Procedure No.: PS/00140/2019

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/00140/2019, instructed by the Spanish Agency for Data Protection for the entity IBERDROLA COMERCIALIZACIÓN DE ÚLTIMO RESOURCE, S.A.U., (currently CURENERGIA COMERCIALIZADORA DE LAST RESOURCE, S.A.U.), in view of the claim filed by Ms. A.A.A. (in hereinafter, the claimant), and based on the following

BACKGROUND

FIRST: On 12/13/2018 there is an entry in the AEPD written by the claimant, addressed against IBERDROLA COMERCIALIZACIÓN DE ÚLTIMO RESOURSO, S.A.U., (in the CURENERGIA COMERCIALIZADORA DE ULTIMO RESOURSO, S.A.U. in hereinafter CURENERGIA), with NIF A95554630. The reasons on which the claim are, in summary, the following: the company has used your personal data personal character as a former client of the same without your consent to carry out fraudulent hiring and registration.

SECOND: Upon receipt of the claim, the Subdirectorate General for Data Inspection proceeded to carry out the following actions:

On 01/15/2019, the claim submitted was transferred to CURENERGIA for its analysis and communication to the complainant of the decision adopted in this regard. Likewise, it was required that within a month it send to the Agency certain information:

- Copy of the communications, of the adopted decision that has been sent to the claimant regarding the transfer of this claim, and proof that the claimant has received communication of that decision.
- Report on the causes that have motivated the incidence that has originated the

claim.

- Report on the measures adopted to prevent the occurrence of

similar incidents.

- Any other that you consider relevant.

On 01/15/2019, the claimant was informed of the receipt of the claim and its

transfer to the claimed entity.

On 03/21/2019, in accordance with article 65 of the LOPDGDD, the Director of the

Spanish Agency for Data Protection agreed to admit the claim for processing

filed by the claimant against CURENERGIA.

IBERDROLA has not responded to any of the requests made by the

Spanish Data Protection Agency.

THIRD: On 04/02/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against CURENERGIA for the alleged

infringement of article 6.1.a) of the RGPD, sanctioned in accordance with the provisions of the

article 83.5.a) of the aforementioned regulation and qualified for prescription purposes as

very serious infraction in article 72.1.a) of the LOPDGDD.

FOURTH: Once the initiation agreement was notified, CURENERGIA presented a written

allegations in which he states, in summary, the following: that after analyzing the

claim, it is verified that the affected party sent a request for a social bonus and

documentation for your application; which is a necessary requirement for

processing the existence of a contract; which kept the claimant informed of the

status of its processing; that during said procedure the claimant requested the change of marketer; that once the said change was known, we proceeded to cancel the contract as soon as possible without the activation occurring of the contract, nor the issuance of invoices in the absence of fraudulent contracting.

FIFTH: On 05/07/2019 the period of practice tests began, remembering the following:

Incorporate the file of the procedure indicated above, and therefore consider reproduced for evidentiary purposes, the documentation collected in the previous inspection actions that are part of the file E/00204/2019.

Consider reproduced for evidentiary purposes, the allegations to the initial agreement of the procedure presented by CURENERGIA.

Request from CURENERGIA a copy of the electricity contract signed with the claimant; discharge and discharge dates, reasons for discharge, identification of who requested and if the client is newly registered with the company; as well as any other documentation related to the cancellation produced that is estimated of interest.

Ask the complainant for a copy of the documentation in their possession related to the sanctioning procedure that for any reason had not been provided at the time of the complaint or any other manifestation in relation to the denounced facts, as well as a legible copy of your DNI and the Document 1 provided with your claim.

Request from HOLALUZ a copy of the electricity contract signed with the husband of the complainant, dates of registration and discharge, reasons for discharge, identification of the person who requested it; if the client is again given registration in the company, as well as any other documentation related to

the loss produced that is considered of interest.

CURENERGIA, the claimant and HOLALUZ responded to the test performed

whose content is in the file.

SIXTH: On 09/11/2019, a Resolution Proposal was issued in the sense of

that the Director of the Spanish Data Protection Agency sanctioned

CURENERGIA for infringement of article 6.1.a) of the RGPD, typified in article

83.5.a) of the RGPD, with a fine of €75,000.00 (seventy-five thousand euros). Likewise, it

attached Annex containing the relationship of the documents in the

file in order to obtain a copy of those it deems appropriate.

The representation of CURENERGIA presented on 09/18/2019 a letter requesting a copy

of the file and extension of the term for allegations, being sent the copy of the

requested documents and the letter extending the term to answer.

On 10/22/2019, the representation of CURENERGIA presented a letter in which it indicated

who had proceeded to order on 10/16/2019 transfer for an amount of

forty-five thousand euros (€45,000), as voluntary income from the

proposed violation.

