

□ Procedure No.: PS/00114/2019

938-300320

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: Dated 06/22/2018 has entry in the Spanish Protection Agency  
of Data (AEPD) a letter from Ms. A.A.A. (hereinafter, the claimant) in which  
declares that "MOVISTAR", the trade name under which TELEFÓNICA operates  
MÓVILES ESPAÑA, S.A.U., and TELEFÓNICA DE ESPAÑA, S.A.U., have processed their  
personal data -name, two surnames, NIF and bank details- without your  
consent, since she has registered three telephone lines in her name that she  
He denies having contracted and has charged three bills to his bank account.  
He states that he filed a claim with MOVISTAR for these facts, put  
to his knowledge that she had not made any contract and got them to give  
low "telephone numbers on April 27, 2018" although, despite this, they have  
continued to collect new bills in your bank account. He adds that the  
contracting was by telephone and that MOVISTAR has refused to facilitate the recording of  
the hiring that supposedly she would have made.

Provide a copy of the complaint filed with the Police (Office of

Complaints- \*\*\*LOCATION.1) on 04/25/2018 in which he makes these statements:

- That in a bank account of which he is the holder in the entity CAIXABANK,  
(number ending in the digits \*\*\*DIGITS.1) was charged the following bills for

MOVISTAR: (i) Invoice \*\*\*FACTURA.1, dated 03/01/2018, for an amount of 83.91 euros.

(ii) Invoice \*\*\*INVOICE.2 of 04/01/2018, for an amount of 71.72 euros.

- That when you file a telephone claim with the company, they inform you of that in the month of January a telephone contract was made for the product "MOVISTAR FUSIÓN" associated with the line numbers \*\*\*TELÉFONO.1, \*\*\*PHONE.2 and \*\*\*PHONE.3.

- That the operator had confirmed that the contract was made by another person "named B.B.B., who claimed to be her husband, as can be heard on the recording that they keep about the hiring and that the teleoperator said."

- "That precisely the complainant has been divorced for more than ten years, casually calling himself her ex-husband B.B.B."

On 06/11/2018, the claimant filed a new complaint with the Police (Office of Complaints- \*\*\* LOCATION.1), extension of the previous one, in which it exposes that, despite having removed the fraudulent lines on 04/27/2018, has received a new MOVISTAR invoice, dated 06/01/2018, detailing the consumption made for the aforementioned lines in the period between 04/18/2018 and 05/17/2018, invoice \*\*\*INVOICE.3.

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Attach a copy of the following invoices of the "Fusion" product, which bear the MOVISTAR anagram and the indication TELEFÓNICA DE ESPAÑA, S.A.U. (in hereinafter TDE or the one claimed):

1.- \*\*\*INVOICE.1, issued on 03/01/2018. It contains the name of the claimant, as holder of the contract and as recipient of the invoice, and their NIF \*\*\*NIF.1 (of which a copy is provided). The contracted services are a fixed line

(\*\*\*PHONE.1) and the mobile line \*\*\*PHONE.2.

2.- \*\*\*INVOICE.2 of 04/01/2018, with identical data

3.- \*\*\*FACTURA.4, dated 05/01/2018, with identical data

4.- \*\*\*INVOICE.3, dated 06/01/2018, with identical data.

SECOND: In view of the facts exposed, the AEPD deployed the following performances:

A.- Within the scope of reference file E/4627/2018, the AEPD, by means of a written dated 08/16/2018, transferred to TELEFÓNICA MÓVILES ESPAÑA, S.A.U., (TME) of a copy of the claim and requested explanations about his actions in relation to the claimed facts. The notification, through the notific@ application, was accepted by this operator on 08/20/2018.

TME responded to the request for information -in the framework of E/4627/2018- in date 09/10/2018 stating as "preliminary question" the following:

"It is interesting to highlight that the claim of Ms. ... is addressed to movistar, which is the trade name of TME and Telefónica de España, S.A.U., in forward TDE, turning out to be the latter the one that provides the service of telecommunications to which the aforementioned claim refers". (The underlining is the AEPD)

TME made the declarations and provided the documents that are detailed:

- That he has sent a letter to the claimant in response to the claim that she has formulated before the AEPD and that has been definitively resolved.

Attaches, as Annex 1, a copy of the letter sent to the claimant, dated 09/06/2018, signed by the Office of the DPD, with the following text:

<<(...) we answer the claim filed by you before the

Spanish Agency for Data Protection ...(...) we inform you that it has been

responded to the AEPD specifying the causes that have motivated the incident that gave rise to your claim as well as the detail of the measures adopted...(…) inform you that given the special circumstances that have concurred in the case, my client has proceeded to annul all the invoices issued in relation to the lines whose cancellation was processed, leaving the matter definitively solved>>.

That he acknowledges that the claimant requested on 04/25/2018 the cancellation of the lines \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3, with respect to the that the Movistar Fusión service had been contracted and that, in addition to her request for withdrawal, the claimant submitted a claim to which the claimed responded by letter, a copy of which is provided, integrated into the documents from annex 2. They are part of annex 2 that the respondent sends to the AEPD the following documents:

(Yo)

A letter that the claimant sent to MOVISTAR, signed 06/11/2018, in which he details that he was a client of MOVISTAR for

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many years and resigned in November 2017. That in January 2018 "someone spoofed my identity and Movistar kept passing me installments in my bank account. That, after speaking with several operators of that company, managed to cancel the numbers on 27 April 2018 "And I informed him that I had not made

that contract. Contract that was made by telephone recording. That

MOVISTAR refuses to deliver a copy of the recording of

the hiring. Request a refund of the amounts collected.

