

□ Procedure No.: PS/00087/2021

RESOLUTION R/00246/2021 TERMINATION OF THE PROCEDURE FOR PAYMENT  
VOLUNTEER

In sanctioning procedure PS/00087/2021, instructed by the Spanish Agency for  
Data Protection to PROMOTECH DIGITAL, S.L., given the complaint filed by  
A.A.A., and based on the following,

BACKGROUND

FIRST: On March 15, 2021, the Director of the Spanish Agency for  
Data Protection agreed to initiate a sanctioning procedure against PROMOTECH  
DIGITAL, S.L. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00087/2021

935-240719

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency before  
the entity, PROMOTECH DIGITAL, S.L., with CIF.: B87231312, (hereinafter, "the  
claimed entity"), by virtue of a complaint filed by D. A.A.A., (hereinafter, "the  
claimant person"), and based on the following:

FACTS

FIRST: On 10/26/20, you have entered this Agency, a document presented by  
the claimant, in which he indicated, among others, the following:  
"I have repeatedly received SMS from this company, when I have never subscribed, nor  
SMS sending accepted (I never consent to it from any company). Not in the SMS  
allows you to unsubscribe, except by mail".

SECOND: In view of the facts set forth in the claim and the documents

provided by the claimant, the General Subdirectorate for Data Inspection proceeded

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to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (GDPR). Thus, on 12/01/20 an informative request is addressed to the claimed entity.

THIRD: On 12/30/20, the respondent entity sends a letter to this Agency, in which it indicated, among others, the following:

“The claimant made use of the electronic commerce service provided by PROMOTECH through the Website \*\*\*URL.1 on April 28, 2016, as it is manifested through the ticket of the order that you made on that date and that is attached as DOCUMENT 1.

Therefore, the claimant's data must be kept by PROMOTECH for the statutes of limitations for actions of any kind that may result applicable to the relationship between it and PROMOTECH itself. Yo. In this sense, It is necessary to take into account, at least, the limitation period of 5 years established with relation to personal obligations in Article 1964, section 2, of the Code Civil, in accordance with the provisions of the AEPD in its Report 00148/2019.

It must be taken into account that the mobile phone number data must form part of the data kept during the prescription periods of the actions relevant, since said data is used during the order management process (realization, preparation and delivery) made through the aforementioned Website.

Add that, although the claimant is correct when he says that he does not have any relationship currently with PROMOTECH, it must be reiterated that it did, at least, in 2016, and that this relationship is what motivates the conservation of your data, for application of the statutory limitation periods to be taken into account.

Therefore, the retention of the claimant's data is motivated by the compliance with the applicable regulations in relation to the limitation periods of the actions that may correspond to PROMOTECH and/or the claimant as derivation of the relationship established between both Parties and, specifically, of the request made by the claimant on April 28, 2016.

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It is indicated in the letter from the AEPD that "To this must be added that the claimant already filed a claim against the respondent in procedure number:

E/07310/2018, which was resolved with a non-admission for processing since the claimed

He stated that he had suppressed the claimant's data. Notwithstanding the foregoing, deletion of the data should not have been carried out."

b. Disagreement must be indicated with the statement that "the suppression of the data should not have been carried out", because:

As indicated, PROMOTECH had to keep the claimant's data in strict application of the Regulations on prescription of the relevant actions with regarding the relationship with the claimant and the request made by him in April 2016.

PROMOTECH has sent a significant number of communications messages by SMS since you sent your response within the Procedure

E/07310/2018 and always strictly complied with its commitments contained in

said answer.

The fact, as will be indicated below in point 3, that there may have been a  
punctual and involuntary failure that could have given rise to the shipment to which the claimant  
does not mean that PROMOTECH did not comply with the commitments  
that it acquired with its response brief within Procedure E/07310/2018. b)

Rather, in the almost two years since that response and until the SMS received by the  
claimant, the latter has not been included in any of the various communications  
commercials carried out by PROMOTECH through said channel, which highlights  
I state that it did act as indicated in the 2018 Procedure.

