

□ File No.: EXP202103029

RESOLUTION OF SANCTIONING PROCEDURE

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

BACKGROUND

FIRST: dated August 13, 2021, A.A.A. (hereinafter, the claiming party)

filed a claim with the Spanish Data Protection Agency.

The claim is directed against BUSINESS POWER CONSULTORES, S.L. with NIF
B19707595 (hereinafter, the claimed party).

The reasons on which the claim is based are the following:

The affected person denounces the receipt of a commercial call, from the managing entity of
BUSINESS POWER CONSULTANTS, S.L. called ENERGY POWER, offering
discounts on the electricity bill, despite proving that the receiving line,
***TELEPHONE.1, is registered in the Robinson List since 11/10/2020.

It also indicates irregular treatment by the calling entity when accessing
certain data that identifies you as the owner of the supply.

Along with the claim document, he provides a recording in which the interlocutor
identifies as ENERGY POWER, energy manager of BUSINESS POWER
CONSULTANTS, S.L. revealing the treatment of data very
details of the claimant, such as: name and surname, ID, invoice, consumption and
supply point distributor.

The calling line number is ***PHONE.2 and the calling line number is
contact information provided by the calling entity is ***TELEPHONE.3.

The following documentation is provided along with your complaint letter:

- Download link of the recording in which the interlocutor identifies herself from the

energy manager ENERGY POWER, revealing the treatment of

very detailed data of the claimant, such as: name and surname, ID, invoice,

consumption and distribution point of supply. In this recording it is provided as

contact telephone number of the ENERGY POWER company, not the calling number,

but the number ***PHONE.3.

- Certificate of registration in the Robinson List dated November 10, 2020

- Accreditation invoice of the holder of the receiving line

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SECOND: On October 11, 2021, in accordance with article 65 of the

LOPDGDD, the claim presented by the claimant party was admitted for processing.

THIRD: The General Subdirectorate of Data Inspection proceeded to carry out

of previous investigative actions to clarify the facts in

matter, by virtue of the functions assigned to the control authorities in the

article 57.1 and the powers granted in article 58.1 of the Regulation (EU)

2016/679 (General Data Protection Regulation, hereinafter GDPR), and

in accordance with the provisions of Title VII, Chapter I, Second Section, of the

LOPDGDD, having knowledge of the following extremes:

During these proceedings, the following entities have been investigated:

About the content of the advertising call:

The claimant provides a download link for the audio file of the recording of the

call.

After analyzing the recording provided by the claimant, it is verified that the author of the

call knows the personal data of the claimant in detail and the company claimant's power supplier. There are also many inaccuracies of the calling entity agent during the conversation. In this one, it identify themselves as the manager ENERGY POWER that offer new conditions of marketing on behalf of FACTOR ENERGÍA. They inform the claimant that the phone number that appears as calling number indicator ***PHONE.2 does not accept incoming calls and they provide the claimant as a contact telephone number number ***PHONE.3.

About the telephone number that issued the call and the one indicated in the course of the recording as a contact telephone number

Requested information about the ownership of the phone that originated the call ***TELEPHONE.2 to NEOTEL 2000, S.L., final operator of this telephone number, dated November 3, 2021, this Agency received a letter of reply informing that the owner of this telephone number is:

CRADEMSO, S.L. with CIF B02677789 and registered office at C/ CALABRIA 273 ENT-1, 08029 BARCELONA (BARCELONA)

According to a report from the Central Mercantile Registry, this entity's corporate purpose is the acquisition, promotion, construction, possession, encumbrance, exploitation, under rent - except leasing financial or in any other way, administration, commercialization and alienation of all kinds of urban properties, that is, of the sector of construction and real estate activities. Activity completely disconnected from customer acquisition and marketing.

On October 13, 2021, it is verified that the telephone number of contact ***PHONE.3 of ENERGY POWER, has been terminated.

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It is incorporated into these actions, diligence with the screenshot of the registration of inspector terminal calls with the check call.

