

□ Procedure No.: PS/00438/2019

938-300320

- RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: In the course of the actions followed by the Spanish Agency for
Data Protection (AEPD) in the sanctioning procedure PS / 0006/2019 it was held
knowledge that the website banderacatalana.cat had modified the identity
of the person responsible for the page and the processing of personal data, so that
this became D. A.A.A., with NIF ***NIF.1. End of which was recorded in
the Diligence dated 10/31/2019 raised within the framework of the aforementioned file
sanctioning PS/0006/2019.

In view of this, the Director of the AEPD, through an Internal Note signed on
11/19/2019, urged the General Subdirectorate for Data Inspection to initiate
Previous Actions of Investigation in order to determine if the new person in charge of the
website banderacatana.cat, D.A.A.A. (hereinafter the respondent) complied with the
data protection regulations.

It should be remembered that in the sanctioning procedure PS/0006/2019, it was sanctioned
to the entity GRUP BC, S.L., which was responsible for the website
on the date on which the opening of this sanctioning procedure was agreed, for
breach of article 13.1 of the RGPD in relation to articles 6.1.a) and 8 of the
RGPD and with article 7 of the LOPDGDD.

SECOND: The Agency's Data Inspection, within the framework of the file
E/10868/2019, access on 11/19/2019 to the website banderacatalana.cat.

verifying that, under the heading "legal text", specifically in the section destined to the "Responsible", informs that the person in charge of the web hosted in banderacatalana.cat/botiga/ and the processing of personal data is Mr.

A.A.A. with identification number ***NIF.1 and fiscal domicile at ***ADDRESS.1.

By means of proof of proof dated 11/19/2019 signed by the inspector

acting, various screenshots are incorporated into file E/10868/2019

obtained from the legal text of the aforementioned website. The screenshots offer the following relevant information for the purposes at hand:

The section that has the heading "Subscription to our Newsletter" says:

- "Purpose", "The sending of our commercial newsletter, informative communications and advertising about our products or services that are of interest to you, even by electronic means (Email, SMS, etc.)."
- "Legitimation", "The user's consent when subscribing to our mailings for the same commercial facts or Newsletter"

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- "Conservation", "Until the interested party revokes the consent and requests the withdrawal from service"

- "Obligation to provide personal data and consequence of not doing so".

"The provision of personal data requires a minimum age of 13 years or, in its case, have sufficient legal capacity to contract"

"The requested personal data is necessary to manage your requests and/or

provide the services that you can contract, so that, if you do not provide them to us, we will not

we will not be able to serve you correctly or provide you with the service you have requested.” (The underlined is from the AEPD)

THIRD: On December 10, 2019, the Director of the Spanish Agency of Data Protection agreed to initiate a sanctioning procedure against the claimed, for the alleged infringement of article 13 of the RGPD, in relation to articles 6.1.a) and 8 of the RGPD and article 7 of the LOPDGDD, typified in article 83.5.b) of the RGPD.

FOURTH: The notification to the defendant of the initiation agreement was made through the following actions:

On 12/12/2019 it is sent by postal mail, through the State Society Post and Telegraph, S.A. (hereinafter Correos), to the address that appears on the page website www.banderacatalana.cat linked to the person in charge: ***ADDRESS.1.

The notification thus practiced was unsuccessful. Work on file document issued by Correos on 12/20/2019, called “Certification of Impossibility of Delivery” in which it is certified that “according to the information existing in the Information System, its shipment NT 28019822ADKH09112601, admitted on 12-12-2019,

To: A.A.A.. Address: ***ADDRESS.1

It has been Returned to Origin due to Wrong Address on 12-20-2019 at 7:40 p.m. By employee 442438. Having the following associated information:

Delivery management by Unit 0869294.

1st delivery attempt on 12-19-2019 at 12:52 by employee 264502 has succeeded 03 absent”. (The underlining is from the AEPD)

Article 44 of Law 39/2015, on the Common Administrative Procedure of the Public Administrations (LPACAP) indicates that when the addressee of the notification is unknown, the location of the notification is ignored, or the notification is attempted it would not have been possible to practice, the notification will be made by means of an announcement

published in the B.O.E.