PROMOTECH, as it has already stated, makes communications from time to time  
commercials by SMS to those people who have given their informed consent,  
prior and express to this end, in the terms of the Data Protection Regulations and the  
Regulations on electronic commercial communications.

In none of such communications is the claimant included, except in the case  
punctual and accidental of the communication that is included in the letter of the AEPD, for  
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as there would have been an involuntary, occasional and unintentional failure in the  
generation of the shipment that would have given rise to the inclusion in it of the number of  
claimant's mobile phone.

PROMOTECH, as has been pointed out, already has a specific process when  
of generating commercial communications through SMS, for which it is not included in

the list of recipients to those people who have expressed their refusal or not have given their consent to receive such communications.

However, and although it must be reiterated that the recipient filtering process is already exists, in order to avoid involuntary, occasional and unintentional situations as the one produced with the claimant, PROMOTECH will establish in the month of January 2021 an additional filter to the existing one so that:

The current filtering by which they are not included in the list of recipients will be maintained. those people who do not have the mark in the database indicating that they have given their consent or have not expressed their refusal to receive the commercial communications by electronic means.

The creation of a specific and independent database will be added in which will collect the people who, through whatever channel, (a) have not given their consent to the reception of commercial communications by means electronics; (ii) have stated their refusal to continue receiving such communications; or (iii) have revoked the consent they had given to the receipt of such communications.

The list of recipients of each commercial communication will be filtered against this base of data so as not to include as such recipients those who were included in the same.

Of course, the claimant will be included in such a database. iii. Every time you know is going to generate the database of recipients of a commercial communication,

The filtering processes will be documented, both the one that is already carried out and the one that is going to be implemented in January 2021, so that its completion can be accredited and can verify its correctness.

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All of which we inform you in order to respond to the transfer of claim and request for information made in the reference procedure. Y

In any case, we are at your entire disposal for any questions, additional or complementary, they consider appropriate".

FOURTH: On 02/19/20, by the Director of the Spanish Agency for Data Protection agreement is issued for the admission of processing of the claim filed by the claimant, in accordance with article 65 of the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of the digital rights (LPDGDD), considering that what is indicated above, does not comply with current regulations, so the opening of this procedure proceeds sanctioning

FOUNDATIONS OF LAW

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Competition:

- On the exercise of the rights recognized in the RGPD and the treatment of personal information:

It is competent to initiate and resolve this Sanctioning Procedure, the Director of the Spanish Agency for Data Protection, by virtue of the powers that art 58.2 of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 04/27/16, regarding the Protection of Natural Persons with regard to the Treatment of Personal Data and the Free Circulation of these Data (RGPD) recognizes each Control Authority and, as established in arts. 47, 64.2 and 68.1 of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and Guarantee of

Digital Rights (LOPDGDD),

Sections 1) and 2), of article 58 of the RGPD, list, respectively, the

investigative and corrective powers that the supervisory authority may provide to the

effect, mentioning in point 1.d), that of: "notifying the person in charge or in charge of the

treatment of alleged infringements of these Regulations" and in 2.i), that of:

"impose an administrative fine under article 83, in addition to or instead of the

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measures mentioned in this section, according to the circumstances of each

case."

- Regarding the sending of advertising SMS without consent:

In accordance with the provisions of art. 43.1, second paragraph, of the Law

34/2002, of July 11, on Services of the Information Society and Commerce

Electronic System (LSSI), is competent to initiate and resolve this Procedure

Sanctioning, the Director of the Spanish Agency for Data Protection.

In the present case, according to the claimant, he has received several SMS, with

advertising messages of the claimed entity, without consent.

II

For its part, the respondent entity alleges in its brief answering the

requirement made by this Agency that the claimant made use of the service of

electronic commerce arranged by PROMOTECH, through the Website \*\*\*URL.1, in

April 2016 and that therefore he is fully entitled in the treatment of the

personal data of the claimant.

