

□ File No.: PS/00191/2022

## RESOLUTION OF SANCTIONING PROCEDURE

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

### BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claiming party), dated \*\*\*DATE.1,  
filed a claim with the Spanish Data Protection Agency (hereinafter,  
AEPD). The reasons on which the claim is based are the following:

The complaining party reported that several media outlets published in  
their websites the audio of the statement before the judge of a victim of a rape  
multiple, to illustrate the news regarding the holding of the trial in a case that was  
very mediatic The complaining party provided links to the news published in  
the claimed media websites.

On \*\*\*DATE.2, a new letter sent by the complaining party was received  
stating that he had been able to verify that there were means that had eliminated  
this information, although it accompanied publications made by some media  
communication on Twitter where it was still available.

SECOND: Dated \*\*\*DATE.3, in accordance with article 65 of the Law  
Organic 3/2018, of December 5, Protection of Personal Data and guarantee of  
digital rights (hereinafter, LOPDGDD), the claim was admitted for processing  
submitted by the complaining party.

THIRD: The General Subdirectorate of Data Inspection proceeded to carry out  
of previous investigative actions to clarify the facts in  
matter, by virtue of the investigative powers granted to the authorities of  
control in article 58.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter GDPR), and in accordance with the provisions of the Title VII, Chapter I, Second Section, of the LOPDGDD, being aware of the following extremes:

During the investigation actions, publications were found, more than those initially denounced by the complaining party, where the voice of the complainant could be heard undistorted victim. Among them, the following CONECTA5 publication TELECINCO, S.A.U, with NIF A82432279 (hereinafter, the claimed party):

\*\*\*URL.1

On \*\*\*DATE.4, the defendant was notified of a precautionary withdrawal measure urgent content or distorted voice of the intervener in such a way that will be unidentifiable in the web address from which this was accessible content.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

2/32

On \*\*\*DATE.5, a letter sent by this entity was received by this Agency informing that it had proceeded to give immediate and full compliance to the practiced requirements; verifying the deletion of the news.

FOURTH: On April 25, 2022, the Director of the Spanish Agency for Data Protection agreed to initiate disciplinary proceedings 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 Public Administrations (in hereafter, LPACAP), for the alleged infringement of article 5.1.c) of the GDPR, classified as in article 83.5.a).

FIFTH: Notified of the aforementioned start-up agreement in accordance with the rules established in the LPACAP, the claimed party submitted a brief of allegations on May 10, 2022 in which, in summary, he stated that:

1.- The voice is not considered as a personal data, because not all own attribute and individual of a person is a personal data, but only those that identify or allow us to identify the specific person.

For this purpose, it invokes Opinion 4/2007 on the concept of personal data of the Group of Labor of Article 29, which indicates that a person can be considered "identified" natural person when, within a group of people, he is "distinguished" from all other members of the group; the natural person is "identifiable" when, although not has yet identified it, it is possible to do so. And that the identification is achieved normally through specific data that we can call "identifiers" and that They have a privileged and very close relationship with a certain person.

It indicates the claimed party that never identified the victim basically because He was unaware and still is unaware of that identity. And that the information he gave was limited to some circumstances of the event, to procedural information, the sex of the victim and her voice.

It states that in order to consider whether the voice is sufficient to identify the person, circumstances must be taken into account. And that in the case that we are concerned with, the voice, as can be verified in the recordings issued in its day, is the typical and normal appearance of a young Spanish woman, without any particular accent or characteristics that define it, a fact that he considers should not be left aside, since it is about assessing whether the voice alone is capable of individualizing the victim among a certain group, daring to say that this group is so indeterminate and wide like that of young women (...) \*\*\*LOCATION.1. Therefore, he denies categorically that the voice can single out the victim among all the women

young people who were in \*\*\*LOCATION.1 on the day of the events.

For all these reasons, it considers that neither the voice nor the information it disclosed are identifiers enough to single out the person within the reference group to the point that it can be identified.

He goes on to indicate that another element that he considers particularly important to ponder is that of the necessary means for the identification of a person, invoking the effect recital 26 of the GDPR:

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

3/32

“(26) The principles of data protection must be applied to all information relating to an identified or identifiable natural person. Personal information pseudonyms, which could be attributed to a natural person through the use of additional information, should be considered information about a natural person identifiable. To determine whether a natural person is identifiable, consideration must be account all means, such as singling, that you can reasonably use the data controller or any other person to directly or indirectly to the physical person. To determine if there is a probability reasonable that means are used to identify a natural person, they must take into account all objective factors, such as costs and the time required for identification, taking into account both the technology available at the time treatment and technological advances. Therefore, the principles of data protection should not apply to anonymous information, i.e. information that does not relate to an identified or identifiable natural person,

nor to the data made anonymous so that the interested party is not identifiable, or cease to be. Consequently, this Regulation does not affect the processing of said anonymous information, including for statistical purposes or investigation.

He concludes from the foregoing that the mere and hypothetical possibility of singling out a individual is not sufficient to consider the person as identifiable, and that, if taking into account the set of means that can reasonably be used by the data controller or by any other person, there is no such possibility or is insignificant, the person should not be considered as identifiable and the information should not be classified as personal data, as is the case in the present case.

On the other hand, it considers that the justification that makes the initiation agreement to the ruling of the Supreme Court, of the First Civil Chamber (ruling 661/2016 - rec. 3318/2014-) cannot be used to correctly assess their actions all time that in that case, the recruitment and dissemination carried out by a television channel

Regarding a trial of a victim of gender violence, he referred to the issuance of close-ups of the victim, his first name and his place of residence, which are sufficient identifiers to single out the victim to the point that they can be reasonably identified by a third party, whereas in the present case, the claimed party limited himself to divulging a typical and normal voice of a young woman Spanish, without any particular accent or characteristics that define it.

He concludes by indicating that since the voice is not enough to single out the victim to the point of identifying it, there is no processing of personal data, therefore that the application of any of the principles enshrined in the GDPR is not appropriate, in particular the principle of minimization of treatment.

2.- The origin of the information must be taken into account, since it was the Court that

the case is being investigated by the person who distributed the informative material, including the testimony of the victim with his own voice, among the majority of the communication media of the country.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

4/32

Consider this element of transcendental importance when evaluating and qualifying the facts analyzed, since the Judgment of the Court of Justice of the Union European Union of February 14, 2019 (Case C 345/17, Sergejs Buivids), which also invokes the agreement to initiate this procedure, "it mentions various criteria to ponder between the right to respect for privacy and the right to freedom of expression", among which are, "the manner and circumstances in which it is obtained the information and its veracity.

It presumes that, when the Court made such information available to the media, communication, he would have considered that it was going to be published as it was had distributed, and that this distribution would not violate the rights of the victim, Otherwise, either I would not have distributed it or I would have done it with the voice distorted or with clear instructions to proceed with its distortion, which has not happened.

He ends by saying that this circumstance is what caused the non-application of the filters and controls that are normally applied in cases like the one at hand, since there was a "legitimate expectation" that the material provided by the Court it could be published without further ado, which he considers an undoubted defense.

3.- An incorrect assessment of the fine has been made, since they have taken into account

has a series of aggravating factors but no mitigating factors, specifically:

- The absence of a history of previously committed infractions.
- The degree of cooperation with the AEPD in order to remedy the

alleged infringement and mitigate the adverse effects of the infringement, since

immediately received the adoption of a provisional measure, proceeded to eliminate the notice and fully comply with the requirements practiced.