The copy of the complaint that the claimant filed with the Police Station of

Police on 04/25/2018 and the amplifying complaints of the previous one, of

dates 05/04/2018 and 06/11/2018.

Copy of a letter that MOVISTAR sends to the claimant, dated

07/13/2018, linked to the telephone number \*\*\*TELÉFONO.1, of the

that we reproduce these fragments: <<... we indicate that we have

reviewed your case in detail, indicating that we have carried out the

timely steps, in order to cancel the existing debt

corresponding to the lines \*\*\*TELEPHONE.1, \*\*\*TELEPHONE.2 and

\*\*\*PHONE.3.>>

(iii)

(iii)

- Adds all the invoices that were issued in relation to the three lines

aforementioned were annulled; that none was paid, so the

return to the claimant of any amount, and that their personal data is not

were communicated to asset solvency files.

B.- On 12/13/2018 - within the framework of reference file E/10190/2018- the

carry out investigative actions directed at TELEFÓNICA DE ESPAÑA, S.A.U.

(TDE or claimed)

Dated 12/21/2018 and 01/21/2019, the respondent has submitted the following

information in relation to the services contracted on behalf of the claimant:

According to the information contained in their systems, the lines of

1.

phone \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3, whose

services are marketed through the "Fusion" service, they were registered to

name of the claimant on dates 01/22/2018 the first and 01/14/2018

the last two. They were discharged with dates 05/01/2018 (the first) and

04/25/2018, the last two.

two.

associated with the complainant, where they appear, the following:

They provide a copy of the contacts that appear in their files

and registration of additional

. Under the indication "Information on the matter", "Typification Sale-

2.1

Recruitment...Hera plus web", "Type of management requested", this is collected

annotation in the comments section:

"energía canarias b.alta fixed destination fusion + soccer with mobile phone holder

\*\*\*PHONE.2

Grab

\*\*\*RECORDING.1(...)" (The underlining is from the AEPD)

Contact

"General information

.

\*\*\*CONTACT.1" contains the customer number "\*\*\*\* CLIENT NUMBER.1", the

date of start and end of contact, in both cases on 04/23/2018 at

14:47:26 and 14:58:19, respectively; the telephone channel indication

and in the observations section this annotation: "Request cancellation by

identity theft, but does not provide the number to unsubscribe. You

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\*\*\*PHONE.3.

indication

Bass

of

the

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I send to store. I provide a portability code for the delivery of the

equipment in store

(The underlining is from the AEPD)

A recording is provided relative to the contracting of the services of

Provides a printed copy of a document with the header

1.

“Claim file”. Under the heading “Identification of the

claim” contains the claim number “\*\*\*CLAIM.1”; What

“Type” “Invoicing”; as “date of receipt” the “12/07/2018”; What

“Target date” on “07/19/2018”; as “Amount discounted” “171.29”; What

“Status of the claim”, “estimated” and in the section “Confirmation of the  
payment order”, “yes”.

two.

merger in the name of the claimant.

In it, the interlocutor of the company reports the date -01/14/2018- and

It asks for your first and last name. A voice is heard, distant and with sound in

echo, which provides the name and surnames of the

claimant.

The interlocutor of the company requests the DNI number and the contracting

Provide the number of the document of which the claimant is the holder. The

The company's interlocutor informs you that you have contracted the service

"Fusion". He asks if the installment is transferred to the charge in the bank account that

has provided to which the contracting party responds affirmatively.

THIRD: The facts set forth in the 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 (RGPD), which

It is effective from 05/25/2018.

It is not an obstacle for the application of the RGPD that the conduct allegedly

offender had been initiated when Organic Law 15/1999 was in force,

Protection of Personal Data (LOPD). In this sense, it must be indicated, for

one party, which the claimant has stated -and the respondent has confirmed in its

response to the request of this Agency, in file E/4627/2018, dated

09/10/2018- that requested the respondent on 04/25/2018 the cancellation of the telephone lines

that had been registered under his name integrated into the "FUSIÓN" product.

On the other, that among the invoices that the respondent issued in the name of the

claimant there is one from 06/01/2018 (when the RGPD was already in force),

invoice \*\*\*FACTURA.3, for the service provided by both the fixed line and the line

mobile \*\*\*PHONE.2. With the same argumentative purpose, it should be mentioned that in

dated 07/13/2018 the respondent addresses a letter to the claimant informing her of

that it has carried out the "timely steps to cancel the existing debt

corresponding to the lines \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3".

It is also worth mentioning the document - screenshot - sent by the



claimed with its response during the preliminary investigation actions

(file E/10190/2018) which has the heading "Claim file" and

deals with the claim dated "07/12/2018" of the type "invoicing" for the amount of

€171.29.

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The cited documents show that when Regulation (EU) 2016/679

was of effective application (on 05/25/2018), the complainant continued processing the data

claims of the claimant without standing, associated with a debt to which the

claimant was an employee derived, among others, from the services provided by the line

mobile \*\*\*PHONE.2.

Although the respondent initiated the processing of the personal data of the

claimant in January 2018 (date on which they were registered associated with their data

the three controversial lines were personal), therefore when the

LOPD, the conduct in which the violation of the protection regulations is specified

of personal data has been maintained over time until, at least, the beginning of July

of 2018, since, as the respondent acknowledges in her letter of July 13, it is then

when it proceeds to cancel the amounts it had billed the claimant for the

lines that he registered in his name, among which was, as indicated,

the mobile line \*\*\*PHONE.2.

The infraction for which the claimed party is held responsible participates in the

nature of the so-called permanent infractions, in which the

consummation is projected in time beyond the initial fact and extends during

the entire period of time in which the data or personal data are subject to treatment. So, even though on the date the conduct began offender, the applicable standard was the LOPD, the applicable standard is the one that It is in force when the infraction is consumed.