Required to FACTOR ENERGÍA, S.A. (hereinafter, ENERGY FACTOR) information on the origin of the personal data provided in the course of the call, consent of the claimant for the reception of this type of calls and the possible relationship of this entity with the manager ENERGY POWER, dated December 15, June 2022 is received at this Agency, a letter sent by this entity stating, among other matters, that the energy manager ENERGY POWER (<https://www.energypower.es/>), has as its corporate name BUSINESS POWER CONSULTORES, S.L., and that indeed this entity "has been one of our commercial agents, with whom a commercial agency relationship has been maintained in telesales modality by virtue of which said company carried out agency work commercial, that is, the promotion of the sale of supply contracts for FACTOR ENERGY", and they add that "to date, said relationship is without activity by the aforementioned agent, although the relationship has not yet been formally resolved contractual".

They also indicate that in the agency contract signed with FACTOR ENERGÍA, within the contractual obligations in charge of the agent is the prohibition to make communications to the subjects that are registered in a file updated exclusion of sending commercial communications ("Robinson List") in accordance with current regulations on the Protection of Personal Data, declaring the AGENT to comply with said obligation.

Requested from FACTOR ENERGÍA the service contract signed with BUSINESS

POWER CONSULTORES, dated June 23, 2022, is received in this

Agency, the requested documentation. In this contract, among other matters, in your

TWENTY-FIRST clause. - CHARACTER DATA PROTECTION

PERSONNEL (folio 17, document "DOC 1.pdf") it is established:

"Given that the provision of the service object of this Contract by EL

AGENT will imply the collection, access and/or processing of personal data

personnel of THE COMPANY's clients, THE AGENT undertakes to assume the

responsibilities that may correspond to him and to act in accordance with the

provided for in the GDPR and the LOPDGDD, and, especially, in relation to the agreements

provided in the following paragraphs and in Annex 7 attached to this

contract regarding the Protection of Personal Data.

THE AGENT must comply with the security measures established in Article 32

of the GDPR.

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In order to comply with the agency activity that is the object of this Agreement, THE AGENT

declares that it is the owner of a file with the contact details of potential clients

in the market that has been legally obtained, being legitimized to carry out the

treatment of the data in the terms of the provision of recruitment services

customers that has been entrusted to it by THE COMPANY. For this, THE AGENT

You must specify in Annex 7 on data protection the origin of which you have

obtained these data.

THE AGENT will act as Data Processor for the collection and registration of

the personal data of the person interested in signing an energy supply contract,
being THE COMPANY the person in charge of the Treatment, who declares and guarantees
that all processing of personal data will be carried out in compliance with the
provided for in the GDPR and the LOPDGDD.

Regarding the personal data obtained as a result of the execution
of this Contract, THE AGENT undertakes to use or apply the personal data
personnel obtained in execution of the Contract in accordance with the instructions
given by THE COMPANY and solely for the purpose of compliance with the
Object of this Contract, making sure that the data subject to treatment
are handled only by those employees whose intervention is required
for the contractual purpose.

[...]

THE COMPANY may carry out, at any time and as long as it does not imply
serious distortions in the development of the activity of THE AGENT the audits of
security that it deems appropriate, in order to verify compliance by
THE AGENT of the obligations and commitments assumed in this document.”

In the aforementioned Annex 7 (folio 37, of this same document), in its first paragraph
notes:

“To comply with the agency activity object of this Contract, THE AGENT
declares that it is the owner of a file with contact details of potential Clients in the
market and declares that it has been obtained lawfully, being legitimized
to carry out the treatment of the data in the terms of the agent activity that
has been entrusted to him by THE COMPANY, that is, the issuance of calls for the
customer acquisition.”

And in its sixth paragraph:

“Furthermore, as Responsible for the Treatment, THE AGENT assures that he has filtered

its database with any of the advertising exclusion lists ("Robinson List"),

complying with article 23.4 of Organic Law 3/2018, of December 5,

Protection of Personal Data and guarantee of digital rights, by which

establishes that "Those who claim [...]"