- Adherence to the Digital Pact for the protection of people.
- The unique and isolated nature of the alleged infringement.

On the other hand, regarding the aggravating circumstance of intentionality or negligence, he does not agree

I agree that the AEPD considers that the claimed party has been negligent by not ensure a procedure that guarantees the protection of personal data,

Well, what has happened is that the audio has been broadcast as it was broadcast by the own Court, in such a way that if there is negligence, it is on the side of the Court itself Court.

SIXTH: On May 24, 2022, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency penalize CONECTA5 TELECINCO, S.A.U., with NIF A82432279, for an infraction of article 5.1.c) of the GDPR, typified in article 83.5 of the GDPR, with a fine of €50,000 (fifty thousand euros).

SEVENTH: Notification of the proposed resolution in accordance with the established rules in the LPACAP, the claimed party submitted a brief of allegations on June 6, 2022 in which, in summary, he stated that:

1.- Regarding the fact that the voice is a personal data:

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

a) Denies that the dissemination of the victim's voice has entailed the real risk that the itself could have been identified by people who were unaware of its status as victim, understanding the claimed party as "certain risk" "the materialized risk, in versus potential or hypothetical risk."

It considers that this risk has not materialized since there is no evidence that the victim has been identified by people who were unaware of such condition, since it has not received no claim in this regard. The defendant understands that "if the victim had been identified by people close to her who were unaware of her status as due to the dissemination of his statement (voice) by CONECTA5, this person would have been the first to exercise any rights and legal actions that could assist."

b) It wonders what additional information has been disseminated or was available to "that largest segment of the population" to which the proposed resolution alludes in order to be able to identify the victim beyond the fact that she is a young woman and that she was in \*\*\*LOCATION.1 the day he was the victim of a sexual assault.

c) It reiterates that the voice of the victim, together with the rest of the information that was available by the population, are not sufficient identifiers to be able to single out the victim to the point of identification.

d) He does not deny that the voice has features that make it unique, but he denies that such a voice can single out the victim among all the young women who were in \*\*\*LOCATION.1 on the day of the events.

e) It reiterates the criticism it made in the allegations to the initial agreement regarding the invocation of the Judgment of the Supreme Court, of the First Civil Chamber, judgment 661/2016 (rec. 3318/2014).



2.- Reiterates the allegations that the source of the information was the Court.

It indicates that "in other cases we have received clear instructions from the communication offices of the courts with regard to the treatment of the distributed information. Which did not occur in the present case."

Invokes letter e) of section 5 of the 2020 Justice Communication Protocol, regarding the criteria for recording images of the parties involved in the oral trial, where, the defendant indicates, "No mention is made of the need to apply any treatment to the voice, considering, we understand, that it is not broadly enough to identify the victim."

3.- He considers the allegations made in his previous letter to have been reproduced, so subsidiary, against the graduation of the fine.

Points out that, despite what the motion for a resolution indicates, it must be applied as mitigating adherence to the Digital Pact for the protection of people, since "refrained from identifying the victim and did not disseminate any information that, with general character, would have served to identify him."

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

6/32

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

#### PROVEN FACTS

FIRST: On \*\*\*DATE.1, the claimant filed a claim with the

Spanish Agency for Data Protection denouncing that various media

communication had published on their websites the audio of the statement before the

judge of a victim of multiple rape, to illustrate the news regarding the holding the trial in a case that was highly publicized, providing links to the news published on the websites of the claimed media.

On \*\*\*DATE.2, a new letter sent by the claimant was received stating that he had been able to verify that there were means that had eliminated this information, although it accompanied publications made by some media communication on Twitter where it was still available.

SECOND: On \*\*\*DATE.3, in accordance with article 65 of the LOPDGDD, the claim presented by the claimant party was admitted for processing.

THIRD: The General Sub-directorate of Data Inspection, in the exercise of its investigative activities, found a publication of the Respondent where could hear the victim's voice undistorted at the following address:

\*\*\*URL.1

FOURTH: On \*\*\*DATE.4, the defendant was notified of a precautionary measure urgent removal of content or distorted voice of the victim in such a way that will be unidentifiable in the web addresses from which this was accessible content, specifically:

\*\*\*URL.1

FIFTH: On \*\*\*DATE.5, this Agency received a letter sent by this entity informing that it has proceeded to give immediate and complete compliance with the requirements practiced.

SIXTH: It is proven in the report of previous actions of investigation of dated January 24, 2022, which verified what was stated by the party claimed in his brief of \*\*\*DATE.5, that is, it was verified that the news is no longer available in this address:

\*\*\*URL.1

In accordance with the powers that article 58.2 of the GDPR grants to each authority of control and as established in articles 47 and 48.1 of the LOPDGDD, it is competent to initiate and resolve this procedure the Director of the Agency Spanish Data Protection.

Likewise, article 63.2 of the LOPDGDD determines that: "Procedures processed by the Spanish Data Protection Agency will be governed by the provisions in Regulation (EU) 2016/679, in this organic law, by the provisions regulations dictated in its development and, insofar as they do not contradict them, with character subsidiary, by the general rules on administrative procedures."

## II

Regarding the various considerations made by the defendant regarding the considering the voice as personal data, it should be noted that the voice of a person is personal data and identifies or makes it uniquely identifiable, regardless of the number of people who can recognize it and the data additional to the assumption.

Indeed, the voice fits perfectly into the definition of what is data from personal nature of article 4.1) of the GDPR:

"Personal data": any information about an identified natural person or identifiable ("the data subject"); An identifiable natural person shall be considered any person

whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, data of location, an online identifier or one or more elements of identity physical, physiological, genetic, mental, economic, cultural or social of said person;”

The voice is a personal and individual attribute of each physical person that is defined for its height, intensity and timbre. Endowed with unique and singular distinctive features that individualize it directly, associating it with a specific individual, it is molded when speaking, being able to know, through it, the age, sex, state of health of the individual, his way of being, his culture, his origin, his hormonal, emotional and psychic. Elements of the expression, the idiolect or the intonation, are also data of personal character considered together with the voice.

Voice is produced when air passes from the lungs through the airways.

(windpipe) and through the larynx, causing the vocal cords to vibrate, creating

Sound. Sound that becomes words thanks to the muscles that control the soft palate, tongue and lips, without forgetting the cavity where find these muscles, which acts as a sounding board. How can

appreciate, there are various organs involved in speech, different in each of people, in fact, and by way of example, the vocal cords of the

Men are longer and thicker than those of women and children, which is why the

voice of those is deeper than that of these, like the sound of a double bass

It is deeper than that of a violin.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

But even so, not all men's vocal cords are equally long, which is why for which there are men with a more or less serious voice, as happens with those of women, which is why there are women with more or less high-pitched voices.

In addition, we have already seen that not only the vocal cords, but many more organs that, depending on their strength and structure will make each voice unique and different. Therefore, we can identify the people we know by voice without having to see them (for example, when we have a telephone conversation with someone close to us or we heard someone acquaintance on the radio). In fact, the responding party acknowledges In his pleadings to the proposed resolution that we are "capable of remember no more than a few dozen voices", which implies that we can identify those people. Therefore, anyone who knows the victim You can identify her by hearing her voice.