The Supreme Court has ruled on the rule that should be applied in those cases in which the infractions are prolonged in time and there have been a normative change while the infraction is 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 in the subsequent in which the offending conduct continued. The Judgment examined a case that dealt with the sanction imposed on a Judge for breach of her duty to abstention in preliminary proceedings. The sanctioned alleged the non-validity of the article 417.8 of the LOPJ when the events occurred. The STS considered that the infraction had been committed since the date of initiation of the Preliminary Proceedings until the moment in which the Judge was suspended in the fiscal year of their functions, so that rule was indeed applicable. In the same sense, pronounces the SAN of 09/16/2008 (Rec.488/2006)

FOURTH: On July 29, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate sanctioning proceedings against TELEFÓNICA DE ESPAÑA, S.A.U., (hereinafter TDE or the claimed party), in accordance with the provisions of Articles 63 and 64 of Law 39/2015, of October 1, on Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), by the alleged infringement of article 6.1. of the RGD, typified in article 83.5 of the RGD.

FIFTH: Notification of the initiation agreement, on 08/26/2019 the respondent presents allegations and requests the file of the sanctioning procedure for non-existence of responsibility. In support of his claim, he adduces the following arguments:

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- Begins by indicating that there are a series of circumstances that justify

that TDE had processed the claimant's data linked to the line

\*\*\*PHONE.2. The circumstances described by the respondent are transcribed:

□

“Dated January 14, 2018, B.B.B. (holder of the numbering

\*\*\*TELEPHONE.2) requests the portability of the line to Movistar, with

In order to integrate the line in the Fusion contract, it is provided

portability verification recording, the line is installed in

Movistar in a pre-fusion contract waiting to complete the

formalities.

□ On the same date, Ms. A.A.A. [the complainant] contacts the

company to formalize the Merger Agreement of the lines

\*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3 (including

reference line)

□ Dated February 8, 2018, under verbal order D. B.B.B. Y

wife [name of claimant]

in the name and authorization of your

with DNI [the claimant's DNI], request the change of data

bank”

(The underlining is from the AEPD).

-

Incorporates scanned email sent on 08/23/2019 to the

Subdirectorato de Inspección de la AEPD with this message:

"...in relation to sanctioning file PS/00114/2019, it is provided as

proof of consent of the steps taken on the lines

\*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3

in the name of [the

claimant].

Recording of the verifier of the line \*\*\*TELEPHONE.2 the

following voice recordings.

Recording of the merger contract \*\*\*TELEPHONE.1, \*\*\*TELEPHONE.2 and

\*\*\*PHONE.3. Contract bank account change recording

Fusion".

-

- States that the charges in the claimant's bank account began to

be generated from the moment that D. B.B.B. (hereinafter D.B.B.B. or

the impersonator) makes the address change "supposedly under

verbal command from his wife.

It invokes the "appearance of legitimacy with which it acted" TDE since the data

provided by the impersonator were truthful and there was an appearance that it was

the claimant who gave the consent.

- With regard to the proof of consent of the claimant, load that

corresponds to the claimed entity, states that "As is obvious, and so it is

It follows from what is stated in the file, it is impossible for my represented

can prove the consent of the complainant without the existence of the

recording, but it can be accredited by the existence of the payment of

invoices and actions on the line that can only be carried out as the holder".

Insists on the non-existence of an infringement of article 6.1. GDPR and adds that

“a proof that TDE has acted according to the norm” is “the deception

used and the usurpation of data by the impersonator”.

It invokes the principle of presumption of innocence, given that the

impersonator identified himself to TDE as the husband of the claimant and

correctly provided all the identification data that was requested (name,

surnames and ID). It argues that any sanctioning resolution requires the certainty

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of the imputed facts and the certainty of the guilty verdict and that this

last one does not attend. For this reason, it concludes that it is not appropriate to impose any sanction or

Nor was it appropriate, given the circumstances, to open this file

sanctioning

SIXTH: On 06/11/2020 a trial period is opened in which it is agreed

carry out the following evidentiary proceedings:

Consider reproduced the submitted claim and the documentation attached to it;

the documents and statements obtained both in the informative request process

prior to admitting the claim for processing, which was requested from TELEFÓNICA

MÓVILES, S.A.U., and TELEFÓNICA DE ESPAÑA, S.A.U. (TDE), such as those obtained

by virtue of the informative request that the Data Inspection made to TDE and the

Report of previous inspection actions. Documents all of them that integrate,

respectively, E/4627/2018 and E/10190/2018. Also, they were given reproduced the allegations to the initiation agreement PS/00114/2019 presented by TDE and the documentation that accompanies them.

The respondent was asked to provide the documents to the procedure following:

“3.1.- The sound recording - audible - of the conversation held between that entity and D.B.B.B. on 02/08/2018 in which -as TDE has declared- that person, “in the name and authorization of his wife Ms. [the claimant] with DNI \*\*\*\*, request the change of bank details. In the letter of notification of opening of evidence TDE was informed that the recording that he said he provided with his allegations to the initial agreement, while it was inaudible, was non-existent for purposes of evidence.

3.2.- Document -regardless of the support on which it appears- that proves that the claimant either consented to TDE processing her bank details or gave her representation to D.B.B.B. for the purpose of providing TDE with your data on your behalf banks for the direct debit of the invoices derived from some contracts that the claimant did not celebrate.

3.3.- The document that proves that the owner of the mobile line \*\*\*TELEPHONE.2 -BBB - who had requested the portability of this line, of which he was the owner, from Vodafone to “MOVISTAR” -as evidenced by the recording of the company verifier that the respondent has sent to this Agency- consented to the change of ownership of the line in the name of the claimant and she also lent her consent to said change of ownership.

