

□ File No.: PS/00017/2022

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the complaining party) dated May 11,

2021 filed a claim with the Spanish Data Protection Agency. The

The claim is directed against Telefónica Móviles España, S.A.U. with NIF A78923125

(hereinafter, the claimed party or TME). The grounds on which the claim is based are  
the following:

The complaining party states that a contract has been entered into in its name with the  
claimed party fraudulently and without his consent, fact of which he has  
knowledge after receiving invoices associated with it at home and completing the  
payment to your bank account.

Attach the following documentation to the claim:

Police report dated May 4, 2021.

Receipt corresponding to the month of March 2021.

Invoice issued on April 16, 2021.

SECOND: On May 17, 2021, a resolution was issued by the Director of the  
Spanish Data Protection Agency in file E/05680/2021, agreeing  
the inadmissibility of processing the claim.

THIRD: The claimant filed an appeal for reconsideration on June 28  
of 2021, in which he shows disagreement with the resolution.

Provide, together with the documents already submitted, a new invoice, received after the  
formulation of your claim before this Agency, on May 31, 2021,

accompanied by a letter from the claimed entity informing of the receipts

pending payment, which has proceeded to return

States that, after making the pertinent claim before the operator of

telecommunications (by telephone, with ref. \*\*\*REFERENCE.1, as specified

the documentation provided shows), bills continue to arrive at your address.

FOURTH: On August 18, 2021, the appeal for reconsideration is estimated

filed by the claimant against the Resolution of the Spanish Agency for

Data Protection issued on May 17, 2021.

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FIFTH: The General Subdirectorate for Data Inspection proceeded to carry out

preliminary investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter RGPD), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of the LOPDGDD, having knowledge of the

following ends:

On October 21, 2021, the respondent has sent this Agency the

following information in relation to the facts denounced:

Date of registration and cancellation of the telecommunications service is 12/31/2020-04/09/2021

1. In relation to the documentation that allows to prove the will of

recruitment state that according to records in their system:

□

- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

11/13/2020 It appears in systems that the client requests portability of the line \*\*\*TELEPHONE.1 to contract Fusion of said line with mobile line. There is recording of that date, which is verified damaged and inaudible. The order \*\*\*ORDER.1 is registered. At the time of call, the client provides his ID, address, mobile phone of contact \*\*\*PHONE.2 and bank details, which remain recorded on the order form.

11/13/2020 According to the established protocol, a third party is requested to Identity Verification of portability.

11/17/2020 The operator offers the installation of a fixed line interim until portability is complete. The client gives up the provisional fixed line and also desists from the requested portability on 11/13/2020.

11/18/2020 Informative SMS is sent to the customer to the number provided \*\*\*PHONE.2

11/18/2020 Customer confirms cancellation of landline order provisional.

12/23/2020 In the same sales file, there is a request for high FUSION

with high mobile. Only fixed line portability has been cancelled.

Order \*\*\*ORDER.2.

12/31/2020 The line \*\*\*TELÉFONO.3 is registered as a mobile line corresponding to the Fusion contract.

01/05/2021 Client withdraws from installation indicating that the 12/23/2020 only made a consultation, without hiring. By mistake administrative, the manager cancels the fixed line request, but does not deactivate the new mobile line linked to the same order.

03/01/2021 Invoice is issued for the mentioned mobile line

01/18/2021 to 02/17/2021.

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04/01/2021 Invoice is issued for the mentioned mobile line

02/18/2021 to 03/17/2021.

04/09/2021 Customer complains and cancels the mobile line. Observed that the line has not been used at any time by the client, cancellation of invoices issued or to be issued is ordered and amount compensation.

05/01/2021 Invoice is issued for the aforementioned mobile line of

03/18/2021 to 04/09/2021.

As a result of the request for information sent to the entity, the representatives of Telefónica Móviles inform that the Fraud department of the company that, after analyzing the records in systems and the lack of use of the line on which the claim is made, rules out the possibility of impersonation, attributing the incident to an administrative error by not canceling the mobile line generated for the Fusion contract once the client withdrew from said contract.

1. In relation to the procedure followed to prove the identity of the contracting party the representatives of the entity inform that the identity of the client in commercial actions of portability procedures between operators of fixed lines are affected by the VPT (Third Party Verification) process, provided by the CNMC in the Technical Specification of the Network Solution for Conservation of Numbers in Fixed Public Telephone Networks and Resolution of March 16, 2012, of the Commission of the Market of Telecommunications, by which Circular 1/2012 is published, by which amends Circular 1/2009, which introduces verbal consent with verification by a third party in the contracting of wholesale services regulations of fixed communications, as well as in requests for conservation of numbering.