The assertion made by the claimed party saying that the voice of the victim is the "typical and normal of a young Spanish woman", and therefore, she cannot be identified among all the young women who were there on car day in

\*\*\*LOCATION.1 is subjective and general, as much as saying that young women Spaniards have the same image. If it is obvious that not all of that segment of the population has the same image, since it is clearly visible that each person has some traits that make it unique, the same happens with the voice, due to that the morphology of the organs involved in its production are different in each of them.

Along the same lines, report 139/2017 of the Legal Office of this Agency states that "the image, as well as the voice of a person is personal data, just like that it will be any information that allows to determine, directly or indirectly, its identity (...)"

In fact, the National Court Judgment dated March 19, 2014 (rec.

176/2012) says that "the voice of a person constitutes data of a personal nature, as

as can be deduced from the definition offered by article 3.a) of the LOPD,

as

"any information concerning identified or identifiable natural persons",

This question is not controversial."

The victim's voice identifies her directly in her environment (understood in a

broad sense, encompassing the family and the social), since, as determined in

Opinion 4/2007 of the Article 29 Working Group, "it can be considered

"identified" a natural person when, within a group of people, they are

"distinguishes" from all other members of the group.

It is clear that the voice of any person, regardless of whether their features are

more or less marked, you can make it be identified at least by

those who are part of the circle closest to the victim or who may know her

anyway. Let's imagine relatives or colleagues from work or studies,

social activities etc For this reason, the diffusion of the voice of the victim has meant the

certain risk that it could have been identified by people who

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

9/32

They were unaware of their status as a victim. Which is a particularly serious fact in a

event like the one that gives rise to the news.

It is not possible to share the interpretation made by the claimed party about what is

must be understood by "certain risk", which, according to its criteria, is that risk that has been

materialized, as opposed to potential or hypothetical risk.

In the field of data protection, the Guidelines of the Working Group of Article 29 on the impact assessment related to data protection (EIPD) and for determine whether the treatment is "likely to carry a high risk" for the purposes of the Regulation (EU) 2016/679, adopted on April 4, 2017 and last revised and adopted on October 4, 2017, defines what a risk is: "A "risk" is a scenario that describes an event and its consequences, estimated in terms severity and probability.

In line with the foregoing, recital 75 of the GDPR provides that "The risks to the rights and freedoms of natural persons, serious and variable probability, may be due to data processing that could cause physical, material or immaterial damages and losses...", making it clear that the Risk is a circumstance that can give rise to damages of all kinds, without need to materialize.

Likewise, if we go to the Dictionary of the Spanish Language, we will find that "Risk" is defined as "contingency or proximity of damage." And "true" as "known to be certain, certain and indubitable."

Consider that "certain risk" is, only and exclusively, that risk that has been materialized, and therefore, has caused damage, would imply excluding from the concept those contingencies that, being certain, certain and indubitable, have been neutralized and they have not caused any harm.

Therefore, "certain risk" is one that is "certain, sure and indubitable", one that exists, regardless of whether or not it has ultimately caused harm. What translates in the present case, in which it is indifferent whether or not someone has identified the victim through her voice, because the truth is that there was a risk that someone would will identify.

It is also irrelevant the consideration made by the defendant regarding the fact that

"If the victim had been identified by people around him who were unaware of his

status as such due to the dissemination of his statement (voice) by CONECTA5, it

person would have been the first to exercise any legal rights and actions

who could assist you.", because the truth is that, even in the absence of claims, the

The claimed party has the obligation to respect the principles related to the treatment of

personal data covered by article 5 of the GDPR and be able to prove it

based on the principle of proactive responsibility (art. 5.2 of the GDPR).

On the other hand, the voice also makes the victim indirectly identifiable to a

larger segment of the population if combined with other data, even with

additional information, depending on the context in question. Again the Opinion

4/2007 clarifies that "In cases where, at first sight, the identifiers

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

10/32

available do not make it possible to single out a specific person, this person can still be

"identifiable", because that information combined with other data (whether the

responsible for their treatment is aware of them as if not) will allow

distinguish that person from others. (underlining is ours).

That the data controller, in this case the media, is not

able to identify the victim through his voice, does not mean that he is not

identified by people in your environment and identifiable by third parties, including the media

of communication with additional elements that can also be obtained from your

journalistic function.



Let us also bear in mind that, in the case examined, there is a  
easier to make the victim identifiable through his voice in response to the  
circumstances of the event and the context in which it is made public: within the framework of  
a highly publicized judicial procedure, continuously followed by various  
media that provide information about the victim, his  
environment, the violators, and the violation suffered (which makes up information  
additional).

In this sense, recital 26 of the GDPR determines that "...To determine if  
a natural person is identifiable, all means must be taken into account, such as the  
singularization, which can reasonably be used by the data controller or  
any other person to directly or indirectly identify the natural person.

To determine whether there is a reasonable probability that means will be used to  
identify a natural person, all objective factors must be taken into account,  
as well as the costs and time required for identification, taking into account both  
the technology available at the time of treatment such as advances  
technological..."

Remember that the purpose of the Fundamental Right to Data Protection  
Personal is to protect people without ambiguity and without exception: such protection does not  
must decline in this case in response to the greater or lesser number of people who  
can recognize, or have recognized, the victim, or the subjective considerations  
on its identifiability of the data controller, even more so in this case, given  
that what has occurred is the dissemination of a story from a victim of a rape  
multiple.

In conclusion, a person can be identified by their voice. The publication of the data  
the victim's voice alone and undistorted put her at risk  
certain of being identified by people who were unaware of her status as a victim.

Victims of sexual assaults, such as gang rape, have to face the challenge of resuming his life once the trial is over, trying to overcome the physical and psychological sequelae derived from the traumatic experience they have suffered. In this sense, your environment plays a decisive role. Unfortunately, even today produce situations in which they are stigmatized despite having been the victims, sometimes even being forced to change their place of residence. For this reason, it is essential to treat with the greatest care any personal data that allows you to reveal your identity, prevent you from being recognized as a victim in your environment,

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

11/32

understood in a broad sense. Here the medium plays a decisive role. communication, since the risk analysis that must be carried out prior to the publication, and which in the present case we are not aware of, is the last guarantee with which account the victim.

II

The defendant party reiterates the criticism that it made in the allegations to the initiation agreement regarding the invocation of the Judgment of the Supreme Court, of the First Chamber of the Civil 661/2016 (rec. 3318/2014), since this ruling refers to the recruitment and disclosure, in the development of a trial of a victim of gender violence, of close-ups of the victim together with his first name and place of residence, which allows the identification of the person, unlike what happens in the present case, in which the claimed party has limited himself to divulging "a typical and normal voice of a young Spanish woman, without any particular accent or characteristics that

define."

Regardless of the fact that, as already indicated in the motion for a resolution, the invocation of such sentence in the Legal Basis V of the initiation agreement is carried out to substantiate that the Fundamental Right to Freedom of Information does not is absolute, we cannot share the opinion of the respondent that it does not. Such judgment is applicable to the present matter. To this end, we will examine the mentioned sentence:

"1st) The interest of the questioned information is not discussed nor the right of the chain television company sued to broadcast images recorded during the act of the oral trial of the criminal case, since there is no limitation in this regard agreed by the body judicial."