A. The respondent evacuated the evidence procedure on 06/11/2020 and responded in the following terms:

1.- Regarding the evidence requested in point 3.1, TDE replied that the “mentioned recording was and is audible”. Provides the recording and explains how to access the

sound document. In the annex provided, it includes in point 1 the so-called  
"Recording request to change bank details" that we will reproduce. From the  
second 00:18.25 you hear:

"-Today's date, February 8, 2018, we proceed to record the change of  
charge account you request. Tell us the line number you want to make the  
request.

- \*\*\*TELEPHONE 1

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-Yes

-Uh...\*\*\*PHONE.1

-Please tell me a name, surnames and ID of the holder.

-Sorry, sorry, I gave you the wrong number.

-It's \*\*\*TELEPHONE.1 but the rest of the numbers have been said correctly.

- Oh, okay, okay.

-Effectively.

-Indicate the name, surnames and DNI of the owner of the line

- Yes, A.A.A.

- ID?

- \*\*\*NIF.1

- Tell me your name, surnames and ID

-BBB

-Yes

-\*\*\*NIF.2

- Are you related to the owner?

-Husband

-Perfect

-Tell us the bank account number of charge in which you want to make, request, the change

-XXXX XXXX XXXXXXXXXX XXXX

- Do you authorize us to make recurring charges on this account? banking?

- Yes

-We proceed to make the modification. We end the recording...

2.- Regarding the evidence requested in point 3.2 of the notification letter of evidence, the respondent replied in the following terms:

"In this sense, the recording in which Ms. A.A.A. contact with the company to formalize the merger contract for the lines \*\*\*TELÉFONO.1, \*\*\*TELEPHONE.2 and \*\*\*TELEPHONE.3, in attached document No. 1 and as section 2.2.

In the same recording, Mrs. A.A.A. expressly authorizes the performance of the charges in the bank account indicated by it, as stated in the Agreement of initiation of the sanctioning procedure of reference." (The underlining is from the AEPD)

The annex provided by TDE with the response to the tests, point 2.2., includes a sound document with this rubric: "Document, whatever the support on which it is stating that it proves that the claimant consented to TDE processing their data banks" We transcribe the sound document. At the second 00:18.65 you hear:

<<-Look, today's date, January 14, 2018, we contract with MOVE. Can you tell us your name and two surnames?

Yes, A.A.A.



- And your ID?

-\*\*\*NIF.1

- Ok, you requested to hire what is fusion plus, okay?, for a

fee of 70.74 included (?), okay? You agreed to receive our invoice in the mail

electronic, which can also be received on paper. has been informed of all

conditions at Movistar.es/contratos. Do you authorize us to make the indicated charges

in your bank account, what have you told us? Do you know the conditions of the

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service?

-Yes

-Okay, the recording is done.>>

3.-Regarding the test requested from TDE in point 3.3. of the notification letter

proof that consisted of proving that D. B.B.B. had consented to a

change of ownership of the line \*\*\*TELEFONO.2 in the name of the claimant and that the

claimant, had consented to said change of ownership-, responded in the following

terms, referring to the answer to the question in point 3.2.:

“In the document Annex N°1 and as epigraph 2.2, the recording is attached in the

that Ms. A.A.A. Contact the company to formalize the Merger contract of the

lines \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3.

Also, in Annex No. 1 and in section 2.1. the change of account is attached

charge of the aforementioned lines by D. B.B.B.

In this sense, it is interesting to highlight that the contracting of the mobile line

\*\*\*TELÉFONO.2 with a prefusion rate was intended to integrate the aforementioned line in a Fusion contract whose main line was \*\*\*TELEPHONE.1 and whose hiring was carried out by who identified himself as A.A.A. in the recording provided as Annex No. 1 section 2.2.”

B. The result of the practical tests was as follows:

1º Despite being required in the testing phase, TDE has not provided any recording in which the claimant, or who had been supplanting her identity, consented \*\*\*PHONE.2 that belonged change ownership of line number to your name to D.B.B.B. and that -according to the operator's statement- was subject to portability from the operator VODAFONE on the same date of 01/14/2018 on which the claimant entered into the FUSION contract.

2º In the recording of the conversation held on 01/14/2018 between TDE and the person who identified himself with the name, two surnames and NIF of the claimant and consented to contracting the Fusion product, they are not mentioned line numbers object of the Fusion contract nor the twenty digits of the bank account.

3º In the recording of the conversation held on 02/08/2018 between TDE and D. B.B.B. in which he requests to change the direct debit bank account for the invoices of the Fusion product, the account number communicated to the operator belongs to the claimant. It is the claimant's bank account as stated in her police report. It is in that account that MOVISTAR sent the invoices, two charges, for products that had not contracted.

4º In the recording of the conversation held on 02/08/2018 between TDE and D. B.B.B. in which he requests to carry out a change of the direct debit bank details of the invoices, there is no recording of the owner's consent for their data to be

banks were treated for this purpose. Nor does it appear, neither on the part of the operator or by D. B.B.B., a statement that it was acting in the name and on behalf of the alleged owner, that is, the claimant or in virtue of verbal mandate (as TDE maintains)

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SEVENTH: Royal Decree 463/2020, "by which the state of alarm is declared for the management of the health crisis caused by Covid 19", published in the BOE on 03/14/2020, in its Third Additional Provision, "Suspension of deadlines administrative", ordered:

"1. Terms are suspended and the deadlines for the processing of the procedures of public sector entities. The calculation of the deadlines will resume at the moment in which this Royal Decree loses its validity or, in its case, the extensions thereof.

2. The suspension of terms and the interruption of terms will apply to the entire public sector defined in Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations."