The notice board of the BOE dated 01/07/2020 published the notification announcement of the AEPD, of 01/02/2020, in procedure PS/00438/2019. The embedded ad in the BOE it said:

“...within a maximum period of 10 business days counted from the day following the publication of this announcement, the interested party for the purposes of this notification or its representative, you may request, proving your identity, a copy of the document corresponding to the indicated administrative act, for knowledge of its content in full, requesting it through the Electronic Office of the Agency (<https://sedeagpd.gob.es/sede-electronica-web/>), or appearing from Monday to Friday from 9:00 a.m. at 2:30 p.m. at the Citizen Service of the Spanish Protection Agency

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of Data, calle Jorge Juan, 6, 28001 Madrid. If after this period has not appeared, the notification will be understood as practiced for all legal purposes from the day following the expiration of the maximum term indicated for appearing.”

There is no record in this Agency that the person claimed, by himself or through representative, has requested a copy of the agreement to initiate the file sanctioning. There is also no evidence that the respondent has presented allegations to the aforementioned agreement.

FIFTH: The agreement to initiate the sanctioning procedure, in its dispositive part, second section, agrees to incorporate into the administrative file, for the purposes of evidence, “the Internal Note from the Director of the AEPD in which she orders the Inspection

of Data that carries out the precise actions to determine if the claimed person incurred in a violation of data protection regulations and documents obtained and generated by the General Subdirectorate for Data Inspection during the research phase. Likewise, the sanctioning procedure incorporates the Diligence dated 10/31/2019 of the sanctioning procedure PS/0006/2019”.

SIXTH: Article 64.2.f) LPACAP provides that, in case of not making allegations to the initial agreement, it may be considered a resolution proposal if it contains a precise statement about the imputed responsibility.

In view of the fact that the respondent has not made any objections to the initial agreement and to the fact that the aforementioned agreement contained a very clear statement regarding the responsibility attributed to the claimed party, the resolution is handed down.

SEVENTH: As a consequence of the suspension of administrative deadlines caused Due to the Covid 19 health crisis, the maximum duration of this procedure Sanctioning PS /438/2019 ends on 11/27/2020.

Royal Decree 463/2020, "declaring the state of alarm for the management of the health crisis caused by Covid 19", published in the BOE on 03/14/2020, established in its Third Additional Provision, "Suspension of additional terms ministerial":

"1. Terms are suspended and the deadlines for the processing of the procedures of public sector entities. The computation of the terms is carried out will cease at the moment in which this Royal Decree loses its validity or, as the case may be, its extensions.

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 Administrative Procedure Common Agreement of Public Administrations.”

This suspension was lifted on 06/01/2020. Royal Decree 537/2020, published

enacted in the BOE on 05/23/2020, establishes in article 9: "Administrative deadlines

pending by virtue of Royal Decree 463/2020, of March 14. With effects from

June 1, 2020, the computation of the administrative deadlines that would have been suspended

pending will be resumed, or restarted, if so provided for in a standard with

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range of law approved during the validity of the state of alarm and its extensions.

Therefore, although the agreement to initiate the sanctioning procedure was signed on

11/19/2019 and that, in accordance with article 64.2, last paragraph, of the LOPDGDD, the term of

maximum duration of the procedure is 9 nine months computed from that date,

the suspension of deadlines agreed by Royal Decree 463/2020 affected the procedure

sanctioning procedure that we examined and the computation of the deadlines was resumed with the date

06/01/2020, pursuant to Royal Decree 463/2020. Applied the standards cited last

The day of the maximum duration of the procedure is 11/27/2020.

In this proceeding, the following are considered proven facts:

FACTS

1.- Within the framework of E/10868/2019, a procedure dated 11/19/2019 is carried out that

incorporates

date from

www.banderacatalana.cat/botiga/content/2-text-legal.

the screenshot obtained in that

2.-The

www.banderacatalana.cat/botiga/content/2-text-legal offers this information:

screenshot taken on

11/19/2019 from

In the heading "Responsible", it is stated that "the new person in charge of the web hosted at banderacatalana.cat/botiga/ and the processing of personal data is the Mr. A.A.A. with tax identification number ***NIF.1 and tax domicile in ***ADDRESS 1."

The next heading,

"Purposes, legitimacy and conservation of the processing of the data sent through:", offers us the information structured in three sub-headings called "Contact Forms"; "Send of emails" and "Subscription to our newsletter".

(It is a translation. The original text of the inverted commas is written in Catalan)

3.- The screenshot obtained by the Data Inspection on 11/19/2019 from www.banderacatalana.cat/botiga/content/2-text-legal, in the section called "Subscription to our newsletter", says the following:

"Purpose: Sending our commercial bulletin, informative communications and advertising about our products or services that are of interest to you, including by electronic means (email, SMS, etc.).