However, the claimant filed in September 2018, a first

claim against the claimed entity, within the framework of the procedure

E/07310/2018, and that according to the existing documentation in said file it was: “by

the lack of attention to your right regulated in Article 21 of the RGPD”.

Prior to admitting said claim for processing, this Agency gave

transfer of the same to the claimed entity, so that it proceeded to its analysis and give

response, both to the claimant and to this Agency.

In the letter that the respondent entity addressed to the claimant, dated 11/13/18, it was

you can read verbatim the following:

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“(…) We hereby inform you that it is the will of said

Company resolve any request from its customers within the framework of the

law, and comply with the communication received from the AEPD on 16

October 2018, which requires Promotech Digital, SL. what for

communicate the decision adopted in relation to the facts subject to

claim. In the claim filed, you state that you have

received two commercial communications via SMS, without having registered in the

database of XXXXXXXX or on the web, nor have given their consent

for this type of advertising. After consulting the records on the website of

XXXXXXXX, record your registration as a user of the services of this

company since 2016, specifically to place an order

of products on April 28, 2016, having given their consent



to receive commercial communications about our services  
and promotions, when you formalized online the form for your registration as  
Username.

Likewise, it does not appear in the company registry that it has exercised  
above your right to delete your personal data or  
opposition, or that has been removed from the user registry. Nevertheless,  
After receiving notification from the AEPD of your claim, it has been  
proceeded to comply with your request, in such a way that they have been blocked  
your data in the XXXXXXXXX system, keeping them only,  
as dictated by the Law, for the attention of the possible responsibilities born  
of your initial treatment, and for the processing of this claim before  
the AEPD (...)"

We inform you that the blocking of your personal data makes it impossible  
its use or treatment for the sending of commercial communications or  
other purposes than those indicated in the previous paragraph.

Subsequently, at the moment in which your personal data leaves  
if necessary to fulfill the purposes described above,  
will proceed to its total suppression in the system of XXXXXXXXX (...)"

For all these reasons, this Agency resolved, regarding file E/07310/2018,  
refusing to process that claim considering that the person responsible had  
served the exercise of the claimant's right.

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However, as can be deduced from the brief presented by the claimant before this

Agency, in October 2020, the entity claimed sent an SMS again

advertisements to the claimant without their consent.

On the exercise of the rights recognized in the RGPD, article 12 of the RGPD,

establish that:

III

1.- The person responsible for the treatment will take the appropriate measures to facilitate the

interested all information indicated in articles 13 and 14, as well as any

communication under articles 15 to 22 and 34 relating to processing, in the form

concise, transparent, intelligible and easily accessible, with clear and simple language, in

particular any information directed specifically at a child. Information

shall be provided in writing or by other means, including, if applicable, by

electronics. When requested by the interested party, the information may be provided

verbally provided that the identity of the interested party is proven by other means.

2. The person responsible for the treatment will facilitate the interested party in the exercise of their rights in

under articles 15 to 22. In the cases referred to in article 11, paragraph 2,

The person in charge will not refuse to act at the request of the interested party in order to exercise their

rights under articles 15 to 22, unless you can show that you are not in

conditions to identify the interested party.

3. The data controller will provide the interested party with information regarding their

proceedings on the basis of a request under articles 15 to 22, and, in

in any case, within one month from receipt of the request. Saying

The term may be extended for another two months if necessary, taking into account the

complexity and number of requests. The person in charge will inform the interested party of

any such extension within one month of receipt of the

request, indicating the reasons for the delay. When the interested party submits the

request by electronic means, the information will be provided by electronic means

when possible, unless the interested party requests that it be provided in another way.

On the other hand, article 21 of the RGPD, on the right of opposition, establishes that:

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1. The interested party will have the right to object at any time, for reasons related to your particular situation, to which personal data concerning you are subject to processing based on the provisions of Article 6, paragraph 1, letters e) or f), including profiling on the basis of these provisions.