The same could be applied to the present case, that is to say, the interest of the disputed information or the right of the media to disseminate the statement of the victim during the act of the oral trial of the criminal case, since it did not. There is no limitation in this regard agreed by the judicial body.

"2nd) The only controversial point is, therefore, whether the identification of the applicant as a victim of the crimes prosecuted in said criminal case, through first shots of his face and the mention of his first name and place of residence, he was also included in the fundamental right of the television channel demanded to transmit truthful information or, on the contrary, was limited by the fundamental rights of the plaintiff to her personal privacy and to her own image."

In the case that has given rise to this disciplinary procedure, point controversial is whether the identification of the intervener as a victim of a crime against sexual integrity by broadcasting the undistorted voice, is also included in the fundamental right of the requested party to transmit information

truthful or, on the contrary, was limited by the Fundamental Right to Protection

of Personal Data.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

12/32

"3rd) Regarding this matter, the jurisprudence has recognized the general interest and the public relevance of information on criminal cases (judgment 547/2011, of 20 July), which are accentuated in cases of physical and psychological abuse (judgments 128/2011, of March 1, and 547/2011, of July 20), but it has also pointed out, regarding the identification of the persons involved in the trial, that the defendant and the victim are not on an equal footing, because in terms of that one does allow a complete identification, and not only by its initials, due to the nature and social significance of the crimes of mistreatment (judgment 547/2011, of July 20).

[...]

6th) In short, the defendant television channel should have acted with the prudence of the diligent professional and avoid issuing images that represented the recurring in close-up, either refraining from issuing the corresponding shots, well using technical procedures to blur their features and prevent their recognition (judgment 311/2013, of May 8). Similarly, it should also avoid mentioning your first name, because this information, insufficient by itself to constitute illegitimate interference, became relevant when pronounced on the screen simultaneously with the image of the applicant and add the mention of her town of residence, data all of them unnecessary for the essence of the content

information, as evidenced by the news about the same trial published in the next day in other media.

In the case that we are analyzing, the claimed party should have acted prudently of the diligent professional, identify the risk, assess it and adopt security measures measures, avoiding the diffusion of the voice of the victim using procedures technicians to distort the voice and prevent its recognition, as responsible for the treatment, within the framework of the Fundamental Right to Data Protection of Personal character.

Furthermore, in this case there is also additional information, as as stated in the Fundamentals of Law II, which further facilitates the identification of the victim through his voice, since we are referring to a procedure high-profile court case, followed continuously by various media outlets communication that provide information about the victim, their environment, the rapists and the violation suffered. In fact, the claimed party itself acknowledges that the data that have transcended capable of being attributed to the victim, apart from his voice, are his condition as such, his sex, and the place, date and some details of the rape multiple.

"7th) The identification of the plaintiff through her image and personal data indicated and its direct link to an episode of gender violence and other serious crimes, when the simultaneous or subsequent disclosure of data was foreseeable referring to how the victim and her aggressor met and how they happened criminal acts, assumes that the loss of anonymity violates both the right of the plaintiff in her own image, by issuing her physical features, such as her personal and family privacy, to the extent that some reserved data, pertaining to his private life (who went to the Internet to start a relationship or the intimate content of some of his talks), devoid of offensive entity in a

situation of anonymity, they began to have it from the moment in which any person who watched those news programs and who resided in the locality of the victim could know who they were referring to, so that the psychological damage inherent in his status as a victim of crimes was added to the non-material damage consisting of the fact that knew information about his private life that he had not consented to make public.

In the present case, the identification of the victim by broadcasting his voice without distort, the additional information previously exposed and its direct link with a crime against sexual integrity, supposes the loss of the victim's anonymity to the extent that such data make it possible to identify it from the moment it anyone who knows her, listen to the video released by the claimed party. AND This is based on the undoubted fact that the voice, by itself, already identifies it.

#### IV.

The defendant also reiterates the allegations regarding the origin of the information was the Court, who distributed the recording among all the media communication without applying any prior voice distortion procedure or giving any instructions in this regard.

Beforehand, we must clarify what is the data processing that is being analyzed in this proceeding. For these purposes, the GDPR defines in its Article 4.2 the processing of personal data: "any operation or set of operations carried out on personal data or sets of personal data, whether whether by automated procedures or not, such as the collection, registration, organization,

structuring, conservation, adaptation or modification, extraction, consultation,

utilization,

communication by transmission, diffusion or any other form of

authorization of access, comparison or interconnection, limitation, deletion or destruction". (he

underlining is ours).

And it is the diffusion of the voice of the victim that the claimed party has carried out that is

object of this procedure, not entering within the scope of this other

treatments, such as the sending that the Court makes to the media

communication of the material disseminated by the claimed party.

Once the treatment to be analyzed is delimited, we must identify who is the

responsible for it.

Article 4.7) of the GDPR establishes that it is ""responsible for the treatment" or

"responsible": the natural or legal person, public authority, service or other

body that, alone or jointly with others, determines the purposes and means of processing; Yeah

the law of the Union or of the Member States determines the aims and means of the

treatment, the person responsible for the treatment or the specific criteria for its

appointment may be established by law of the Union or of the States

members;".

As established in Directives 07/2020 of the European Protection Committee

of Data on the concepts of data controller and manager in the

GDPR, the concept has five main components: "the natural person or

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

legal entity, public authority, service or other body”, “determines”, “alone or together with others”, “the purposes and means” and “of the treatment”.

In addition, the concept of data controller is a broad concept, which deals with to ensure effective and complete protection for the interested parties. It has determined so the jurisprudence of the Court of Justice of the European Union. For all we will quote the Judgment of the CJEU in the Google-Spain case of May 13, 2014, C-131/12, the which considers in a broad sense the person responsible for the treatment to guarantee “an effective and complete protection of the interested parties”.

It is clear that the claimed party is responsible for the treatment, when deciding on the purposes and means of processing, as it holds the power to do so by having a decisive influence on themselves. In this way, the purpose is informative and the The media encompass decision-making power from the way it is distributed or made available information available to the public, including its content. the middle of communication has, in order to fulfill its purpose, once in the exercise of his journalistic work has collected all the precise information, what information provided and by what means, in what terms and with what personal data.

Thus, Guidelines 07/2020 on the concepts of data controller and in charge in the RGPD specify that "the person in charge of the treatment is the party that determines why the processing is taking place (i.e. “for what purpose” or “what for”) and how this objective will be achieved (that is, what means will be used to achieve it)”.

The transfer of the video of the hearing with the undistorted voice of the victim by the Tried to the media is another data treatment different from the one that is being analyzed. Therefore, that the origin of the information was the Court not is sufficient to exempt the claimed party from liability, because what is is prosecuting is not the provision of information by the Court to the media, but the treatment for which the party is responsible



claimed, such as the dissemination of personal data such as the voice of the victim.

As soon as the information reaches the media, the latter, as the person responsible for the treatment, is responsible for complying with the data protection regulations, without be able to cover the breach of the same in the fact that the Court sent him thus the information, assuming that such forecast allows you to publish it without comply with the requirements of the GDPR and the LOPDGDD.

Indicates the claimed party in its pleadings to the proposed resolution that "in other cases we have received clear instructions from the offices of communication of the courts with regard to the treatment of information distributed. Which did not occur in the present case." It also refers to the letter e) of section 5 of the 2020 Justice Communication Protocol, regarding the guidelines for recording images.