This suspension was lifted on 06/01/2020. Royal Decree 537/2020, published in the BOE on 05/23/2020, establishes in article 9:

"Administrative deadlines suspended by virtue of Royal Decree 463/2020, of 14 of March". "With effect from June 1, 2020, the computation of the deadlines

Administrative procedures that had been suspended will be resumed, or restarted, if so would have foreseen in a norm with the force of law approved during the validity of the

state of alarm and its extensions” (Underlining is from the AEPD)

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Administrative procedures that had been suspended will be resumed, or restarted, if so would have foreseen in a norm with the force of law approved during the validity of the state of alarm and its extensions” (Underlining is from the AEPD)

The end date of the sanctioning procedure, the date on which the

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having been issued and notified of the resolution is on 07/16/2020. They must be added to

the date on which the suspension of deadlines was lifted (06/01/2020) the calendar days that remained on the date on which the suspension took effect to end the term of maximum duration of the procedure (scheduled for 04/29/2020)

It should be underlined that the addition of days after the lifting of the suspension of terms is the calendar days that mediated between the date on which the suspension and the date on which the proceeding should have ended if no produced the aforementioned suspension. Important nuance insofar as in the proposal for resolution erroneously indicated that the procedure ended on 07/13/2020 as a consequence of having added only the working days and not the days natural.

EIGHTH: The proposed resolution was signed on 06/22/2020 and notified electronically on the same date. Acceptance of electronic notice by TDE, as evidenced in the file, took place on 06/26/2020, so the The term of ten working days granted to formulate allegations ended on 07/10/2020. A date 07/15/2020 there is no news that the respondent has formulated allegations.

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

#### PROVEN FACTS

FIRST: The claimant, holder of DNI \*\*\*NIF.1, a copy of which is in the file, states that TDE has registered several telephone lines in her name that she did not has contracted and has charged several invoices related to those lines in a bank account owned by you in the CAIXABANK entity.

SECOND: The claimant has provided a copy of the complaints that she filed in the Police Station for these events

a. In the first, dated 04/25/2018 (Affidavit number 3956/2018), it states that

noticed that in his bank account numbered ZZZZ ZZZZ ZZ ZZZZZZZZZZ,

MOVISTAR had charged two receipts for the amounts, invoices and dates

following: Invoice \*\*\*FACTURA.1, dated 03/01/2018, for an amount of 83.91 euros.

Invoice \*\*\*FACTURA.2, dated 04/01/2018, for an amount of 71.72 euros.

That he filed a telephone complaint with MOVISTAR, which informed him that in January

In 2018, a telephone contract was made under your name for the product "Movistar Fusión"

associated with the numbers \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3.

He denies having made the contract, having authorized it or having provided his account banking.

He adds that the respondent has confirmed that the contract was made by another

person named B.B.B. who claimed to be her husband. That coincidentally her ex-husband, of

who has been divorced for more than ten years, is called B.B.B.. That the bills are

domiciled in a town on the island of \*\*\* LOCATION.2, so it means that the

contracted service is enjoyed in that place.

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b. Complaint of 05/04/2018 (Affidavit 4239/2018), extension of the Affidavit 3956/2018,

in which it states that on 04/27/2018 it canceled the fraudulent lines and that, despite

To this, he has received a new invoice for the consumption made between 03/18/2018 and

04/17/2018 for an amount of 75.82 euros.

c. Complaint of 06/11/2018 (Affidavit 5477/2018), extension of the Affidavit 3956/2018,

in which he explains that he canceled the fraudulent lines on 04/27/2018 and that as of

06/01/2018 has received a new invoice for the consumption made by the lines

fraudulent in the period between 04/18/2018 and 05/17/2018.

THIRD: TDE has provided the recording, dated 01/14/2018, in which a person who identifies himself with the name, two surnames and NIF of the claimant, grants your consent to contracting the Fusion product. In the recording of conversation the numbers of the telephone lines are not identified in any case for which the Fusion service is contracted. The conversation that is the subject of this recording it is reproduced in its entirety in the sixth Antecedent.

FOURTH: TDE stated in the course of the preliminary investigation that, according to the information that arrived in their systems, the telephone lines

\*\*\*PHONE.1, \*\*\*PHONE.2 and

I know

marketed through the Fusion product, were registered in the name of the claimant on the following dates: on 01/22/2018 the line \*\*\*TELÉFONO.1 and the 01/14/2018 the last two. And he adds that they canceled the first, fixed line, the 05/01/2018 and mobile lines on 04/25/2018.

whose services

\*\*\*PHONE.3,

FIFTH: There are screenshots in the file from the information systems

TDE related to the product contracted on behalf of the claimant. In one of them, with the identification "sale-contracting" refers to a "registration of fixed destination merger + soccer with mobile holder

\*\*\*PHONE.2 and additional registration \*\*\*PHONE.3"

SIXTH: TDE has declared that the mobile line \*\*\*TELÉFONO.2 was owned by Mr.

BBB who requested portability to MOVISTAR on 01/14/2018. It is on that day -see

Proven fact Third- when the claimant allegedly contracted the product

Fusion.

SEVENTH: Although it was requested in the test phase, TDE has not provided any document that proves that once the line \*\*\*TELÉFONO.2 has been ported from VODAFONE to MOVISTAR the claimant agreed to change ownership of the line to his name, since it appeared in the name of D. B.B.B.

EIGHTH: TDE has provided the recording, dated 01/14/2018, in which a person who identifies himself with the name, two surnames and NIF of the claimant, grants his consent to contracting the Fusion product. in the course of the conversation No bank account details are provided. The only reference to a bank account is this: "Do you authorize us to make the indicated charges in your account bank, what has he told us?". The conversation that is the subject of this recording reproduced in full in the sixth Antecedent.