The controller will stop processing the personal data, unless prove compelling legitimate reasons for the treatment that prevail over the interests, rights and freedoms of the interested party, or for the formulation, the exercise or defense of claims.

2. When the processing of personal data is for marketing purposes directly, the interested party shall have the right to object at any time to the processing of the personal data that concerns you, including the elaboration of profiles in the insofar as it is related to said marketing.

3. When the interested party opposes the treatment for direct marketing purposes, personal data will no longer be processed for these purposes.

4. At the latest at the time of the first communication with the interested party, the right indicated in sections 1 and 2 will be explicitly mentioned to the interested party and will be presented clearly and apart from any other information.

5. In the context of the use of information society services, and not

Notwithstanding the provisions of Directive 2002/58/EC, the interested party may exercise their right to oppose by automated means that apply specifications techniques.

6. When personal data is processed for the purpose of scientific research or historical or statistical purposes in accordance with article 89, paragraph 1, the

The interested party shall have the right, for reasons related to his particular situation, to oppose the processing of personal data that concerns you, unless it is necessary for the fulfillment of a mission carried out for reasons of interest public.

According to the evidence available at this time, and without

Prejudice to what results from the investigation, the exposed facts could suppose the violation of article 21 of the RGPD, in relation to article 12 of the aforementioned

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Regulation, since it has been proven that the entity did not act diligently, having sent new advertising SMS to the claimant after having exercised this, the right of opposition.

For its part, article 72.1.k) of the LOPDGDD considers it very serious, for the purposes of prescription, "The impediment or the obstruction or the repeated non-attention of the exercise of the rights established in articles 15 to 22 of the Regulation".

This infraction can be sanctioned with a maximum fine of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the

of greater amount, in accordance with article 83.5.b) of the RGPD.

In accordance with the precepts indicated, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction to be imposed in the present case, it is considered appropriate to graduate the sanction to be imposed in accordance with the following aggravating criteria established in article 83.2 of the RGPD:

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The facts object of the claim are a consequence of the clear lack of due diligence on the part of the entity complained against, (paragraph b).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with Regarding the infraction committed by violating what is established in article 21 of the RGPD, in relation to article 12 of the RGPD, allows setting an initial penalty of 3,000 euros, (three thousand euros).

Regarding the sending of advertising SMS without the consent of the interested party, article 21 of the LSSI, provides the following:

III

"1. The sending of advertising or promotional communications by email or other equivalent means of electronic communication previously they had not been requested or expressly authorized by the their recipients.

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2. The provisions of the preceding section shall not apply when there is a prior contractual relationship, provided that the provider had legally obtained

the contact details of the recipient and will use them to send communications commercial references to products or services of your own company that are similar to those initially contracted with the client.

In any case, the provider must offer the recipient the possibility of opposing the processing of your data for promotional purposes through a simple procedure and free, both at the time of data collection and in each of the commercial communications addressed to you.

When the communications have been sent by email, said means must necessarily consist of the inclusion of an email address electronic or other valid electronic address where this right can be exercised, sending communications that do not include said address is prohibited.”

Therefore, according to the evidence available at this time, and without prejudice to what results from the investigation, the facts exposed could suppose the violation of article 21 of the LSSI, by the claimed entity, by send advertising SMS without the consent of the affected party.

The aforementioned infraction is typified as minor in art. 38.4.d) of said standard, which qualifies as such, "The sending of commercial communications by e-mail electronic or other equivalent means of electronic communication when in said shipments do not meet the requirements established in article 21 and do not constitute Serious offense".

Pursuant to the provisions of article 39.1.c) of the LSSI, minor infractions may sanctioned with a fine of up to €30,000, establishing the criteria for its graduation in article 40 of the same norm.