This section indicates that "In order to reconcile the right to information with the right to honor, privacy and self-image of the parties involved in the process, it is recommended to follow these guidelines for recording images:" (the underlining is ours).

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

15/32

And it is that the communication offices of the courts cannot carry out mandates to the media, but warnings, recommendations. For this purpose, there to go to section 6 of the 2020 Justice Communication Protocol, regarding the protection of personal data, which refers to the transmission, by part of the communication offices, of the text of the judicial resolution to the media

Communication.

This section contains the text of a warning about the responsibility of the means of communication in the dissemination of personal data contained in the text of the judicial resolution that must be included in all shipments to the media:

“This communication cannot be considered as the official publication of a public document. The communication of personal data contained in the attached judicial resolution, not previously dissociated, is carried out in compliance of the institutional function that article 54.3 of Regulation 1/2000, of July 26, of the governing bodies of the courts, attributes to this Office of Communication, for the exclusive purposes of their eventual treatment for journalistic purposes in the terms provided for in article 85 of Regulation (EU) 2016/679 of the Parliament European Union and of the Council, of April 27, 2016, regarding the protection of persons physical with regard to the processing of personal data.

In any case, the provisions of the data protection regulations will apply. of a personal nature to the treatment that the recipients of this information carry out out of the personal data contained in the attached judicial resolution, which does not may be transferred or communicated for purposes contrary to the law.” (underlining is our).

In conclusion, it corresponds to the media, as the person responsible for the treatment, decide what and how to publish. You might decide to publish the information despite of the recommendation received, choose not to publish or decide to distort the voice of the victim in order to avoid being recognized, even in the case of not having received

No warning in this regard. That is to say, that the warning that the court does not prevent the publication of personal data, in the same way that the

The absence of it does not legitimize the publication of all personal data.

And it is that, if the interpretation defended by the defendant is followed, the treatment carried out by the media would be totally subordinate or conditioned by the indications received from the judicial body, this not being the case.

In view of the foregoing, it can be stated:

1. The data processing carried out by the judicial body and the media communication are different, not being the subject of this procedure the first from them.

2. It cannot be argued that the treatment carried out by the media is finds itself subordinated or totally conditioned by the decisions, which, in matters of data protection, has previously been adopted by the judicial body.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

16/32

3. What the media, in this case the claimed party, does subsequently with the information is not the responsibility of the Court, but of the media of communication as data controller.

In any case, the GDPR has brought about a transcendental change in the way of understanding the right to the protection of personal data, being one of the novelties most relevant proactive responsibility, contemplated in article 5.2 of said

Regulation:

"2. The controller will be responsible for compliance with the provisions in paragraph 1 and able to demonstrate it ("proactive responsibility")."

Proactive liability implies that the data controller is responsible

of the data processing that it carries out. It not only has to comply with the principles enshrined in article 5.1, but must be able to prove it. That

Responsibility implies the need to make decisions -determination of the purposes and means of the treatment that is going to be carried out-, as well as to render accounts for the decisions made.

In this sense, recital 74 of the GDPR provides for the following:

"The responsibility of the data controller must be established for any processing of personal data carried out by himself or on his behalf. In

In particular, the person responsible must be obliged to apply timely and effective measures and must be able to demonstrate the compliance of the processing activities with the this Regulation, including the effectiveness of the measures. These measures must have into account the nature, scope, context and purposes of the processing as well as the risk to the rights and freedoms of natural persons." (underlining is our).

In those cases in which there is a "treatment chain", that is, different and subsequent treatments carried out by different managers of the treatment, each person in charge will be responsible for the decisions that they adopt in their field regarding your treatment. Not being able to protect himself to exempt himself from its responsibility in what the person responsible for the previous treatment did, as well as You will not be held responsible for the decisions adopted by the person in charge of the treatment that is next in the chain.

In this sense, it is worth mentioning the Judgment of the Court of Justice of the European Union in Fashion ID, C-40/17, ECLI:EU:2018:1039, which rules on a case in which an e-commerce company inserted the module on its website social "likes" of the social network Facebook, which implied that they were transmitted to it personal data of visitors to the trading company's website

email regardless of whether the visitors were members of the aforementioned social network or if they clicked on the "like" button on Facebook. In its section 74 establishes that "On the other hand, and without prejudice to a possible civil liability provided for in national law in this regard, that natural or legal person cannot be held liable, within the meaning of that provision, for operations

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

17/32

before or after the chain of treatment with respect to which it does not determine the ends nor the means.

Consequently, any processing operation carried out within the scope of the claimed (in this case the dissemination of personal data on the occasion of the news) should be attributed only to the media, regardless of the operations of treatment that have been carried out previously by other subjects and that, in no way case, exempt him from his responsibility.

In short, the allegation that the absence of mention of any part of the court to perform any treatment to the voice allowed him to disseminate the material without further ado because, as has been exposed, the means of communication acted as data controller and, as such, had to comply with the regulations on data protection, applying, among others, with the principle of data minimization enshrined in article 5.1.c) of the GDPR.

V

The claimed party invokes, in its pleadings to the initiation agreement, the Judgment of the Court of Justice of the European Union of February 14, 2019

(Case C 345/17, Sergejs Buivids), which "refers to various criteria for balance between the right to respect for privacy and the right to freedom of expression", among which the defendant stands out "the manner and circumstances in from which the information was obtained and its veracity. Such ruling was cited in the initiation agreement to show that the means of communication, for the achievement of its own purposes and the shaping of free public opinion in a democratic society, can obtain all kinds of information in the exercise of their journalistic function in order to be able to later provide to the public.

The reading made now by the defendant of the previous sentence is partial, every time that it refers to one of the weighting criteria between the right to respect for privacy and the right to freedom of expression, ignoring the rest, to that the initial agreement does refer to: "the contribution to a debate of interest general, the notoriety of the affected person, the object of the report, the previous behavior of the data subject, the content, form and repercussions of the publication," in addition to "the manner and circumstances in which it was obtained information and its veracity. Which implies that not only must be taken into account account the origin and veracity of the information, but other concurrent circumstances, as, in the present case, the general interest and notoriety of the affected person.

It has already been indicated in the initiation agreement that, for a matter to be considered of general interest, of public relevance, will be so not only for the person who intervenes, but also by the matter to which it refers. Both requirements must be met resulting, to greater abundance of what is meant in the previous section, than in the assumption examined the victim is not a public person; rather the contrary, it is

www.aepd.es

sedeagpd.gob.es

18/32

great interest that is not recognized by third parties, so it can mean

a new penalty to the one already suffered. The victim is an anonymous person and must follow

being so, in such a way that their fundamental rights are fully guaranteed.

In the present case, (i) we are not dealing with a figure of public relevance, in which

sense that such relevance is sufficient to understand that it supposes, ex lege, a

dispossession of your fundamental right to the protection of your personal data, and (ii)

although we are dealing with facts "of public relevance", in the sense that they are revealed

as "necessary" for the presentation of ideas or opinions of public interest, that

necessity does not reach the provision of data that identifies the victim.

In any case, this does not mean, as stated in the initial agreement, to provide

of prevalence to a fundamental right over another, having to choose which one has more

weight in a specific case, but rather to find a balance between

both to achieve the achievement of the Fundamental Right to Freedom of

Information without distorting the Fundamental Right to Data Protection of

Personal character.