The nature of the marketed product includes the activation of a line mobile that must be equally verified, when performing both operations in the same call.

two.

Copy of the claims received by the affected party related to the contracting this service and detail of the actions carried out

☐ XXXXXXXXXXXX // date 04/09/2021// the invoices issued by unrecognized high of the line. He has been discharged on April 9, so

Affects next bill. XX.XX euros plus taxes are refunded.

SISCAB XXXXXXXXXXXXX and XXXXXXXXXXXXX.

☐ NOTIFICATION:

XXXXXXXXXX

// date 04/29/2021 // Proceeds

Claim. Customer informed by SMS. XX,XX Eur are refunded.

plus taxes by cancellation of the invoices of 05/21 in

concept of Unrecognized High. TC \*\*\*PHONE.2.

In relation to the current state of the debt that may appear in their systems, the

representatives of the entity state that the aforementioned debt has not been recorded in

patrimonial solvency files nor is there any debt in the operator's systems.

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SIXTH: On February 21, 2022, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed party,

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1,

of the Common Administrative Procedure of the Public Administrations (in

hereinafter, LPACAP), for the alleged violation of Article 6.1 of the RGPD, typified in

Article 83.5 of the RGPD.

SEVENTH: Having been notified of the aforementioned initiation agreement, the claimed party submitted a written

of allegations in which, in summary, it stated: “that this party has recognized that

there was subsequently a withdrawal or resolution of the client regarding the

existing contract. And that said withdrawal gave rise to the cancellation of an order

for the installation of the fixed line, without passing an internal order in relation to the mobile line. However, the vicissitudes of the life of the contract and the internal operations to adapt to these vicissitudes do not in any way harm the fact that the legitimating base concurred and that said legitimating base persists until the parties complete the actions that must be executed by virtue of said contract.

My client acknowledges that an internal administrative error delayed the execution of the withdrawal in relation to the mobile line, giving rise to invoices that the client has challenged”.

EIGHTH: On March 18, 2022, the instructor of the procedure agreed perform the following tests:

1. The claim filed by Ms.

A.A.A. and its documentation, the documents obtained and generated during the of admission to processing of the claim, and the report of previous actions of investigation that are part of the procedure E/09072/2021.

2. Likewise, it is considered reproduced for evidentiary purposes, the allegations to the agreement initiation of the referenced sanctioning procedure, presented by Telefónica Móviles España, S.A.U., and the accompanying documentation.

NINTH: On April 22, 2022, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency penalize Telefónica Móviles España, S.A.U., with NIF A78923125, for an infraction of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, with a fine of 15,000 euros (fifteen thousand euros).

TENTH: Once the proposed resolution was notified, the party complained against filed a written allegations on May 5, 2022 in which, in summary, it stated: “The client contracted and lacks the truth in his complaint and in his claim when he says what

contrary.

The lack of recording of the contract has generated understandable doubts to the AEPD, to the just as after further verification, doubts arose about the date on which the client complied with the terms of the contract to terminate the billed mobile line, which is not occurred until 04/09/2021.

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In the present case, TME complied with what was established in the contract in the sense of that I had to continue giving coverage to the contracted mobile line after the communication in which the client gave up the fixed line. And so he did for 3 months. If TME had interpreted that the contract had expired, it would obviously have ceased to provide the service, but this is reflected in the contract of the Fusion Service, even if the customer cancels the fixed line, the mobile service remains, unless the customer states that he wants to unsubscribe from the mobile line, which he did but months later.

The entire cancellation procedure begins with the client saying that he has never contracted, that has been proven false and the refund of the amounts does not originate in the legal or contractual obligations of TME and is not incompatible in any way with the right that TME would have had to demand the amounts of the services that discharged, who were not expressly discharged in the terms contractually agreed and which were to continue to be provided by contract.

Proven that the client DID contract, that he has repeatedly failed to tell the truth thereby denouncing the commission of crimes, which TME has already returned the amounts



invoiced to the client, who at no time registered it in solvency bureaus and who the client has not alleged any damage, it will be necessary to abide by what the parties agree or determine the Courts on the date of termination of the contract to decide if TME made a treatment without legitimizing basis, which is the action typified by the proposed sanction.

#### PROVEN FACTS

FIRST: The claimant, dated May 11, 2021, states to this Agency that a contract was signed in his name with the telephone company Movistar de fraudulently and without your consent, a fact of which you have knowledge after receive invoices associated with it at home and make payment to your account banking.