NINTH: The bank account number in which TDE domiciled in the name of the claimant the invoices of the Fusion product provided it to TDE D. B.B.B. through a call in which he requested a change in the direct debit of the bank details of the

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Fusion product registered in the name of the claimant. The recording is played provided by TDE:

"-Today's date, February 8, 2018, we proceed to record the change of charge account you request. Tell us the line number you want to make the request.

- \*\*\*TELEPHONE 1

-Yes



-Uh... \*\*\*PHONE.1

-Please tell me a name, surnames and ID of the holder.

-Sorry, sorry, I gave you the wrong number.

-It's \*\*\*TELEPHONE.1 but the rest of the numbers have been said correctly.

- Oh, okay, okay.

-Effectively.

-Indicate the name, surnames and DNI of the owner of the line

- Yes, A.A.A.

- ID?

- \*\*\*NIF.1

- Tell me your name, surnames and ID

-BBB

-Yes

-\*\*\*NIF.2

- Are you related to the owner?

-Husband

-Perfect

-Tell us the bank account number of charge in which you want to make, request, the  
change

-XXXX XXXX XXXXXXXXXX XXXX

- Do you authorize us to make recurring charges on this account?  
banking?

- Yes

-We proceed to make the modification. We end the recording...

TENTH: TDE has stated: "Therefore, from that moment on, it is when

charges begin to be generated in the account of Mrs. AAA, after the change of data

banking made by D. B.B.B. allegedly under verbal command of his wife". (Allegations to the initiation agreement, First allegation, folio 2)

ELEVEN: A copy of four invoices with the anagram of

MOVISTAR and the indication "Fusión" issued in the name of the claimant:

Invoice \*\*\*INVOICE.1, dated 03/01/2018, for an amount of 83.91 euros; invoice

\*\*\*INVOICE.2, dated 04/01/2018, for an amount of 71.72 euros; invoice \*\*\*INVOICE.4, of

05/01/2018, for 75.82 euros and the \*\*\*INVOICE.3, of 06/01/2018 for 23.81 euros.

The following information is included in all of them: In the left header, below the

\*\*\*PHONE.1 Mobile line:

date and

\*\*\*PHONE.2". Below, the name and both surnames of the claimant and her number

of ID. Bank direct debit in the C.A. and Pensions of Barcelona- La Caixa.

the invoice number:

"Landline:

TWELFTH: TME recognized in the brief in response to the information request

prior to the agreement of admission to processing of the claim, that on 04/25/2018 the

The claimant requested the withdrawal of the three lines that he denies having contracted.

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FOUNDATIONS OF LAW

The Director of the Agency is competent to resolve this procedure.

Spanish Data Protection, in accordance with the provisions of art. 58.2 of the

RGPD and in the art. 47 and 48.1 of LOPDGDD.

Yo

II

The RGPD dedicates article 5 to the principles that must govern the treatment of personal data, provision that provides:

"1. The personal data will be:

a) treated lawfully, loyally and transparently with the interested party (<<lawfulness, loyalty and transparency>>)

(...)

2. The data controller will be responsible for compliance with the provided in section 1 and able to demonstrate it (<<proactive responsibility>>)"

Article 6 of the RGPD, "Legality of the treatment", specifies in section 1 the assumptions 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 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;

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 of another natural person.

e) the treatment is necessary for the fulfillment of a mission carried out in public interest or in the exercise of public powers vested in the controller of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the data controller or by a third party, provided that over said interests do not prevail the interests or the rights and freedoms fundamental data of the interested party that require the protection of personal data, in particular when the interested party is a child (...)"

Article 4 of the RGPD, "Definitions", offers in section 2 a legal concept of "processing" as "any operation or set of operations performed on personal data or set of personal data, either by procedures automated or not, such as the collection, registration, organization, structuring,

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conservation, adaptation or modification, extraction, consultation, use, communication by transmission, broadcast or any other form of enabling of access, collation, interconnection, limitation, suppression or destruction".

Likewise, article 4 of the RGPD, section 1, understands "personal data"

"any information about an identified or identifiable natural person (<<the interested>>); An identifiable natural person shall be deemed to be any person whose identity can be determined directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, a online identifier or one or more elements of physical identity, physiological, genetic, psychic, economic, cultural or social of said person;"

The infraction for which the claimed party is held responsible is provided for in the article 83.5 of the RGPD: "Infringements of the following provisions are

will be sanctioned, in accordance with section 2, with administrative fines of 20,000,000

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

as a maximum of the overall annual total turnover of the financial year

above, opting for the highest amount: a) The basic principles for the

processing, including the conditions for consent under articles

5,6,7 and 9.”

In turn, the LOPDGDD in its article 72.1. qualifies as a very serious infraction "b)

The processing 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” and

It adds that this infraction prescribes after three years.

III

TDE is attributed an infringement of the principle of legality, in particular of article

6.1 RGPD, given that it processed personal data of the claimant -name,

surnames, NIF and bank details- linked to the mobile line \*\*\*TELÉFONO.2 whose

hiring in the name of the claimant is not accredited. This, despite having

provided a recording in which a person who identifies himself by name,

surnames and NIF of the claimant grants consent to the hiring of the

Fusion product. The mobile line was owned by D. B.B.B. therefore with respect to

this line should have been proven that the claimant had authorized a change of

ownership in his name prior to the time of the recording in which he allegedly

The claimant consents to contracting the Fusion product.

As we will point out later, the defendant entity did not act in this

matter with the minimum diligence required in order to comply with the obligations

imposed by the RGPD.

A. It has been proven in the file that TDE, in its capacity as service provider

of the Fusion service or product that it sells, processed the personal data of the

\*\*\*PHONE.1, \*\*\*PHONE.2 and

claimant linked to three lines:

\*\*\*PHONE.3.