In fact, in this case the defendant proceeded, as a result of the

request made by the AEPD on \*\*\* DATE.4, to remove the news from the link

\*\*\*URL.1. But he could have chosen, as indicated in the aforementioned requirement,

to having distorted the voice of the victim, notwithstanding which the information

would have continued to be available and would continue to be supplied to its full extent,

which shows that to provide this specific information it was not

necessary, under the terms of art. 5.1.c) of the GDPR to disseminate the voice of the victim.

SAW

The claimed party ends, considering the allegations made as reproduced, in subsidiary way, in its pleadings to the initiation agreement, against the graduation of the fine, in which he criticized the fact that the following mitigations:

- The absence of a history of previously committed infractions.
- The degree of cooperation with the AEPD in order to remedy the alleged infringement and mitigate the adverse effects of the infringement, since immediately received the adoption of a provisional measure, proceeded to eliminate the notice and fully comply with the requirements practiced.
- Adherence to the Digital Pact for the protection of people, since “refrained from identifying the victim and did not disseminate any information that, with general character, would have served to identify him.”
- The unique and isolated nature of the alleged infringement.

In the first place, regarding the absence of a history of infringements committed previously, the Judgment of the National Court, of May 5, 2021, rec.

1437/2020, provides us with the answer: "It considers, on the other hand, that it should

The non-commission of a previous infraction can be appreciated as mitigating. well, the Article 83.2 of the GDPR establishes that it must be taken into account for the imposition of the administrative fine, among others, the circumstance "e) any previous offense committed by the person in charge or the person in charge of the treatment". It is a circumstance

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

19/32

aggravating, the fact that the budget for its application does not meet entails



that cannot be taken into consideration, but does not imply or allow, as it claims

the plaintiff, its application as mitigation”.

Secondly, the degree of cooperation with the Agency cannot be

be considered a mitigation since the withdrawal orders that it issues are of

mandatory compliance in accordance with the provisions of article 69 of the LOPDGDD. The

consideration of cooperation with the Agency as mitigation, as claimed

the appellant, is not linked to any of the cases in which there may be

a collaboration or cooperation or requirement by reason of a legal mandate, when

the actions are due and required by law, as in the case at hand.

Third, voice is personal data that identifies or makes a person identifiable.

person in an unambiguous way, as we indicate in the Fundamentals of Law II,

Therefore, it cannot be considered as an extenuating circumstance that the party

claimed adheres to the Digital Pact for the protection of people whenever

that what has happened is a clear breach of point 1 thereof: "The

signatories to the Charter will refrain from identifying in any way the victims of

assaults, acts of violence or sexual content in their information or

publish information from which, in general, your identity can be inferred

in the case of people of no public relevance. All this without prejudice to the fact that the

non-public persons may be involved in newsworthy events, in which case

the informative coverage will be the necessary one to give adequate fulfillment to the right

information, taking into account the peculiarities of each case".

On the other hand, the claimed party in its pleadings to the start-up agreement

He also disagreed that there was negligence on his part, since he has issued the audio as

which was disseminated by the Court itself, in such a way that, if there is negligence, it is

on the side of the Court itself. Couldn't disagree more with that.

affirmation. On the one hand, because, as has been stated in the Fundamento de Derecho

IV, what is being analyzed in this procedure is the diffusion of the voice of the victim without distortion by the claimed party. And on the other hand, because the media of communication are responsible for the treatment that habitually distort the voice so that the person speaking is not recognized, such and as indicated in the initiation agreement when it refers to the negligence of the party claimed by not ensuring a procedure that guaranteed the protection of data personal in such sensitive circumstances, since we are referring to a woman (...) victim of a violent crime and against sexual integrity.

For all the foregoing, all the allegations made by the party are dismissed.

claimed both to the initiation agreement and to the resolution proposal.

## VII

The voice of a person, according to article 4.1 of the GDPR, is personal data make it identifiable, and its protection, therefore, is the subject of said GDPR:

“Personal data”: any information about an identified natural person or identifiable (“the data subject”); An identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

20/32

an identifier, such as a name, an identification number, data of location, an online identifier or one or more elements of identity physical, physiological, genetic, mental, economic, cultural or social of said person;”

The voice is a personal and individual attribute of each physical person that is defined for its height, intensity and timbre. Endowed with unique and singular distinctive features that

individualize it directly, associating it with a specific individual, it is molded when speaking, being able to know, through it, the age, sex, state of health of the individual, his way of being, his culture, his origin, his hormonal, emotional and psychic. Elements of the expression, the idiolect or the intonation, are also data of personal character considered together with the voice.

For this reason, report 139/2017 of the Legal Office of this Agency states that "the image as well as the voice of a person is personal data, as will be any information that makes it possible to determine, directly or indirectly, your identity (...)"

In fact, the National Court Judgment dated March 19, 2014 (rec. 176/2012) says that "the voice of a person constitutes data of a personal nature, as as can be deduced from the definition offered by article 3.a) of the LOPD, as

"any information concerning identified or identifiable natural persons",  
This question is not controversial."

Article 4.2 of the GDPR defines "processing" as: "any operation or set of of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of authorization of access, collation or interconnection, limitation, deletion or destruction."

The inclusion of a person's voice in journalistic publications, which identifies or makes a person identifiable, implies a processing of personal data and, therefore,

Therefore, the person responsible for the treatment that carries out the same is obliged to comply with the obligations for the data controller set forth in the GDPR and in the LOPDGDD.

This procedure is initiated because the claimed party published, on the website referred to in the facts, the audio of the statement before the judge of a victim of a multiple rape, to illustrate the news regarding the holding of the trial in a case that was very mediatic. The victim's voice was clearly appreciated when recounting with all the crudeness of details the multiple rape suffered. All this constitutes a processing of personal data of the victim.

People have the power of disposal over their personal data, including his voice, as well as its diffusion, resulting, without a doubt, deserving of protection of the person whose personal data is disclosed in violation of the law legal.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

21/32

Thus, Constitutional Court Judgment 292/2000, of November 30, provides that "the content of the fundamental right to data protection consists of a power of disposal and control over personal data that empowers the person to decide which of these data to provide to a third party, be it the State or a individual, or which this third party may collect, and which also allows the individual know who owns that personal data and for what, being able to oppose that possession or use. These powers of disposal and control over personal data, that constitute part of the content of the fundamental right to data protection are legally specified in the power to consent to the collection, obtaining and use of access to personal data, its subsequent storage and treatment, as well as

its use or possible uses, by a third party, be it the State or an individual. and that right to consent to the knowledge and treatment, computerized or not, of personal data, requires as essential complements, on the one hand, the ability to know everything moment who has these personal data and to what use is submitting them, and, on the other hand, the power to oppose that possession and uses”.

In this sense, and regardless of the legal basis legitimizing the treatment, all controllers must respect the principles of treatment included in article 5 of the GDPR. We will highlight article 5.1.c) of the GDPR which establishes that:

"1. Personal data will be

c) adequate, pertinent and limited to what is necessary in relation to the purposes for which that are processed ("data minimization");"

However, we are faced with a fundamental right that is not absolute, since, if necessary, the Fundamental Right to Data Protection can give in to the prevalence of other rights and freedoms also constitutionally recognized and protected, such as, for example, the Fundamental Right to Freedom of Information, weighing it on a case-by-case basis.