However, analyzing the check deposited, it was observed that its amount did not coincide with

the sanction consigned in the Resolution Proposal once the deduction has been made

20% corresponding to voluntary payment, that is, sixty thousand euros (€60,000),

since it was no longer possible to take advantage of the 20% deduction for

acknowledgment of responsibility; In addition, the letter had not been forwarded either.

desisting or waiving any action or recourse in administrative proceedings as

indicated in the aforementioned Motion for a Resolution.

Therefore, given the time elapsed, CURENERGIA was asked to contribute to the

as soon as possible the bank account number in order to order the return of the

amount deposited on 10/16/2019 (45,000 euros), as it does not coincide with the amount of the

sanction consigned in the Resolution Proposal and the continuation of the

procedure, proceeding to dictate the final resolution.

SEVENTH: Of the actions carried out in this procedure, they have been

accredited the following:

PROVEN FACTS

FIRST. On 12/13/2018, the AEPD received a written document from the affected party in which

declares that CURENERGIA without your consent or authorization has used your data

of a personal nature as a former client of the same to make a contract and

fraudulent registration on 10/19/2018, having knowledge of it when receiving an e-mail from your

supplier HOLALUZ and indicate the cancellation in the contract.

SECOND. The claimant has provided a copy of her DNI nº ***DNI.1, with address at

***ADDRESS.1, Madrid (Madrid), coinciding with the one that appears in the letter of

claim.

THIRD. It is recorded that on 05/30/2018 HOLALUZ and the claimants signed

electricity supply contract for CUPS ***CUPS.1 corresponding to the address

located at ***ADDRESS.1, Madrid (Madrid).

FOURTH. A copy of the e-mail sent by HOLALUZ to the partner of the

claimant stating:

"…Because it is possible that this is our last mail and it is that our paths are

separate: on 10/19/2018 we canceled your Holaluz supply point.

As you know, we do not have and will not have permanence. We believe that close treatment and

transparency is the best for our clients to stay with us. Forks

That's why we deeply regret not having lived up to you. For our

part we only have to send you our last invoice. And don't hesitate, if you have any

query or doubt about the change, count on us to help you" (the underlined is

of the AEPD).

FIFTH. On 10/23/2018, the claimant sent an e-mail to CURENERGIA in which

stated: "I request the withdrawal of contract No. ***CONTRATO.1. The reasons are

that this contract has been registered by Iberdrola fraudulently on the 19th

October 2018 without my authorization or consent. For this reason I already have

open the corresponding claim (No. ***CLAIM.1) and additionally

I will take the appropriate measures.

I enclose a copy of my ID in the email in which I have attached this letter.

Upon receiving it, CURENERGIA responded on the same date: "We confirm that

we have received your email and that we have initiated the necessary steps

to answer you as soon as possible…"

SIXTH. CURENERGIA sent communication to the claimant dated 10/24/2018

noting that in response to your request of 10/23/2018 of opposition to the treatment of

your personal data had proceeded to make effective the aforementioned right

to the requested treatment.

Later on 10/30/2018 I send you a new communication in relation to the contract

"…In relation to the claim

of supply denounced indicating:

corresponding to the information indicated above, we want to transmit our most

Sincere apologies for any inconvenience that may have been caused.

Likewise, we inform you that your contract has been cancelled, so it has not been

activate after rejecting you, its activation…"

SEVENTH. It is recorded that on 02/20/2018 the claimant and her partner processed before

IBERDROLA the request for a social bond, providing the necessary documentation to

your application, for the point of supply, CUPS ***CUPS.1, corresponding to the

address located at ***DIRECCION.1, Madrid (Madrid).

EIGHTH. On 05/17/2018 CURENERGIA sent the complainant a communication in the

that indicated: "We inform you that your request for a social subscription complies with the

requirements to be considered a vulnerable consumer, in accordance with the provisions

in Royal Decree 897/2017, which regulates the social bond, and in the Order

ETU/943/2017, which develops said Royal Decree.

Continuing with the established process to complete the processing of your bonus

social, we have begun the formalization of a contract under the Voluntary Price

for the Small Consumer (PVPC). The social bonus will be applied from the moment

that said formalization takes place.

(…)"

NINETH. On 05/29/2018 CURENERGIA sent the complainant a communication in the

telling him: "We want to thank you for having contracted with us your

electricity supply.

Along with this letter we deliver two copies of your contract. We kindly ask you to

return signed the “Copy for IBERDROLA COMERCIALIZACION LAST

RESOURCE, SAU through any of our managers…”

CURENERGIA provides the two copies of the contract without number, without date, none of the

which is signed by the claimant.

