EDP after verifying the letter of the document- the respondent continued without articulate some consistent measure aimed at verifying that the holder of the the data had granted its representation to the person who intervened in the hiring.

In light of the recordings in the file and what is alleged by EDP

In its defense, it is clearly evident that the entity completely lacks a protocol of action for telematic contracts when the person who provides the data is not its owner, but a third party that claims to act on its behalf.

Lack that, in addition, prevents compliance with the principle of responsibility proactive.

Regarding the element of guilt in the framework of the procedure

sanctioning party it seems appropriate to refer to the SAN of 05/30/2015 (Rec. 163/2014) which has highlighted the differences that exist between the attribution of responsibility to a natural person and a legal person and connects the "reproachability" of a certain conduct to a "legal person" with the circumstance that that

"Would it have provided or not an effective protection to the legal right protected by the rule". The second Legal Basis of the aforementioned Judgment states:

<<However, the mode of attribution of responsibility to people

legal does not correspond to the forms of fraudulent or reckless guilt that

They are attributable to human behavior. So, in the case of violations

committed by legal persons, although the element of

guilt, it is necessarily applied differently from the way it is applied with respect to

to natural persons. According to STC 246/1999 "(...) this construction, different from the

imputability of the authorship of the infraction to the legal person arises from the

nature of legal fiction to which these subjects respond. missing in them
volitional element in the strict sense, but not the ability to break the rules to the
that they are subjected. Capacity for infringement and, therefore, direct blame that
derives from the legal right protected by the norm that is violated and the need for
said protection is really effective and for the risk that, consequently, must
assume the legal entity that is subject to compliance with said rule">>

EDP–given the nature of the business activity it carries out, which
implies the processing of numerous personal data - had the obligation to
have adopted the necessary and timely measures to be in conditions of

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comply with the obligations that are implicit in the principle of legality.

In short, the conduct of EDP, materialized in the processing of data

Personal information of the claimant –name, two surnames, NIF, mobile phone and address–

linked to a gas energy contract in which he denies being a party, without there being

accredited that condition of the claimant and without having observed a minimum

diligence in its action, violates article 6.1.b, of the RGD, subsumable action

in the sanctioning type of article 83.5 of the RGD.

IV

The arguments put forward by the claimant in her various briefs - briefs

whose content is summarized in the second, fifth and eighth Background, and to which

we mention in the preceding Foundations of this resolution- demand to make

some precisions:

In defense of its claim to archive the file, EDP makes various allegations that revolve around the same idea: the existence of a contract of representative mandate between Mrs. B.B.B. and the claimant for the first will enter into an energy contract with EDP on its behalf. representative mandate that For EDP, it is the legitimate legal basis for the treatment it has carried out.

To support such an assertion, the respondent makes endless assertions devoid of any legal consistency. He says, for example, that "there is a relationship valid contractual relationship" between EDP and the complainant and justifies that assertion in two elements that, it states, the Agency considered proven in the initiation agreement:

"That the claimant's data was obtained through Mrs. B.B.B. and what is this

The lady stated on several occasions, during the telephone conversations, that acted on behalf of the claimant.

In the allegations to the proposed resolution, EDP once again focuses on this issue to now denounce the legal defenselessness to which this Agency has subdued.

Thus, it states that "he is in a situation of legal defenselessness, since that the AEPD itself accredited admits the origin of the data, provided in the call at the time of the hiring made by Mrs. B.B.B., resulting in no however irrelevant in order to prove the due treatment of the same, when is precisely the point of reference that justifies the legitimacy of the treatment of the data of the Complainant, since the existence of a valid contractual relationship between the parties is confirmed." Second allegation of the brief of allegations to the resolution proposal. (The underlining is from the AEPD)

Well, in relation to this "legal defenselessness" that EDP suffers, we must specify what this Agency did say and what it did not say, but EDP wants to attribute it.