The entity, in order to prove that it was entitled to process its

personal data linked to the contracting of the Fusion product has provided a

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recording in which someone identifies himself with the name, two surnames and NIF of the claimant and consents to contracting this service.

Without prejudice to highlighting once again -it was already indicated in the initial agreement- that

the sound of the recording is distant and strange, it must be emphasized that in the recording

In no case are the telephone lines object of the contract identified.

Fusion product to which, allegedly, the claimant gave consent.

The recording is dated -as it is heard at the beginning- on 01/14/2018. The

Fusion product, as stated in the invoices issued by TDE, included the line

\*\*\*PHONE.2. This line belonged to D. B.B.B. and according to TDE he had behaved to

MOVISTAR from VODAFONE on the same day 01/14/2018. That is, on the same day

that the claimant, allegedly, gave her consent to the hiring of her

name of a product that included a fixed line and two mobiles. extreme must

relate to the dates on which, according to TDE, they were registered in the name

of the claimant the services linked to the lines: the fixed line would have been given

high on 01/22/2018 while the mobile line that belonged to D. B.B.B. was discharged

in the name of the claimant on the same 01/14/2018.

According to the information provided by the respondent on 01/14/2018, the line mobile phone \*\*\*TELÉFONO.2 was transferred by its owner from VODAFONE to MOVISTAR. But for that could be integrated into the Fusion product supposedly contracted by the claimant necessarily had to have carried out a change of ownership from the old holder -D. BBB – in the name of the claimant.

TDE, despite the fact that this was requested by the instructor in the testing phase, did not provide no document in which the claimant gave her consent to the change in her name of the owner of the aforementioned mobile line. The entity limited itself to responding to the requested proof reiterating arguments related to the only two provided recordings. At the request to prove documentary evidence that the

The claimant had consented that the mobile line owned by D.B.B.B. figure out To his name he replied the following:

“In the document Annex N°1 and as epigraph 2.2, the recording is attached in the that Ms. A.A.A. Contact the company to formalize the Merger contract of the lines \*\*\*PHONE.1, \*\*\*PHONE.2 and \*\*\*PHONE.3.

Also, in Annex No. 1 and in section 2.1. the change of account is attached charge of the aforementioned lines by D. B.B.B.

In this sense, it is interesting to highlight that the contracting of the mobile line \*\*\*TELÉFONO.2 with a pre-merger rate was intended to integrate the aforementioned line in a Fusion contract whose main line was \*\*\*TELEPHONE.1 and whose hiring was carried out by who identified himself as A.A.A. in the recording provided as Annex No. 1 section 2.2.”

The beneficiary operator that had to manage the portability of the line mobile \*\*\*TELÉFONO.2 from VODAFONE was TELEFÓNICA MÓVILES ESPAÑA, S.A.U., to whom this Agency addressed within the framework of E/4627/2018, in writing received by the operator on 08/20/2018 with which he was transferred from the

claim. This entity responded to the aforementioned request, warning with character prior to the fact that the claim was directed against MOVISTAR, a trade name under which

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both she and TDE operated and that it was TDE “which provides the service of telecommunications referred to in the aforementioned claim”.

TDE, in its capacity as data controller of the

claimant as the owner of the various lines for which he allegedly had

contracted the "Fusion" product that this operator markets -among them the line

cell phone of which TME had been a beneficiary operator- had to be able to

to prove that the mobile line \*\*\*TELÉFONO.2 was owned by the claimant in that

date. The line was covered to benefit TME by D. B.B.B. on the same date in

that the claimant allegedly contracts the Fusion product by telephone, therefore

that it was necessary for the claimant to consent to a change of ownership in her name

prior to contracting a product or service that included, among others, the aforementioned

line. Extreme on which TDE has not accredited anything.

The RGPD refers in article 5.2 to the principle of proactive responsibility to

under which the data controller is not only responsible for compliance with the

principles listed in article 5.1, which is why legality is of interest here, but

is also "able to prove it."

Regarding the proof that the claimant had consented to a change of

ownership in his name of the controversial mobile line, a charge that corresponds to the

claimed entity, TDE stated in its allegations to the initial agreement: “As it is



obvious, and this is clear from what is stated in the file, it is impossible for my represented can prove the consent of the complainant without the existence of the recording, but it can be accredited by the existence of the payment of invoices and actions on the line that can only be carried out as owner". (The underlining is from the AEPD)

The first police report is from 04/25/2018, when the claimed one has passed the second charge to the claimant's bank account. By then, the affected has not only filed a police report, but has previously carried out the steps with the operator, has obtained a copy of the invoices and has tried without successful (this is stated in the complaint filed with the Police) that TDE facilitated the Recording of your intended hiring. Nor can it be accepted that there is any action of the claimant in which she behaves as the alleged owner of the line that was none other than to manage their withdrawal after having submitted claims for identity theft to the operator.

Although TDE bears the burden of proof that the claimant consented happen in the ownership of the mobile line \*\*\*TELÉFONO.2 (controversial line) to previous owner, D. B.B.B., and that the defendant has not provided any evidence to the

In this regard, he adduces in his defense the inexistence of responsibility based on the fact that acted in accordance with the law and that he has been the victim of the deception of the impersonator who used the personal data of the claimant.

However, regardless of the deception to which the supplanter could have lead him, the truth is that the defendant did not act with the diligence that the circumstances of the case required. As has been indicated, there is no record in the file document that proves that the claimant -or the third party that has supplanted her identity- consented to the change of ownership to your name of the mobile line

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\*\*\*TELÉFONO.2 owned by D. B.B.B., whose service was provided by VODAFONE and which was covered by MOVISTAR.