Legitimation: The user's consent when subscribing to our mailings commercials or newsletters.
service drop.

Conservation: Until the interested party revokes the consent and requests the

Obligation to provide your personal data and consequence of not doing so.

"The provision of personal data requires a minimum age of 13 years or, in where appropriate, have sufficient legal capacity to contract.

(It is a translation. The original text of the inverted commas is written in Catalan. The

underlined is from the AEPD)

4.- In sanctioning file PS/0006/2019 -in which it was sanctioned for the same

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made to Grup BC, S.L., with NIF B65880916, in its capacity as responsible for the

web hosted at www.banderacatalana.cat and the processing of personal data-

These extremes were recorded:

4.1. On the site <http://banderacatalana.cat/botiga/content/2-text-legal>, the

information offered on the legality of the treatment of the data of minors

13 years that they signed up for your newsletter is identical to the one that has been

described in the preceding Proven Facts.

4.2. As of 10/31/2019 the page [www. banderacatalana.cat](http://www.banderacatalana.cat) reported that

“The new person in charge of the website hosted at banderacatalana.cat/botiga/ and of the

treatment of personal data” is Mr. A.A.A. with identification number

fiscal ***NIF.1 and fiscal domicile in ***ADDRESS.1.

(It is a translation. The original text of the inverted commas is written in Catalan. The

underlined is from the AEPD)

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 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 processing of personal data and the free

circulation of data” (RGPD) recognizes each control authority and according to what

established in articles 47 and 48.1 of the LOPDGDD, the Director of the Agency

Spanish Data Protection is competent to resolve this procedure.

II

Article 13 of the RGPD, under the heading “Information to be provided

when the personal data is obtained from the interested party”, establishes:

"1. When personal data relating to him is obtained from an interested party, the

responsible for the treatment, at the time they are obtained, will provide

all the information indicated below:

The identity and contact details of the controller and, where applicable,

The contact details of the data protection officer, in his

a)

of your representative;

b)

case;

c)

legal basis of the treatment;" (The underlining is from the AEPD)

The purposes of the treatment to which the personal data is destined and the

The data controller is obliged to inform the interested party whose

personal data is collected from what is the "legal basis of the treatment" that will be

realize; which implies informing you of the legitimacy of the entity that collects the

data for the specific treatment that it intends to carry out.

In this sense, article 5.1.a) of the RLOPD mentions among the principles that

The processing of personal data is governed by that of “legality”. Article 6 GDPR under the

heading “Legality of the treatment provides:

"1. The treatment will only be lawful if at least one of the following is met

conditions:

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

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for one or more specific purposes;

(...)”

This precept is completed with article 8 of the same legal text that deals

on the “Conditions applicable to the consent of the child in relation to the

information society services.

“1. When article 6, paragraph 1, letter a) applies in relation to the offer directly to children from services of the information society, the treatment of personal data of a child will be considered lawful when they are at least 16 years old.

If the child is under 16 years of age, such consent will only be considered lawful if the consent was given or authorized by the holder of parental authority or guardianship over the child, and only to the extent given or authorized.

Member States may establish by law a lower age for such purposes, provided that it is not less than 13 years.

2. The controller will make reasonable efforts to verify in such cases that the consent was given or authorized by the holder of the country authority or guardianship over the child, taking into account the available technology.

3. Section 1 shall not affect the general provisions of the Law of the Member States, such as the rules relating to the validity, formation or effects of contracts in relation to a child”. (The underlining is from the AEPD)

The LOPDGDD made use of the authorization that article 8.1., last paragraph, of the RGPD grants the Member States of the Union to determine the age in the that it is lawful for a minor under the age of 16 to give their consent to the processing of their data in relation to the direct offer of information society services.

Within the limits of Regulation 2016/679, the LOPDGDD sets the age for consent to the processing of data at the age of 14. Article 7 of the Law Organic 3/2018, under the heading "Consent of minors", establishes:

"1. The treatment of the personal data of a minor only

may be based on your consent when you are over fourteen years of age.

The cases in which the law requires the attendance of the holders are excepted. of parental authority for the celebration of the legal act or transaction in the context of which consent for treatment is obtained.