In Legal Basis II of the motion for a resolution, section B (in the

this resolution, Legal Basis III), it is said that the recordings sent

by EDP (Proven Facts 7 and 8) "exclusively prove that a

person, Mrs. B.B.B., insistently stated that she represented the

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claimant to contract on his behalf with EDP." And then it is added: "The

aforementioned recordings, nor do they prove that the claimant granted his representation to the

said lady to contract the gas supply on her behalf nor do they provide any evidence

any in that sense." And it goes on to say that the "recordings sent by EDP

(four audios, of which two of them make up document 1 and the rest the

document two of those provided with the response to the information request) do prove

what is the origin of some of the claimant's personal data that EDP processed

associated with a contract that he denies having entered into: we refer to the data of

name, surnames and ID of the claimant. Data that, as evidenced by

the audition of the recordings, were provided by Mrs.

to EDP."

"However, the recordings do not explain the origin of other data from the

claimant that EDP also treated linked to a contract to which the holder of the

personal data is external: your address in ***LOCALIDAD.1, ***CCAA.1, which does not

coincides, as has already been highlighted, with that of the supply point and the number

of the complainant's mobile phone that EDP included in the copy of the contract that it sent to

home"

BBB

As it seems obvious, in such paragraphs nothing else is stated than the recordings of EDP demonstrate that the data of the complainant that were subject to treatment by the entity (except its address and mobile number) come from or originate in the information that, in light of the recordings sent to the AEDP, was provided by Mrs. BBB

. This, in contrast to other data of the complainant that EDP also treated but that the aforementioned lady did not provide him, since they are not mentioned in the recordings provided: the claimant's address and mobile phone number.

Pretend -as the complainant does- that in such paragraphs this Agency is acknowledging that it was the claimant who provided his data to Mrs. B.B.B. It is any inadmissible point.

In short, when the Agency states that the recordings provided are irrelevant is referring to their lack of virtuality to prove or provide evidence that the claimant granted his representation to Mrs. B.B.B.. While that representation is not accredited or evidence of its existence is provided, it is not possible accept, as the claimant claims, that there was a valid contractual relationship between the parts.

The claimed, in proof of the alleged validity of the contractual relationship between EDP and the claimant, has invoked again the recording that it provided as a document attached to the pleadings to the initiation agreement.

Regarding this recording – which, as I already underlined at the time, the Agency did not contains date- EDP, surprisingly, provides new information that, without However, it is not accompanied by its necessary proof. The entity now says in its brief of allegations to the proposal - second allegation, third paragraph - that the recording is from 08/10/2019 (data that does not appear on the sound recording) and that “said payer, is the son of the Complainant, knowing the latter as the owner of the

contract"

The recording provided by EDP with the brief of allegations to the agreement of

beginning (Proven fact tenth) -in which the person who calls and identifies himself with the

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personal data of the claimant asks how much the debt amounts to, since they have

cut off the supply, after which the telephone operator of the claimed one questions him

about the CUPS of the home and informs you of the amount pending payment and the

possibility of card payment - cannot have the probative effect that EDP wants

attribute to him

It suffices to point out in this regard that the processing of the complainant's data without

legitimation for it begins in May 2018; that in the recordings it is indicated that

payment will be made by direct debit, which seems to have not happened

given the existing non-payment situation and that the claimant, who received at his home

the non-payment notification already knew perfectly well the amount owed.

The entity also affirms (third allegation of the allegations to the proposal,

first paragraph) that "acted...ensuring the identification of the previous and new owner,

as well as to translate the operation carried out into a durable medium"

Interesting statement that demands precision: identification is not the

legal basis of the treatment, but rather the alleged consent of the

claimant to a mandate granted to Mrs. B.B.B.. Thus, it is true that in the

recordings provided by EDP Mrs. B.B.B., who insistently affirms that she

is the claimant's representative, provided EDP, or in other words, "identified" before

EDP to his intended representative and provided his name, two surnames and NIF.

EDP evidently through the recording provided -in which the supposed

The claimant's representative identifies him/her - knows his/her name, surnames and NIF. But the relevant issue is another: the accreditation that the aforementioned lady acted in condition of the claimant's representative because they both agreed to do so, which requires proving that the claimant consented to such representation.

The various arguments put forward by EDP have the same common element.