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And in the last paragraph of this page:

"From the moment the potential client accepts the commercial purpose of the

call, in the event that he gives his consent to the contracting of the

product of THE COMPANY by signing the corresponding contract, THE

AGENT will act as Treatment Manager for the collection and registration of

personal data of the interested party, being THE COMPANY the person in charge of the

Treatment.

Consequently, in relation to the General Data Protection Regulation (RGPD)

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

Guarantee of Digital Rights (LOPDGDD), the Parties reveal the

following points: [...]:

Identification of affected information

- Object of the order

-

- Duration, Obligations of the treatment manager

- Obligations of the person in charge of the treatment (where the aspects

established in article 28 of Regulation (EU) 2016/679 of Parliament

European Parliament and of the Council of April 27, 2016 regarding the protection of natural persons with regard to the processing of personal data and the free circulation of these data)

- Responsibility

In short, this contract reflects on the part of ENERGY POWER the instructions for the provision of service and the obligations of BUSINESS POWER CONSULTANTS, S.L.

Having requested information on the origin of the claimant's data from BUSINESS POWER CONSULTORES, S.L., being notified of this request on 27 December 2021 to the address that appears in the Central Mercantile Registry and in the website of the manager ENERGY POWER <https://www.energypower.es/>, has not been received a letter of allegations from this company in this Agency.

FOURTH: On July 18, 2022, the Director of the Spanish Agency for Data Protection agreed to initiate disciplinary proceedings against the claimed party, for the violation of article 6 of the GDPR, typified in article 83.5 of the GDPR and for the violation of article 48.1.b) of the LGT classified as "minor" in article 78.11) of the LGT.

FIFTH: Notified of the aforementioned start-up agreement in accordance with the rules established in Law 39/2015, of October 1, on the Common Administrative Procedure of

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Public Administrations (hereinafter, LPACAP) and after the period granted for the formulation of allegations, it has been verified that no allegation has been received

any by the claimed party.

Article 64.2.f) of the LPACAP -provision of which the claimed party was informed

in the agreement to open the procedure - establishes that if no

arguments within the established term on the content of the initiation agreement, when

it contains a precise pronouncement about the imputed responsibility,

may be considered a resolution proposal. In the present case, the agreement of

beginning of the disciplinary file determined the facts in which the

imputation, the infringement of the GDPR attributed to the defendant and the sanction that could

impose. Therefore, taking into consideration that the claimed party has not

made allegations to the agreement to start the file and in attention to what

established in article 64.2.f) of the LPACAP, the aforementioned initiation agreement is

considered in the present case resolution proposal.

In view of all the proceedings, by the Spanish Agency for Data Protection

In this proceeding, the following are considered proven facts:

PROVEN FACTS

FIRST: The receipt of a commercial call, from the claimed entity to the

claimant offering discounts on the electricity bill, despite being registered

on the Robinson List since 11/10/2020.

Likewise, irregular treatment is verified in the processing of personal data

by the entity claimed by having this access to certain data of the

claimant that identify him as the holder of the supply, such as: name and

surnames, ID, invoice, consumption and distributor of the supply point, without being able to

accredit the consent of the interested party in the transfer of such personal data, or a

legitimate interest that allows its treatment.

SECOND: The Spanish Data Protection Agency has notified the defendant

the agreement to start this disciplinary procedure, but it has not

presented allegations or evidence that contradicts the facts denounced.

FUNDAMENTALS OF LAW

Yo

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679

(General Data Protection Regulation, hereinafter GDPR), grants each

control authority and as established in articles 47 and 48.1 of the Law

Organic 3/2018, of December 5, Protection of Personal Data and guarantee of

digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve

this procedure the Director of the Spanish Data Protection Agency.