TENTH. The communications made between the entities are provided.

CURENERGIA and HOLALUZ through Extensible Markup Language (“XML”), format

official information exchange files declared by the CNMC of which

The dates of cancellation, registration and replacement of the supply contract of the

claimant.

ELEVENTH. CURENERGIA has not provided any documentation: contract signed

by the parties, recording of the call or digital contract, which proves that

had the consent of the claimant for the processing of their data

personal in relation to the canceled supply contract.

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 art. 47 of the Organic Law 3/2018, of

December 5, Protection of Personal Data and guarantee of rights

(hereinafter LOPDGDD), the Director of the Spanish Agency for

Data Protection is competent to resolve this procedure.

IBERDROLA is accused in this proceeding of violating the

Article 6, Legality of the treatment, of the RGPD that establishes that:

II

"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;

(…)”

On the other hand, in article 4 of the RGPD, Definitions, in its section 11, it is

establishes that:

“11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either through

a statement or a clear affirmative action, the processing of personal data that

concern him”.

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates

that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of will

free, specific, informed and unequivocal by which he accepts, either through a

declaration or a clear affirmative action, the treatment of personal data that

concern.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to state

specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the

processing of personal data for purposes unrelated to the

maintenance, development or control of the contractual relationship".

In the present case, it is proven that the claimant and her partner were

customers of the claimed for the point was supplied electrical, CUPS, located in its

domicile, requesting on 02/20/2018 the electric social bonus contributing the

necessary documentation for your application.

III

It is true that CURENERGIA sent them a communication on 05/17/2018 in which

told them that "We inform you that your request for a social subscription complies with the

requirements to be considered a vulnerable consumer, in accordance with the provisions

in Royal Decree 897/2017, which regulates the social bonus…" and another of

05/29/2018 in which it indicated "We want to thank you for having contracted with

us your electricity supply" and that together with the letter he sent copies of the

IBERDROLA

contract to return

COMERCIALIZACION LAST RESOURCE, SAU through any of our

managers…"; however, there is no proof that the holders contracted with the

demanded the supply of electricity since the aforementioned copy, contract no.

*** CONTRACT.1, was never signed or sent to the company since the next day,

05/30/2018, those affected signed an electricity supply contract with HOLALUZ

for CUPS located in your home.

“Exemplary for

signed

The entity itself in writing dated 04/10/2019 stated: “That the times of

management and processing of the social bond led the claimant to make the decision to

switch to the marketer Holaluz. Notwithstanding the foregoing, and whenever

IBERCUR was aware of said change of marketer by the

claimant, the contract was canceled as soon as possible, without

came to produce neither the activation of the contract, nor the issuance of invoices, not having

therefore no fraudulent contracting”.

The documentation in the file offers indications that the

claimed violated article 6 of the RGPD, since the aforementioned entity processed the data

of the claimant (name, surnames, NIF, address, etc.,) linking them to the

electricity supply contract corresponding to your home that the affected

denies having authorized or given his consent for his hiring and of which he had

knowledge by sending a farewell e-mail from your supply company

Holaluz informing him that since 10/19/2018 they had proceeded to lower the point

of supply: "...Because it is possible that this is our last mail and it is that

our paths separate: on 10/19/2018 we canceled your point of

supply of Holaluz”.

The Contentious-Administrative Chamber of the National High Court, in

similar assumptions has considered that when the owner of the data denies the

contracting, the burden of proof corresponds to the person who affirms its existence, owing

the data controller of third parties to collect and keep the

documentation necessary to prove the consent of the holder. Thus, the SAN of

05/31/2006 (Rec. 539/2004), Fourth Law Basis:

"…On the other hand, it is the data controller (for all, sentence of

this Chamber of October 25, 2002 Rec. 185/2001) who is responsible for ensuring

that the one from whom consent is requested actually gives it, and that

person who is giving consent is effectively the owner of that data

personal, having to keep proof of compliance with the obligation to

disposal of the Administration, responsible for ensuring compliance with the Law.

Well, applying all said regulations and doctrine to the alleged defendant

we have that Telefónica Móviles has declared that in order to recharge

telephone calls, the client must complete and sign a contract in which they will indicate

your personal data and the data of the Movistar Plus contract to which you are associated or

details of the bank account or credit/debit card, and that to ensure the

identity of the client, the distributor must request a photocopy of the DNI and documents

proof of payment data.

However, as argued by the contested administrative decision and

can be deduced from the proceedings, it turns out that at the request of the Agency of

Data Protection the remission of the contract signed by Mr. Gaspar Telefónica Móviles

He stated that he did not have a copy of the contract in his files.