They intentionally omit any reference to what constitutes the core of the conduct contrary to the RGPD for which the entity is responsible: the proof that the claimant granted Mrs. B.B.B. his representation to intervene in his name in contracting with EDP.

Related to the above we have to bring up another of the interesting statements made by EDP in its defense (which the entity also highlighted in bold): that "the AEPD not only hinders and inhibits legal traffic, but also annuls completely the figure of the representative and the mandate, not considering this administrative body these operations carried out by third parties, as acts

legitimate" (The underlining is from the AEPD)

Affirmation that again starts from a false premise. This Agency - of course could be otherwise because it is subject to the Spanish legal system - nothing has to say about the figure of the representative mandate

What is decisive is that EDP has not proved that the person who intervened in the hiring, and said to act as representative of the claimant, held that representation. What is relevant is the lack of proof that the claimant -whose data personal has treated EDP associated with a contract that he denies having entered into-

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had granted his representation to the person who intervened in the contracting and said act in such a condition.

The defendant -who in her arguments to the initial agreement explained in detail the provisions of the Civil Code that regulate the mandate and insisted that in our DC. governs the principle of freedom of form, so this Agency cannot require that the mandate be documented - forgets that article 1278 of the C.c provides that "The Contracts will be binding regardless of the form in which they have been concluded, provided that they meet the essential conditions for their validity. and one of these conditions is consent. Consent of the claimant to the mandate representative that he had supposedly conferred on Mrs. B.B.B., who was essential condition for its existence and about which EDP contributes nothing and says nothing.

Regarding the lack of diligence shown by EDP to verify that the person who provided the personal data of the claimant held his representation and that, not even after the phone call, did some type of activity to confirm the identity of the new owner EDP has responded in his arguments to the proposal:

"However, this consideration is not correct, since, not even in this case

We are facing a contract, nor does my client lack procedures that regulate these aspects." It then indicates:

"First of all, my client has a double verification process implemented for new hires via text message to phone of contact provided, keeping it as proof of the ratification of the

hiring.

Second, this case involves a mere modification of the owner of the contract already signed previously...” (The underlining is from the AEPD)

Allegations that only show confusion regarding the obligations to be which is subject to the person responsible for the processing of personal data of third parties by the specific legislation. The mere manifestations of those who claim to act in representation of another cannot justify the legality of the treatment nor constitute a proof of respect for this principle in the processing of data whose compliance

The controller is bound by the GDPR.

v

In order to specify the amount of the administrative fine to be imposed in each case individual, it must be in accordance with the provisions of articles 83.1 and 83.2 of the RGPD, precepts that state:

“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

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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 such as the number of interested parties affected and the level of damages that have suffered;
- b) intentionality or negligence in the infringement;
- c) any measure taken by the controller or processor to alleviate the damages suffered by the interested parties;
- d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that they have applied under of articles 25 and 32;
- e) any previous infringement committed by the person in charge or the person in charge of the treatment;
- f) the degree of cooperation with the supervisory authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement, in particular whether the person in charge or the person in charge notified the infringement and, if so, in what measure;
- i) when the measures indicated in article 58, section 2, have been ordered previously 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 of certification approved in accordance with article 42, and
- k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits obtained or losses avoided, directly or indirectly, through the 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 the Regulation (EU)

2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of treatment of personal information.
- 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 subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when not mandatory, a data protection officer.
- h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party.”

A) In light of the transcribed regulations and in order to specify the amount of the sanction of fine to be imposed on EDP as responsible for a typified infraction

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in article 83.5.a) of the RGPD, it seems appropriate to make two clarifications:

The first, that article 83.2 RGPD requires that the control authority

guarantees that the sanction to be imposed is in each case “effective, proportionate and

dissuasive" and, on the other, that the amount of the penalty provided for in the RGPD for infractions contemplated in article 83.5 have as a maximum limit the greater of these two amounts: 20,000,000 euros or 4% of the total annual turnover overall for the previous financial year. During the 2017 financial year, the turnover of EDP COMERCIALIZADORA, S.A., amounted to 268,476,000 euros, for which 4% of this amount amounts to 10,739,040 euros.