After the evidence obtained, and without prejudice to what results from the investigation, considers that in this case it acts as an aggravating circumstance:

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The existence of intent (section a), since the entity claimed sent commercial advertising to the claimant's phone, via SMS, without the consent of the interested party.

In accordance with these criteria, it is considered appropriate to impose a sanction on the defendant initial payment of 2,000 euros (two thousand euros).

The balance of the circumstances contemplated in the present case, with respect to the infractions committed by the claimed entity allows a total initial sanction to be set of 5,000 euros, (five thousand euros): 3,000 euros for violation of article 21 of the RGPD and 2,000 euros for violation of article 21 of the LSSI.

Therefore, in accordance with the foregoing, By the Director of the Agency Spanish Data Protection,

HE REMEMBERS:

START: PUNISHMENT PROCEDURE against the entity PROMOTECH DIGITAL, S.L., with CIF.: B87231312, in accordance with the provisions of articles 63 and 64 of the Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (LPACAP), for the alleged infringement of article 21, with regarding article 12 of the RGPD and violation of article 21 of the LSSI.

APPOINT: instructor to D. B.B.B. and, as secretary, Ms. C.C.C., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of the Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Sector Public (LRJSP).

INCORPORATE: to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and his documentation, the documents obtained and generated by the Subdirector General for Data Inspection during the research.

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WHAT: for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations, the sanction that could correspond would be a fine of 5,000 euros (five thousand euros), without prejudice to whatever results from the instruction.

NOTIFY: this agreement to the entity, PROMOTECH DIGITAL, S.L., granting him a hearing period of ten business days to formulate the pleadings and submit any evidence you deem appropriate.

If within the stipulated period it does not make allegations to this initial agreement, the same may be considered a resolution proposal, as established in article 64.2.f) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event that the sanction to be imposed was a fine, it may recognize its responsibility within the term granted for the formulation of allegations to this initial agreement; it which will entail a reduction of 20% of the sanction to be imposed in this procedure, equivalent in this case to 1,000 euros. with the app of this reduction, the sanction would be established at 4,000 euros, resolving the



procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of this procedure, carry out the voluntary payment of the proposed sanction, which will mean a reduction of 20% of the amount of the same, equivalent in this case to 1,000 euros. With the application of this reduction, the sanction would be established in 4,000 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding apply for the acknowledgment of responsibility, provided that this acknowledgment of the responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the referred amount in the previous paragraph may be done at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 3,000 euros (three thousand euros).

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In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the abandonment or renunciation of any action or resource in via administrative against the sanction.

If you choose to proceed to the voluntary payment of any of the amounts indicated above, you must make it effective by depositing it in the account N° ES00 0000 0000 0000 0000 0000 opened in the name of the Spanish Agency for the Protection of Data in Banco CAIXABANK, S.A., indicating in the concept the number of reference of the procedure that appears in the heading of this document and the

cause of reduction of the amount to which it is accepted.

Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where appropriate, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP,

There is no administrative appeal against this act.

Sea Spain Marti

Director of the Spanish Agency for Data Protection.

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: On March 30, 2021, the claimant has proceeded to pay the

SECOND

sanction in the amount of 3,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to

the facts referred to in the Initiation Agreement.

## FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on Administrative Procedure Common to Public Administrations (hereinafter, LPACAP), under the rubric "Termination in sanctioning procedures" provides the following:

"1. Started a sanctioning procedure, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the appropriate sanction.

2. When the sanction is solely pecuniary in nature or it is possible to impose a pecuniary sanction and another of a non-pecuniary nature, but the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least, 20% of the amount of the proposed sanction, these being cumulative with each other. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or resignation of any administrative action or recourse against the sanction. The reduction percentage provided for in this section may be increased regulations.

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In accordance with the above, the Director of the Spanish Agency for the Protection of Data RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00087/2021, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to PROMOTECH DIGITAL, S.L.

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 as prescribed by the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal contentious-administrative 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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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