It turns out, therefore, that the plaintiff company not only has not contributed

no evidence that proves the telephone conclusion of the contract, but

which has also not proven compliance with the guarantees and precautions that

determine the standards transcribed. More specifically, there is no justification

documentary, or recording tape, or any other support that justifies the

conclusion of the contract, and there is no record of the subsequent shipment and reception by the recipient of the documentation corresponding to the aforementioned contract.

We must conclude from all of the above, therefore, that Telefónica Móviles proceeded to treat the data of Doña Julia's DNI without her consent, since she did not There was no business relationship between them.

The claimant has provided a copy of the document sent to CURENERGIA on 10/23/2018 requesting the withdrawal of contract No. ***CONTRATO.1, as well as the motives and reasons for the company's actions; CURENERGIA replied the 10/30/2018 indicating that the contract had been canceled transmitting apologies for the inconvenience caused: "…In relation to the claim corresponding to the information indicated above, we want to convey our most sincere apologies for any inconvenience that may have been caused.

Likewise, we inform you that your contract has been cancelled, so it has not been come to activate after rejecting you, its activation…" .

It should be noted that respect for the principle of legality of the data requires that accredited evidence that the owner of the data consented to the processing of the data of personal character and display a reasonable diligence essential to prove that end. Failure to act in this way would result in emptying the content of the principle of legality.

In addition, it should be noted that despite the information requirement of the Data Inspection of this Agency, the respondent did not send any response to

Despite the fact that he was sued about the causes that had given rise to the incident that had originated the claim and the measures adopted to avoid similar incidents to occur.

IV

Article 83.5 a) of the RGPD, considers that the infringement of "the principles basic for the treatment, including the conditions for the consent in accordance with of articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned Regulation, "with administrative fines of €20,000,000 maximum or, in the case of a company, an equivalent amount at a maximum of 4% of the total global annual turnover of the financial year above, opting for the highest amount.

On the other hand, the LOPDGDD in its article 72 indicates, for prescription purposes, that: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly the following:

(…)

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

(…)"

In accordance with the facts considered proven, the defendant violated Article 6.1.a) of the RGPD, by illegally processing the personal data of the

claimant without stating his consent, materialized in the contract of

electricity supply corresponding to the CUPS of your home, an infraction that comes

typified in article 83.5.a) of the RGPD and that for prescription purposes comes

determined in article 72.1.b) of the LOPDGDD.

In order to establish the administrative fine to be imposed,

observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which

point out:

v

"1. Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. 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 article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

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

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

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

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in

particular if the person in charge or the person in charge notified the infringement and, in such case,

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.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, “Sanctions and corrective measures”, establishes that:

"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 treatments

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

of personal data.

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

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 party."

data.

In accordance with the precepts transcribed and for the purpose of setting the amount of the

sanction to be imposed for the infringement typified in article 83.5 of the RGPD of which

holds CURENERGIA responsible, the following factors are considered concurrent:

-

The merely local scope of the treatment carried out by the

claimed entity, since the infringement is limited to a single

supply point.

In the treatment carried out by the entity, only

-

a person affected by the offending conduct.

-

The damage caused to the affected party since, as a consequence of the

performance of CURENERGIA was discharged from her company

supplier having to be activated again the service after

of its cancellation.

-

There is no evidence that the entity had acted

willfully, even though the offending conduct shows a lack of diligence

remarkable.

-

The link between the activity of the offender and the performance of

processing of personal data, since in its activity

usual has to deal with the data of both its clients and third parties.

-

The entity claimed is considered a large company,

being one of the first large companies in the country both by volume

of business and by billing volume.

Therefore, in accordance with the graduation criteria established in the

article 83 of the RGPD and 76 of the LOPDGDD, both favorable and adverse, are

imposes a penalty of 75,000 euros for which CURENERGIA must respond.

In accordance with the applicable legislation and assessed the graduation criteria

of the sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE LAST RESORT MARKETING ON IBERDROLA,

S.A.U., (currently CURENERGIA COMERCIALIZADORA DE ULTIMO

RECURSO, S.A.U.), with NIF A95554630, for an infringement of article 6.1.a) of the

RGPD, typified in article 83.5.a) of the RGPD, and considered for the purposes of

prescription in article 72.1.b) of the LOPDGDD, a penalty of €75,000 (seventy

five thousand euros).

SECOND: NOTIFY this resolution to IBERDROLA COMERCIALIZACIÓN

OF LAST RESORT,

current CURENERGY

COMERCIALIZADORA DE ULTIMO RESOURSO, S.A.U.), with NIF A95554630

S.A.U.,

(in

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 Data Protection at Banco CAIXABANK, S.A. Otherwise,

it will be collected during 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 LOPDPGDD, 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 LOPDPGDD, 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,

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.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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