It must also be indicated that the respondent has requested in her allegations to the initial agreement that the minimum sanction foreseen for infractions be imposed mild. Allegation that has no reason to be when the applicable standard is the RGPD that neither distinguishes between minor, serious and very serious offenses provided for by the LOPD or contemplates a mechanism equivalent to article 45.5 of the aforementioned Organic Law 15/1999.

Although the main claim of the respondent has been the archiving of the actions, in its allegations to the initial agreement requested in a subsidiary that the minimum sanction provided for minor infractions be imposed. Allegation which has no reason to be when -as is the case here- the applicable standard is the RGPD which, unlike the LOPD, does not distinguish between minor, serious and very serious and that does not contemplate a mechanism equivalent to article 45.5 of the aforementioned Organic Law 15/1999.

B) On the origin of estimating any of the mitigating factors described in the standard EDP argued that for the matter at hand "practically all of the extenuating circumstances included in the sanctioning regime".

However, we cannot share this assertion of the claimed. It's more,

In the present case, it is not even considered appropriate to consider as mitigating factors the fact that only one person or the merely local scope of the offense (article 83.2.a)

In a case such as the one we are analyzing -in which the claimed entity, for telematic contracting in which a third party intervenes on behalf of the owner of the data, lacks a protocol adjusted to Law that allows demonstrate that he actually holds that representation - the offending conduct does not constitutes a specific and isolated event, the only specific event is the claim made by the affected party. Thus, it does not seem correct that the fact that the affected by the conduct of the entity is a single person, can be estimated as exponent of less culpability or unlawfulness of their conduct or appreciate Nor is the local scope of the infringement a mitigating factor. The conduct contrary to standard is the result of an action model through which EDP develops its activity and that it continues to maintain since, in its opinion, it is adjusted to Law, no matter how obvious the breach of the principles of legality and proactive responsibility.

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Nor can the circumstance described in article 76.2.c) of the LOPDGDD, by reference to article 832.k of the RGPD: “The benefits obtained as a result of the commission of the infraction”. Regarding this issue, the National High Court, Contentious Chamber Administrative, in its SAN of 04/17/2018 (Rec. 254/2017) rejected the claim of the plaintiff, sanctioned by the AEPD, to admit as a mitigating factor the Article 45.5.e) LOPD due to lack of benefits. The third legal basis of the SAN says: “Regarding the absence of benefits, we can only reiterate what

argued by the appealed resolution, regarding what is relevant is that the Abanca's action was motivated by the search for economic benefit, for so the fact that it was not finally obtained cannot serve as a basis for a mitigation of culpability or unlawfulness of their conduct. that has been also the spirit of the SAN of 03/31/2017.

C) The concurrence, as aggravating circumstances, of the circumstances following:

- The duration of the illegitimate treatment of the claimant's data carried out by EDP. The documentation that makes up the file reveals that the treatment began on 05/17/2018 (Proven fact 6) and was maintained, at least, until 11/15/2018; that is, for almost five months. For this purpose, the letter that EDP sent to the claimant, dated 11/15/2018, in response to the informative request of the AEPD -Proven fact 9- in which it is shown that it continues to process the data of the affected since it considers that the claimant had signed a contract with it through of Mrs. B.B.B., (article 83.2.a, of the RGPD)
- The business volume or activity figure of the entity (article 83.2.a, of the GDPR) We are in the presence of a large company in the energy sector. The volume global annual total for the financial year 2017 amounted to 268,476 million euros, (article 83.2.a of the RGPD)
- Article 83.2.f) of the RGPD mentions "the degree of cooperation with the control authority in order to remedy the infraction and mitigate the possible Adverse effects". Circumstance that also operates as an aggravating circumstance. Yes ok it is true that EDP responded to the informative requests of this Agency, it is also that, despite the fact that it could not prove the legality of the treatment of the data of the claimant decided to continue with the processing of their personal data associated with a gas contract, after the AEPD had made the request

informative, as evidenced in the letter dated 11/15/2018 addressed to the claimant, despite not having any document proving that the third party who intervened in the contracting acted on behalf of the owner of the data.