2. The treatment of the data of minors under fourteen years of age, based on the consent, it will only be lawful if the consent of the holder of parental authority or guardianship is recorded, with the scope determined by the holders of parental authority or guardianship." (The underline is of the AEPD)

The incidence of article 8 of the RGPD in the matter examined derives from the fact that commercial bulletins sent through electronic means constitute an information society service. In this sense, we refer to the definition tion that Law 34/2002, on Services of the Information Society and Commerce Electronic (LSSI) offers in its Annex:

"For the purposes of this Law, it shall be understood as:

a. Services of the information society or services: all services provided normally for consideration, remotely or electronically and at individual request of the recipient. (...) They are services of the information society, among others and

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provided that they represent an economic activity, the following:

The contracting of goods and services electronically

1.

(...)

4. Sending commercial communications.

(...)” (The underlining is from the AEPD)

III

As stated in the list of Proven Facts, the page

www.banderacatalana.cat., in its "legal text" or privacy policy informs of the

identity of the data controller -A.A.A., with NIF ***NIF.1 - and their data

contact, providing your "fiscal address", located in ***LOCALIDAD.1, thus giving

compliance with the obligation imposed by article 13.1.a) of the RGD.

Section c), of article 13.1 RGD requires that the person be informed of

who collects your personal data, at the time they are obtained, from

the purposes of the treatment and the legitimacy for the treatment of data that is going to be

realize. The website for which the complainant is responsible offers this information

through three sub-headings, which coincide with the three ways in which

plans to collect data from third parties: the “contact forms”; "mailing

emails” and “subscription to our newsletter”.

The privacy policy of the www.banderacatalana.cat informs that the database

legal treatment of the personal data of third parties that are collected when

these are registered in the commercial bulletin, treatment that will be specified in the sending

of the aforementioned newsletter, is "the consent" provided by the owner of the data when you decide to subscribe to the newsletter. Therefore, the paragraph that the text legal of the web page dedicated to the "Subscription to our newsletter" says that the "Legitimation:" for the treatment is "The consent of the user when subscribing to our commercial mailings or newsletter". And with that said, the privacy policy adds the following: "The provision of personal data requires a minimum age of 13 years or, where appropriate, have sufficient legal capacity to contract" (El underlined is from the AEPD)

In short, the defendant reports on his website, www.banderacatalana.cat, that to register in the newsletter of the company a minimum age of 13 years and, at the same time, also informs that the legal basis for the treatment of data of who fills in the form of the newsletter is the consent granted when completing said commercial bulletin.

It is evident, in light of articles 6.1.a) and 8 of the RGPD and 7 of the LOPDGDD, that the information offered by the respondent regarding the consent granted by minors for the processing of their data for the purpose of provide them with an information society service - such as sending the newsletter commercial by electronic means or SMS- violates the aforementioned provisions. Admit that a under 13 years of age can sign up for your newsletter and protect the treatment on the legal basis of article 6.1.a) RGPD is to attribute to minors under 13 years of age the capacity to dispose of your data for the aforementioned purpose, capacity of which lacks and that the law grants to minors who have reached 14 years of age.

Thus, given that the website for which the user is responsible claimed provides information on the legality of data processing www.aepd.es

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of minors under 13 years of age that does not comply with the rules that regulate this matter -article 6.1.a, related to article 8 RGPD and article 7 LOPDGDD- the legal text or privacy policy of the website violates article 13.1.c) RGPD.

The infringement of article 13.1.c) of the RGPD is typified in the article 83.5.b) of the RGPD, a provision that states: "Infringements of the provisions following will be sanctioned, in accordance with section 2, with administrative fines EUR 20,000,000 maximum, or in the case of a company, an amount equivalent to a maximum of 4% of the total global annual turnover of the previous financial year, opting for the highest amount:

a)(...)

b) the rights of the interested parties under articles 12 to 22

For prescription purposes, the LOPDGDD (article 72.1) qualifies as very serious, and sets a three-year statute of limitations for it, the "h) The omission of the duty to inform the affected party about the processing of their personal data in accordance with the provided in articles 13 and 14 of Regulation (EU) 2016/679 and 12 of this law organic".

IV

Article 58.2 RGPD establishes that "Each control authority will have all the following corrective powers" among which he mentions, in addition to the fine administrative (letter i) that of "ordering the person responsible or in charge of the treatment to processing operations comply with the provisions of this Regulation, where appropriate, in a certain way and within a certain period specified..." (letter d)

At the same time, it should be noted that the imposition of the measure described in the section d) of article 58.2. RGPD is compatible with the sanction consisting of a fine administrative, in accordance with the provisions of art. 83.2 of the RGPD according to which "in depending on the circumstances of each individual case", the administrative fines may be imposed "on an additional basis", that is, in conjunction with the measures referred to in article 58.2, letters a) to h) and j).