However, in the present case, as we will explain, it must be considered that the treatment carried out by the claimed party within the framework of the freedom of information has been excessive, as there is no prevailing public interest in information in the dissemination of the voice of the victim - without adding any added value to the information keeping the real voice of the victim (without distorting, for example)-, under whose pretext it seems that those data have been disclosed; voice that, added to the fact that it is a highly publicized case, makes the victim clearly identifiable. By pondering the conflicting interests and, considering the concurrent circumstances of this case, that is, the especially sensitive nature of personal data and the intense

affectation of the privacy of the victim, the interest of the owner deserves greater protection of the right to the protection of your personal data and that they are not disclosed in front of the claimed public interest in its dissemination.

IX

In the struggle between the Fundamental Rights to Freedom of Information in relation to the Fundamental Right to the Protection of Personal Data, even

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

22/32

when an equal degree of protection is recognized for both constitutional rights, ordinarily the first is usually endowed with prevalence by our courts, after assess and weigh all the elements at stake.

However, preponderance does not mean prevalence when, after all the concurrent circumstances in a specific case, the limits set are exceeded normatively and jurisprudentially.

In this sense, the Article 29 Working Group in its Opinion 06/2014 on the concept of legitimate interest of the data controller under the

Article 7 of Directive 95/46/EC, when examining the legal basis of the legitimate interest of the

Article 7.1.f) of Directive 95/46/CE, fully transferable to the current art. 6.1.f) of

GDPR, includes the right to freedom of expression or information as one of the

cases in which the question of legitimate interest may arise, stating that "without

regardless of whether the interests of the data controller will ultimately prevail

term on the interests and rights of the interested parties when the

weighing test".

That said, the Fundamental Right to Freedom of Information is not absolute. We can observe very clear limits established by the courts in the civil sphere, in relation to the Right to Honor, to Personal and Family Privacy and to the Image itself.

Thus, we will cite, for all, the Judgment of the Constitutional Court 27/2020, of 24 February 2020 (recurso de amparo 1369-2017) that provides, in relation to the image of a person, and starting from the incontrovertible fact that it makes identifiable, that "...the debated question is reduced to pondering if the reproduction does not consented to the image of an anonymous person, that is to say, of someone who is not public figure, but who suddenly and involuntarily acquires a role in the newsworthy fact, in this case as a victim of the failed homicide attempt by of his brother and his subsequent suicide, implied an illegitimate interference in his fundamental right to one's own image (art. 18.1 CE).

[...]

...that criminal events are newsworthy events, even with regardless of the character of private subject of the person affected by the news. Without However, the limit is in the individualization, direct or indirect, of the victim, since This data is not of public interest because it lacks relevance for the information that is allowed to be transmitted (SSTC 20/1992, of February 20; 219/1992, of December; 232/1993, of July 12; 52/2002, of February 25; 121/2002, of 20 May, and 127/2003, of June 30). Thus, it is currently recognized by Law 4/2015, of 27 April, of the crime victim statute, in force since October 28, 2015, when he warns of the need "from the public authorities [to offer] a response as broad as possible, not only legal but also social, to the victims, not only repairing the damage in the framework of a criminal proceeding, but also

minimizing other traumatic effects on the moral that his condition can

generate, all this regardless of their procedural situation. Therefore, the present

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

23/32

Statute, in line with European regulations on the matter and with the demands that

raises our society, claims, based on the recognition of the dignity of

victims, the defense of their material and moral assets and, with it, those of the group of

the society". In cases such as those raised in this appeal, this Court must

give relevance to the prevalence of the right to the image of the victim of the crime

against information freedoms, since graphic information became idle or

superfluous because the photograph of the victim lacks real interest for the transmission of

the information, in this case the apparent accomplishment of a homicide and subsequent

suicide" (emphasis added).

We will add the Judgment of the Supreme Court, of its First Civil Chamber,

272/2011, of April 11 (rec. 1747/2008), in which, regarding the necessary data

to provide information and limits to the public interest states that "b) The

trivial information is not protected (ATC 75/2006), but the fact of providing data is not

necessary in a rape case (full name, last initials,

the portal of the street where the victim lived) that have no community relevance, do not

they respect the reserve, they only seek to satisfy curiosity, they produce disturbances or

inconvenience and unnecessarily reveal aspects of personal and private life,

allowing neighbors, close people and relatives to fully identify the

victim and knowledge in great detail of a seriously injurious act



against their dignity (STC 185/2002) or about a disease that has no interest

public and directly affects the irreducible sphere of privacy and that is

reveals the effect of a pure joke or joke (STC 232/1993);”.

Likewise, the Judgment of the Supreme Court, of its First Civil Chamber,

Judgment 661/2016, of November 10 (rec. 3318/2014), in relation to the

capture and dissemination in court of the image of a victim of gender violence

provided that "1st) The interest of the questioned information is not discussed nor the right

of the television channel sued to broadcast images recorded during the act of

oral trial of the criminal case, since there is no limitation in this regard agreed

by the judicial body.

2nd) The only controversial point is, therefore, whether the applicant's identification

as a victim of the crimes prosecuted in said criminal case, through first

shots of his face and the mention of his first name and place of residence, he was

also included in the fundamental right of the television channel

demanding to transmit truthful information or, on the contrary, was limited by the

fundamental rights of the plaintiff to her personal privacy and to her own

image.

3rd) Regarding this matter, the jurisprudence has recognized the general interest and the

public relevance of information on criminal cases (judgment 547/2011, of 20

July), which are accentuated in cases of physical and psychological abuse (judgments

128/2011, of March 1, and 547/2011, of July 20), but it has also pointed out,

regarding the identification of the persons involved in the trial, that the

defendant and the victim are not on an equal footing, because in terms of

that one does allow a complete identification, and not only by its initials, due to the

nature and social significance of the crimes of mistreatment (judgment 547/2011,

of July 20).

[...]

6th) In short, the defendant television channel should have acted with the prudence of the diligent professional and avoid issuing images that represented the recurring in close-up, either refraining from issuing the corresponding shots, well using technical procedures to blur their features and prevent their recognition (judgment 311/2013, of May 8). Similarly, it should also avoid mentioning your first name, because this information, insufficient by itself to constitute illegitimate interference, became relevant when pronounced on the screen simultaneously with the image of the applicant and add the mention of her town of residence, data all of them unnecessary for the essence of the content information, as evidenced by the news about the same trial published in the next day in other media. 7th) The identification of the plaintiff through his image and personal data indicated and its direct link to an episode of gender violence and other serious crimes, when disclosure was foreseeable. Simultaneous or subsequent data referring to how the victim and her aggressor met and the way in which the criminal acts occurred, supposes that the loss of the anonymity would violate both the plaintiff's right to her own image, by the broadcast of their physical features, such as their personal and family intimacy, to the extent that that some reserved data, belonging to his private life (who went to the Internet to start a relationship or the intimate content of some of their talks), lacking offensive entity in a situation of anonymity, they began to have it from the moment

in which any person who watched those news programs and who resided in the location of the victim could know who they were referring to, so that the damage psychological damage inherent to his condition as a victim of crimes was added to the moral damage consisting of the disclosure of information about his private life that he had not consented to make public." (underlining is ours).