SECOND: It is recorded in the systems of the respondent that on November 13, 2020, the complainant requested the portability of the line \*\*\*TELÉFONO.1 to contract Fusion of said line with mobile line.

THIRD: On November 17, 2020, the operator offers the installation of a interim fixed line until portability is complete. The claimant withdraws from the provisional fixed line and also withdraws the portability requested on November 13 of 2020, and confirms the annulment.

FOURTH: It is verified that on December 31, 2020 the claimed party registered the \*\*\*TELÉFONO.3 line as the mobile line corresponding to the FUSIÓN contract.

FIFTH: The defendant acknowledges that, due to administrative error, the manager cancels the fixed line order, but does not deactivate the new mobile line linked to it order.

SIXTH: The claimed party acknowledges that it issues bills for the mobile line \*\*\*TELEPHONE.3 from 01/18/2021 to 02/17/2021, from 02/18/2021 to 03/17/2021 and from 03/18/2021 to 04/09/2021.

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SEVENTH: It is verified that on April 9, 2021 the claimant claims and causes the mobile line to go down, and that the claimed one orders the cancellation of the bills issued or to be issued and compensation of amounts.

EIGHTH: The respondent acknowledges that, as a result of the request for information of this Agency, after analyzing the records in systems and the lack of use of the line on which the claim is being filed, rules out the possibility of impersonation, attributing the incidence of an administrative error by not canceling the mobile line generated for the MERGER contract once the claimant withdrew from said contract.

NINTH: The amount of the debt has not been recorded in asset solvency files nor is there any debt in the operator's systems.

#### FOUNDATIONS OF LAW

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In accordance with the powers that article 58.2 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), grants each control authority and as established in articles 47 and 48.1 of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve this procedure the Director of the Spanish Data Protection Agency.

Likewise, article 63.2 of the LOPDGDD determines that: "The procedures processed by the Spanish Agency for Data Protection will be governed by the provisions in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations issued in its development and, as long as they do not contradict them, with a subsidiary, by the general rules on administrative procedures.”

II

In response to the allegations presented by the respondent entity “that said base legitimizing persists until the parties complete the actions that must be executed by virtue of said contract” it should be noted that in order to apply the legitimizing in the execution of a contract, the person in charge must have the contract in force with the owner of the data whose treatment is proposed to legitimize. In this sense, The respondent acknowledges that, as a result of the request for information from this Agency, after analyzing the records in systems and the lack of use of the line on which the claim, rules out the possibility of impersonation, attributing the incident to a administrative error by not canceling the mobile line generated for the Fusion contract once the claimant withdrew from said contract, although she later indicates: “In the present case, TME complied with what was established in the contract in the sense of that I had to continue giving coverage to the contracted mobile line after the communication in which the client gave up the fixed line. And so he did for 3 months. If TME had interpreted that the contract had expired, it would obviously have ceased to provide the service, but this is reflected in the contract of the Fusion Service, even if the customer cancels the fixed line, the mobile service remains, unless the customer states that he wants to unsubscribe from the mobile line, what he did but months later.”

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Well, the documentation in the file offers clear evidence of that the party complained against violated article 6 of the RGPD, since there is no evidence legitimacy for the treatment of the personal data of the claimant, since due to administrative error, the manager cancels the fixed line request, but does not deactivate the new mobile line linked to the same order, materialized in the issuance of following bills for the mobile line that you did not contract:

On March 1, April 1 and May 1, 2021, invoices were issued corresponding to the billing periods from January 18 to February 17; from 18 from February to March 17 and from March 18 to April 9. All of them from the year 2021 and that the complaining party did not contract.

Subsequently, when making the claim, they proceeded to cancel the mobile line and the return of the amounts collected.

In short, it should be noted that respect for the principle of legality of the data requires that it is accredited that the processing of the data is carried out on the basis of any of the causes of legitimation contained in art. 6 of the RGPD and display a reasonable diligence essential to prove that end, which requires, in those cases in which the basis of legitimation is the one contained in section b) of the art. 6.1 of the RGPD, that the owner of the data has consented to the contracting and that the responsible for the treatment can prove it, because if they do not act in this way, the result would be empty the content of the principle of legality.

In this regard, attention should be drawn to the inconsistency in the successive arguments of the defendant. It initially acknowledged that the claimant had exercised his right of withdrawal, and that "Due to administrative error, the manager cancels the fixed line order, but does not deactivate the new mobile line linked to it order". Subsequently, in the arguments to the motion for a resolution, he refers to the first of the contracts concluded (11/13/2020), indicating that it would never have been

requested the cancellation of the mobile line of this, by affecting the portability only to the fixed line.