The recording in the file in which whoever identifies with the personal data of the claimant contracts with TDE the Fusion product on date 01/14/2018, does not serve as a legitimizing basis for the processing of personal data of the claimant associated with the line \*\*\*TELÉFONO.2 in which the conduct is specified offending

As has been indicated, the offending behavior materializes in the treatment of the personal data of the claimant linked, in particular, to the mobile line aforesaid In this sense we are referring to a line that already existed -in fact, the only one that exists at the time of entering into the Merger agreement- and that on that same date It is the cover of VODAFONE to MOVISTAR by its former owner. For such a line to be included in the merger contract signed on behalf of the claimant with TDE

Previously, a change of ownership had to be managed. The consent of the claimant for that change of ownership of the mobile line, so that it appears in his name, it was a budget for the contracting of the Fusion product by whom identified himself to the operator with the claimant's personal data (name, surnames and NIF) will operate as a legitimizing basis for the treatment (section b, of the article 6.1 RGPD) not only with respect to the remaining lines but also with respect to the controversial line.

The absence of any documentation provided by TDE showing that it acted in accordance with the requirements imposed by the RGPD is an exponent of its lack of

diligence and prevents, as it intends, from declaring the non-existence of responsibility due to the absence of the subjective element of the infraction.

B. The documentation in the file also shows that TDE dealt with the bank details of the claimant violating the principle of legality. The treatment of Data from the bank account of the affected person in La Caixa is fully accredited. It was precisely the charges received on his account that led him to formulate a claim before TDE and later to file a complaint with the Police.

TDE has argued in its defense that in the recording of 01/14/2018 the claimant provided him with his bank details. However, in the recording provided by TDE (see Proven Facts and Precedent Six) no account is provided banking. It only asks for your consent to domicile the payments in the account that is already in the possession of the operator.

The details of the bank account owned by the claimant in La Caixa provided by a third party, D.B.B.B., several days after the recording date of the contracting and requesting for this purpose to make a "change" in the bank details that already were in the possession of the operator. On the other hand, TDE has recognized in its allegations to the initiation agreement that from the moment in which D. B.B.B. makes the change of domicile "supposedly under the verbal mandate of his wife" they began to refer charges to the claimant.

In the recording provided by TDE in which D. B.B.B. handle a change of bank account for the collection of product invoices Fusion this person

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provides as the direct debit account for the invoices the bank account from which the claimant owns. However, on the recording you can't hear any moment to D.B.B.B. state or ask the TDE telemarketer if he was intervening on behalf of the affected party, whom he says is his wife, as TDE alleges in its defense.

The respondent invokes that, as evidenced by the recording, the third party, D.B.B.B., identified himself as the husband of the claimant and provided her personal data (name, surnames and NIF) correctly. In the opinion of TDE, it is an exponent of what he did with the diligence that the circumstances of the case demanded, for which the treatment of the bank details of the claimant, no matter how unlawful the conduct is, is guilty and no sanctioning administrative responsibility can be demanded.

Faced with this argument, it is worth remembering the criterion repeatedly maintained by the Contentious-Administrative Chamber of the National High Court when the data personal -as in this case it happens with the bank details of the claimant, Well, thanks to a phone call made by D. B.B.B. at TDE days after the supposed hiring whose recording has contributed the claimed, acting in its own name and identifying himself as the spouse of the claimant, changes the data of direct debit and provides the claimant's bank account - are provided by relatives or relatives of the holder.

It follows from the preceding statement that TDE violated article 6.1. GDPR to have processed the personal data of the claimant -name, two surnames and NIF- associated with the mobile line \*\*\*TELÉFONO.2 as well as your bank details, since you have not provided no proof of their legitimacy for the treatment carried out.

The treatment of the claimant's data by TDE without legitimation, linked to the aforementioned mobile line, was maintained until 07/13/2018, date of the letter that addressed the claimant informing her of the cancellation of the invoices issued to her

name by the three lines associated with their data, among which was the mobile line cover, and, in any case, until the date of the last invoice issued, on 06/01/2018.

The action of TDE contrary to article 6.1. RGD is subsumable in the article 83.5.a) of the aforementioned Regulation 2016/679.

In determining the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the RGD. In turn, according to article 83.2.k RGD may also take into consideration the circumstances described in article 76 LOPDGDD.

#### IV

For the purposes of setting the amount of the penalty of fine that corresponds to impose the claimed as responsible for an infringement typified in article 83.5.a) of the RGD, the concurrence is appreciated as aggravating circumstances of the following circumstances modifying liability:

The scope of the treatment (article 83.2.a, RGD) since the personal data of the claimant who have been subject to treatment without legitimacy for it were several: the name and two surnames, NIF and bank details.

The obvious link between the business activity of TDE and the treatment

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of personal data of clients or third parties (article 83.2.k, of the RGD in relation with article 76.2.b, of the LOPDGDD)

The continuing nature of the infringement (article 83.2.k, of the RGD in relation to article 76.2.a, of the LOPDGDD)

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: SANCTION TELEFONICA DE ESPAÑA, S.A.U., with NIF A82018474,

for a violation of Article 6.1. of the RGPD, typified in article 83.5.a) of the GDPR, with an administrative fine of €55,000 (fifty-five thousand euros).

SECOND: NOTIFY this resolution to TELEFONICA DE ESPAÑA, S.A.U.

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

Article 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

is between the 1st and 15th of each month, both inclusive, the term to carry out the

voluntary payment will be until the 20th day of the following month or immediately after, and if

is between the 16th and last day of each month, both inclusive, the term of the

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

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

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

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

48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of month from the day following the notification of this resolution or directly contentious-administrative appeal before the Contentious-Administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

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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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