It seems convenient to remember, in addition, that the RGPD introduces an infringing type in which the typical behavior consists of not having complied with the corrective measures imposed in their sanctioning resolutions by the control authority, that is, by the AEPD. Thus, article 83.6 of the RGPD establishes that "Breach of the resolutions of the supervisory authority in accordance with article 58, section 2, shall be sanctioned in accordance with section 2 of this article with fines administrative fees of a maximum of 20,000,000 euros or, in the case of a company, of an amount equivalent to a maximum of 4% of the total annual turnover of the previous year, opting for the highest amount"

A. In determining the amount of the administrative fine to be imposed on the claimed, the provisions of articles 83.1 and 83.2 of the Regulation 2016/679.

In the present case, in determining the amount of the sanction of a fine for the infringement typified in article 83.5.b) of the RGPD attributed to the claimed party,

They appreciate, as aggravating factors, the following factors:

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- The one described in article 83.2.b) RGPD, "The intention or negligence in the infringement". It is accredited in the file (Proceeding of 10/31/2019) that, in that date, the respondent already had the status of person in charge of the web page Catalan flag.cat. On 11/19/2019 -date of the Certificate of Proof issued by the data inspection in E/10868/2019- it is verified that the information that the website provides continues to be wrong. Up to that date they had

More than eleven months have elapsed since the entry into force of Organic Law 3/2018 (what happens on 07/12/2018). Sufficient time in the opinion of this Agency so that the responsible had adapted its privacy policy to current regulations.

The serious lack of diligence revealed by the defendant's conduct is also manifest in that he necessarily had knowledge of the procedure sanctioning promoted by this Agency against the previous person in charge of that same website, for identical facts. Procedure that ended sanctioning the then responsible -Grup B.C., S.L.- for the same breach of the RGPD. Just an obvious and very serious lack of diligence on the part of the person responsible - close to fraud - can explain why, despite your full knowledge that the information you offer violates the law, continue publishing it.

- The circumstance described in article 83.2. k) of the RGPD, in relation to the Article 76.f) of the LOPDGDD, which refers to "The affectation of the rights of minors". Failure to comply with the duty to inform under the terms of article 13.1.c) RGPD, as stated in the Foundations of the resolution, has repercussions directly in the treatment of data of minors -under 13 years of age fulfilled - who are not authorized by law to dispose of their data with the purpose of registering for newsletters through electronic means.

Circumstance that reveals a plus of illegality and guilt of the subject offender.

B. Pursuant to article 58.2.d) GDPR is sanctioned with the consistent corrective measure in ordering the respondent to remove from the website the information it publishes, regarding the consent of minors under 13 years of age as a basis legitimizing the treatment of your data through the subscription to the newsletter, that violates the data protection regulations, and that provides information about of the legitimizing basis of the processing of personal data obtained through the registration in the newsletter by minors who comply with the provisions in force.

The maximum period in which the claimed party must comply with this order is of ten business days, which will be computed from the date on which the present non-executive resolution.

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 A.A.A., with NIF ***NIF.1, for an infraction of article 13

RGPD -in relation to articles 6.1.a) and 8 RGPD and in relation, also, to the

article 7 LOPDGDD-, typified in article 83.5.b) RGPD, with an administrative fine

(according to article 58.2.i, RGPD) of €10,000 (ten thousand euros).

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SECOND: SANCTION A.A.A., with NIF ***NIF.1, for an infraction of article 13

RGPD -in relation to articles 6.1.a) and 8 RGPD and in relation, also, to the

article 7 LOPDGDD-, typified in article 83.5.b) RGPD, with the order (according to the

article 58.2.d, RGPD) to delete from the privacy policy of the page

www.banderacatalana.cat the information contrary to the provisions of the RGPD and of

the LOPDGDD object of this sanctioning file and to offer information

correct regarding the legitimizing basis of the treatment of the data of minors

age when signing up for your newsletter. The term granted to comply with this

order is ten business days, computed from the date on which it is submitted

resolution is executive.

THIRD: NOTIFY this resolution to A.A.A.

FOURTH: Warn the sanctioned party that the administrative fine must make it effective

Once this resolution is enforceable, in accordance with the provisions of

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

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

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

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

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

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

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

Spanish 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.

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-

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through the

Electronic Registration of

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

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

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

records provided for in 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.

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Director of the Spanish Data Protection Agency

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