- The scope of the treatment (article 83.2.a, RGPD) since the personal data of the complainant who have been processed by EDP without legitimacy to do so there were several: the name and two surnames, NIF, home address and telephone number mobile.

- The defendant has acted with a very serious lack of diligence, (article 83.2.b, of the RGPD). We are not only facing a lack of diligence at the moment

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to link the data of the claimant to a gas contract by virtue of the consent granted by the person who claimed to act on their behalf. As detailed in the Foregoing foundations, EDP has shown that it absolutely lacks a protocol of action that contemplated the need to collect some document that make proof of the representation that is said to hold in the hiring telematics in which whoever contacts the entity claims to intervene in representation of another person.

- The obvious link between EDP's business activity and the processing of personal data of clients or third parties (article 83.2.k, of the RGPD in relation with article 76.2.b, of the LOPDGDD)

SAW

In accordance with articles 58.2 and 83.2 of the RGPD, previously transcribed,

the control authorities may impose, in addition to the sanction of a fine,
any of the corrective measures or sanctions contemplated in letters a) to h) and j)
of section 2 of article 58 of the aforementioned RGPD.

In the present case, taking into account that the claimed - with regard to the treatment
of personal data collected in telematic contracts in which a third party
intervenes and declares to hold the representation of the owner of the data and represented-
It completely lacks a protocol of action respectful of the obligations that
It is imposed by the RGPD, it is agreed, under article 58.2. d) of the RGPD, order
EDP that incorporates the contracting protocol that it has implemented for the
contracting through a representative all changes that allow you to be in
conditions to prove before this Agency that the represented party, and owner of the data, has
authorized such representation and has conferred it in favor of the person intervening in
the legal business. The term in which the new measures must be implemented
will be one month computed from the date on which the resolution in which it is thus
agree to be executive.

In line with the above, article 83.6 RGPD must be brought up, which establishes:

“Failure to comply with the resolutions of the control authority pursuant to article
58, paragraph 2, will be sanctioned in accordance with paragraph 2 of this article with
administrative fines of a maximum of EUR 20,000,000 or, in the case of a
company, of an amount equivalent to a maximum of 4% of the turnover
global annual total of the previous financial year, opting for the highest amount.

Therefore, in accordance with the applicable legislation and having assessed the criteria for
graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE EDP COMERCIALIZADORA S.A., with NIF A95000295, for
an infringement of article 6.1 of the RGPD, typified in article 83.5 of the RGPD, a

fine of 75,000 euros (seventy-five thousand euros).

SECOND: Under article 58.2.d) of the RGPD, ORDER EDP

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COMERCIALIZADORA S.A., with NIF A95000295, that ADJUSTS its protocols of telematic contracting to THE PROVISIONS of the RGPD regarding the LEGALITY OF THE PROCESSING, in particular in the contracts that you carry out THROUGH REPRESENTATIVE, in which as responsible for the treatment must be in conditions to prove both the reality of the representation granted by the owner of the data and represented as your identity.

The period within which EDP must implement the measures ordered adopt and certify its compliance before the AEPD, it will be one month computed from the date on which this sanctioning resolution becomes executive.

THIRD: NOTIFY this resolution to EDP COMERCIALIZADORA S.A.

FOURTH

: Warn the sanctioned party that she must enforce the sanction of a fine administrative imposed once this resolution is enforceable, in accordance with the provisions of article 98.1.b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (in hereinafter LPACAP), within the voluntary payment term established in article 68 of the General Collection Regulations, approved by Royal Decree 939/2005, dated 29 July, in relation to article 62 of Law 58/2003, of December 17, through its income, indicating the NIF of the sanctioned and the procedure number that appears in

the heading of this document, in the restricted account number ES00 0000 0000 0000 0000 0000, opened on behalf of the Spanish Agency for Data Protection in CAIXABANK Bank, S.A. Otherwise, it will be collected in 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, 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 article

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 article 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-

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through the

Electronic Registration of

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

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

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

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

You must also transfer to the Agency the documentation that proves the filing

effectiveness of the contentious-administrative appeal. If the Agency is not aware

of the filing of the contentious-administrative appeal within a period of two months

from the day following the notification of this resolution, it would terminate the

precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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