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Likewise, article 63.2 of the LOPDGDD determines that: "Procedures

processed by the Spanish Data Protection Agency will be governed by the provisions

in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations dictated in its development and, insofar as they do not contradict them, with character

subsidiary, by the general rules on administrative procedures."

In accordance with the provisions of article 114.1.b) of Law 11/2022, of 28

June, General Telecommunications (hereinafter LGT), the competition for

Initiating and resolving this Sanctioning Procedure corresponds to the Director of

the Spanish Data Protection Agency.

II

Article 4.11 of the GDPR defines the consent of the interested party as "all

manifestation of free, specific, informed and unequivocal will by which the

The interested party accepts, either through a declaration or a clear affirmative action, the processing of personal data concerning you”.

In this sense, article 6.1 of the LOPDGDD establishes that "in accordance with the provided in article 4.11 of Regulation (EU) 2016/679, consent is understood to of the affected party, any manifestation of free, specific, informed and incompetent will. equivocal by which he accepts, either by means of a declaration or a clear action affirmatively, the processing of personal data concerning him”.

For its part, article 6 of the GDPR establishes the following:

"1. Processing will only be lawful if at least one of the following is fulfilled

conditions:

a) the interested party gave his consent for the processing of his 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 processing is necessary for compliance with a legal obligation applicable to the responsible for the treatment;

d) the processing is necessary to protect vital interests of the data subject or of 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 conferred on 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 outweigh 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.

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The provisions of letter f) of the first paragraph shall not apply to the treatment carried out by public authorities in the exercise of their functions.”

II

Article 72.1 b) of the LOPDGDD states that "according to what is established in the Article 83.5 of Regulation (EU) 2016/679, are considered very serious and will prescribe after three years, the infractions that suppose a substantial violation of the articles mentioned therein and in particular, the following:

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

IV.

In the present case, related to the reception of a commercial call, it has been accredited that the author of the call knows the personal data of the claimant as well as as the claimant's utility company, and cannot substantiate a lawful access to said personal data, that is, you cannot prove the consent of the interested party in the transfer of such personal data, which implies a violation of article 6 of the GDPR, in accordance with the basis of right II, for understanding that we are facing an illegitimate data processing.

V

In connection with the infringement of article 6 of the GDPR and in order to determine the fine administrative procedure to be imposed, the provisions of articles 83.1 and 83.2 of the GDPR, precepts that indicate:

"Each control authority will guarantee that the imposition of administrative fines

under this Article for infringements of this Regulation

indicated in sections 4, 5 and 6 are effective in each individual case,
proportionate and dissuasive.”

"Administrative fines will be imposed, depending on the circumstances of each

individual case, in addition to or in lieu of 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 shall 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

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 and losses suffered by the interested parties;

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d) the degree of responsibility of the controller or processor,

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 controller or processor;

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 extent;

i) when the measures indicated in article 58, paragraph 2, have been ordered previously against the person in charge or the person in charge in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or to 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 GDPR, the LOPDGDD, article 76,

"Sanctions and corrective measures", provides:

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

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing. personal information.

c) The benefits obtained as a consequence of the commission of the infraction.

d) The possibility that the conduct of the affected party could have led to the commission of the offence.

e) The existence of a merger by absorption process subsequent to the commission of the violation, which cannot be attributed to the absorbing entity.

f) The affectation of the rights of minors.

g) Have, when it is not mandatory, a data protection delegate.

h) Submission by the person responsible or in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between those and any interested party.”

In accordance with the precepts transcribed, for the purpose of setting the amount of the sanction of fine to be imposed on BUSINESS POWER CONSULTORES, S.L. with NIF B19707595, as responsible for an infringement typified in article 83.5.a) of the GDPR, considered concurrent in the present case, as aggravating circumstances, the following factors:

-There has been intentionality, since the call was made to the appellant, in accordance with with article 83.2 b of the GDPR.