In relation to this argument, it should be noted that the initial hiring of 13 of November 2020 referred to a Fusion product that included both fixed services like mobiles. If, as interpreted by the respondent, the right of withdrawal affected only the fixed line, while the mobile persisted, he had to deliver to the claimant some new applicable conditions, since there would have been a modification of the contract. And did not do it. Therefore, the claim lacked a legitimizing basis for the processing of data in both types of fixed and mobile services.

Regarding the December 2020 contract, the operator itself acknowledges that it does not processed the right of withdrawal by mistake, so there was no room for any type of treatment but only contractual withdrawal.

The defendant is accused of committing an infraction for violation of Article 6.1 of the RGPD, due to lack of legitimacy in the treatment.

III

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Well, the RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of legality. the precept has:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner with the interested party;"

In turn, article 6 of the RGPD, under the heading "Legality of the treatment", details in its

section 1 the cases in which the processing of 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 personal data for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is part of or for the application at the request of the latter of pre-contractual measures;

c) the 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 another Physical person;

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

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

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

It should also be remembered that article 5 of the RGPD, after alluding in its

section 1 to the principles relating to the processing of personal data -among them,

as has been pointed out, to the one of "lawfulness" - it says in its section 2 that "The person responsible for the treatment will be responsible for compliance with the provisions of section 1 and able to demonstrate it (<<proactive responsibility>>)"

The infraction for which the claimed party is held responsible in this agreement of

home is typified in article 83 of the RGPD which, under the rubric

“General conditions for the imposition of administrative fines”, states:

"5. Violations of the following provisions will be sanctioned, in accordance with the

section 2, with administrative fines of a maximum of 20,000,000 Eur or, in the case of

of a company, of an amount equivalent to a maximum of 4% of the volume of

Total annual global business of the previous financial year, opting for the one with the highest

amount:

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a) The basic principles for the treatment, including the conditions for the

consent under articles 5,6,7 and 9.”

The LOPDGDD, for the purposes of the prescription of the infraction, qualifies in its article 72.1.

of very serious infraction, in this case the limitation period of three years, "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.”

IV

In order to establish the administrative fine to be imposed, the following conditions must be observed:

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

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

administrative actions under this article for violations of this

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

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

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

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

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

nature, scope or purpose of the processing operation in question as well

such as the number of interested parties affected and the level of damages that

have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

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

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

applied under articles 25 and 32;

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

treatment;

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

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

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

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

particular whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

i) when the measures indicated in article 58, paragraph 2, have been

previously ordered against the person in charge or the person in charge in question in

related to the same matter, compliance with said measures;

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j) adherence to codes of conduct under article 40 or mechanisms

certificates approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits obtained or losses avoided, directly or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its article 76,

“Sanctions and corrective measures”, establishes that:

“two. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

a) The continuing nature of the offence.

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

c) The profits obtained as a result of committing the offence.

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

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

f) Affectation of the rights of minors.

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

h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any interested party.”

In accordance with the precepts transcribed for the purposes of setting the amount of the sanction of fine to be imposed in the present case for the infraction typified in article 83.5.a) of the RGPD for which the claimed party is responsible, the following aggravating factors:

The evident link between the business activity of the defendant and the treatment of personal data of clients or third parties (article 83.2 K, of the RGPD in relation to with article 76.2 b, of the LOPDGDD)

The duration of the illegitimate treatment of the claimant's data carried out by the claimed. From the documentation in the file, it is evident that he followed for three months by sending invoices to the claimed party, without standing to do so. (article 83.2 a).

As a mitigating factor:

Proceeded to manage the cancellation of the services and the payment of the amounts invoiced (article 83.2 c).

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The balance of the circumstances contemplated in article 83.2 of the RGPD, with Regarding the infraction committed by violating the provisions of article 6.1 of the GDPR allows you to set a penalty of 15,000 euros (fifteen thousand euros).

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

FIRST: IMPOSE TELEFÓNICA MÓVILES ESPAÑA, S.A.U., with NIF

A78923125, for an infringement of Article 6.1 of the RGPD, typified in Article 83.5

of the RGPD, a fine of 15,000 euros (fifteen thousand euros).

SECOND: NOTIFY this resolution to TELEFÓNICA MÓVILES 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

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

between the 1st and 15th of each month, both inclusive, the term to make the payment

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

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

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

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 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 month from

counting 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,  
may provisionally suspend the firm resolution in administrative proceedings if the

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The interested party expresses his intention to file a contentious-administrative appeal.

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

Sea Spain Marti

Director of the Spanish Data Protection Agency

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