This infraction can be sanctioned with a fine of a maximum of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the total annual global business volume of the previous financial year, opting for the of greater amount, in accordance with article 83.5 of the GDPR.

SAW

The facts exposed (the violation of the right of opposition), could suppose the commission by the defendant of a violation of article 48.1.b) of the LGT Law, collected in its Title III, which states that:

"1. Regarding the protection of personal data and privacy in relation to the subscriber directories, end users of communications services electronic companies will have the following rights:

b) To oppose receiving unwanted calls for commercial communication purposes

that are carried out through systems other than those established in the previous letter and be informed of this right."

Although the aforementioned article does not configure such a right, so we must go to the data protection regulations in which the right of opposition is regulated: article 21 of the GDPR, (Regulation (EU) 2016/679, of the European Parliament and of the Council, of 04/27/2016, regarding the Protection of Physical Persons with regard to the Treatment of Personal Data and the Free Circulation of these Data) and article 23 of the LOPDGDD (Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights).

This infraction is classified as "mild" in article 78.11) of said standard, which it considers as such: "Failure to comply with the service obligations public, of obligations of a public nature and the violation of the rights of consumers and end users as established in Title III of the Law and its development regulations", and may be sanctioned with a fine of up to €50,000, of in accordance with article 79.d) of the aforementioned LGT.

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VII

In this case, the claimant states that on August 2, 2021, from line ***TELEPHONE.2, the complaining party received an unsuccessful business call consented to a mobile phone line owned by her, ***TELEPHONE.1, despite who has been registered on the Robinson List since November 10, 2020, for which would have violated article 48.1. b) of the LGT, in relation to article 21

of the GDPR and article 23.4 of the LOPDGDD, in accordance with the basis of right VI.

VIII

In relation to the violation of article 48.1 b) of the LGT, by virtue of the precepts indicated, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established in article 80.1) and 2) of the LGT:

- Consideration of the economic situation of the offender (point 2), as it is a small company.

IX

Based on the evidence obtained in the preliminary investigation phase, it is considered that it is appropriate to graduate the sanctions to be imposed in the amount of €10,000 (ten thousand euros) for the infringement of article 6 of the GDPR and €5,000 (five thousand euros) for the infringement of article 48.1 b) of LGT.

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

FIRST: IMPOSE BUSINESS POWER CONSULTORES, S.L. with NIF B19707595, for a violation of article 48.1.b) of the LGT Law classified as "mild" in article 78.11) of the aforementioned Law in relation to article 21 of the GDPR, and the article 23.4 of the LOPDGDD, a fine of €5,000 (five thousand euros).

SECOND: IMPOSE BUSINESS POWER CONSULTORES, S.L. with NIF B19707595, for a violation of article 6 of the GDPR classified as serious in the Article 83.5 of the GDPR, a fine of €10,000 (ten thousand euros).

THIRD: Warn the penalized person that they must make the imposed sanction effective Once this resolution is enforceable, in accordance with the provisions of Article art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common of 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, by means of its income, 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, open in the name of the Agency

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Spanish Data Protection Agency at the bank CAIXABANK, S.A.. In the event

Otherwise, it will proceed to its collection in the executive period.

Once the notification has been received and once executed, if the execution date is
between the 1st and 15th of each month, both inclusive, the term to make the payment
voluntary will be until the 20th day of the following or immediately following business month, and if
between the 16th and the last day of each month, both inclusive, the payment term
It will be until the 5th of the second following or immediately following business month.

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

Resolution will be made public once the interested parties have been notified.

Against this resolution, which puts an end to the administrative process in accordance with art. 48.6 of the
LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from
count 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 for in article 46.1 of the referred Law.

Finally, it is noted that in accordance with the provisions of art. 90.3 a) of the LPACAP, may provisionally suspend the firm resolution in administrative proceedings if the The interested party expresses his intention to file a contentious-administrative appeal.

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

Mar Spain Marti

Director of the Spanish Data Protection Agency

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