As we can see, a clear reference is made to the excessive treatment of personal data (some of which are not of an intimate nature) to provide the information, considering them unnecessary at all points in attention to the concurrent circumstances. Sometimes the courts refer to intimate data, but sometimes it is personal data that is not intimate, such as, for example, the image of a natural person obtained from a photograph published in a social network or name and surname.

eleventh

In the specific case examined, as we have indicated, the claimed party published, on the website referred to in the facts, the audio of the statement before the judge of a victim of a multiple rape, to illustrate the news of a very media.

Thus, it is not a question, as in other cases examined by jurisprudence, of endowing of prevalence to a fundamental right over another, having to choose which one has more weight in a specific case. If not, rather, to find a balance between both to achieve the achievement of the purpose of the first without undermining the second. The reconciliation of both rights is nothing new, since the legislator European Union mandates such reconciliation in article 85 of the GDPR.

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

As we have seen previously, the Fundamental Right to Freedom of Information is not unlimited, since the jurisprudential interpretation when confronting it with other rights and freedoms does not allow the same in any case and with all breadth, but, nevertheless, the prevalence that the courts usually endow it can be seen limited by other fundamental rights that must also be respected. Thus observes its limitation when the personal data provided was unnecessary for the essence of the information content.

We must consider the special circumstances present in the supposed examined. It is about a woman (...) who has suffered a multiple rape. In the published recording, she is heard recounting, with great emotional charge, the aggression sexuality suffered in all crudeness, narrating (...).

In addition, we cannot lose sight of the victim status of the woman whose voice, with all the nuances exposed, has spread.

Let us remember, for merely illustrative purposes, that Law 4/2015, of April 27, of the Statute of the victim of crime, as well as the recent Organic Law 10/2022, of 6 of September, of integral guarantee of sexual freedom, foresee a special need to protect victims of crimes against sexual freedom or sexual indemnity. In addition, the aforementioned Statute of the victim of crime it also provides special protection for victims of violent crimes. and in the case examined both circumstances concur.

In this case, the situation of the victim must be considered (who is not in the same level of equality as the defendants) and what the diffusion of their voice with all its nuances, as well as the special protection that the legal system that, without constraining the supply of information, must be done

compatible with the principle of data minimization, applicable to the form, the medium in which the information is supplied and disseminated due to the immediate affectation of the data personnel and the identification of the victim.

Precisely because the obvious informative public interest in the news is not denied, Given the general interest in criminal cases, in this specific case, it is not a question of to diminish the Fundamental Right to Freedom of Information due to the prevalence of the Fundamental Right to the Protection of Personal Data, but of make them fully compatible so that both are absolutely guaranteed. That is, the freedom of information of the media is not questioned. of communication but the weighting with the right to data protection based on to the proportionality and need to publish the specific personal data of the voice. Such situation could have been resolved with the use of technical procedures to prevent voice recognition, such as, for example, distortion of the voice of the victim or the transcript of the report of the multiple rape, security measures both, applied depending on the case in an ordinary way by means of communication.

At older we have to mean that the victim is an anonymous person and our Constitutional Court, for all the STC 58/2018, of June 4, affirms that the public authorities, public officials and public figures or those dedicated to activities that carry public notoriety “voluntarily accept the risk of

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

26/32

that their subjective personality rights are affected by criticism, opinions

or adverse disclosures and, therefore, the right to information reaches, in relation to with them, its maximum level of legitimizing effectiveness, insofar as their life and conduct morality participate in the general interest with a greater intensity than that of those private persons who, without a vocation for public projection, see themselves circumstantially involved in matters of public importance, to which

Therefore, a higher level of privacy must be recognized, which prevents granting general importance to facts or behaviors that would have it if they were referred to to public figures".

The Judgment of the Court of Justice of the European Union (Second Chamber), of 14 February 2019, in case C 345/17, Sergejs Buivids, mentions various

Criteria to balance between the right to respect for privacy and the right to freedom of expression, among which are "the contribution to a debate of general interest, the notoriety of the affected person, the object of the report, the previous behavior of the data subject, the content, form and repercussions of the publication, the manner and circumstances in which information was obtained and its veracity (see, in this regard, the judgment of the ECtHR of June 27, 2017,

Satakunnan Markkinapörssi

Finland,

CE:ECHR:2017:0627JUD000093113, section 165)".

Oy and Satamedia Oy c.

In such a way that for a matter to be considered of general interest, public relevance, they will be not only for the person who intervenes, but also for the matter to which it refers. Both requirements must concur, resulting, at greater abundance of what was meant in the previous section, that in the case examined the victim is not a public person; rather the contrary, it is of great interest that is recognized by third parties, so it may entail a new penalty

to the already suffered The victim is an anonymous person and must remain so, in such a way that so that their fundamental rights are fully guaranteed.

In the present case, (i) we are not dealing with a figure of public relevance, in which sense that such relevance is sufficient to understand that it supposes, ex lege, a dispossession of your fundamental right to the protection of your personal data, and (ii) although we are dealing with facts "of public relevance", in the sense that they are revealed as "necessary" for the presentation of ideas or opinions of public interest, that necessity does not reach the provision of data that identifies the victim.

For this reason, and as expressed by the Supreme Court in its (civil) judgment 697/2019, of 19 December, the formation of a free public opinion does not require, nor does it justify, the affects the fundamental right to one's own image [in this case to the protection of personal data] with that seriousness and in a way that does not save the necessary connection with the identification of the person object of the information.

It is worth mentioning the breach of point 1 of the Digital Pact for the protection of persons, signed by the entities involved, which establishes that "The signatories of the Charter will refrain from identifying the victims in any way.

of assaults, acts of violence or sexual content in their information or publish information from which, in general, your identity can be inferred in the case of people of no public relevance. All this without prejudice to the fact that the non-public persons may be involved in newsworthy events, in which case

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

27/32

the informative coverage will be the necessary one to give adequate fulfillment to the right

information, taking into account the peculiarities of each case".

twelfth

Every person responsible for the treatment has conferred obligations in terms of data protection, in the terms prescribed in the GDPR and in the LOPDGDD, being able to highlight, in terms of what interests us, proactive responsibility, article 5.2 of the GDPR, the assessment of risks and the implementation of measures of adequate security. Obligations that are even more relevant when, as in In the case we are examining, this one is particularly sensitive.

Such obligations do not decline because we are before a data controller that it is a means of communication.

If we add the diffusion of the victim's voice (with all its nuances), which makes it identifiable and can be recognized by third parties, with the factual account that makes in relation to the violation suffered, there is a very high and very likely risk that may suffer damage to their rights and freedoms. This has happened in other cases of dissemination of personal data of victims of rape crimes. And this, in addition to that with the diffusion of the voice of the victim she is being sentenced again to can be recognized by third parties, when it is not a proportional treatment or necessary in relation to the information purposes pursued.

XIII

The claimed party has processed data that was excessive as it was not necessary for the purpose for which they were processed, which constitutes an infringement of article 5.1.c) of the GDPR.

The infringement attributed to the claimed party is typified in article 83.5, section a) of the GDPR, which under the heading "General conditions for the imposition of administrative fines" provides that:

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



paragraph 2, with administrative fines of maximum EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the total annual global business volume of the previous financial year, opting for the highest amount:

a) the basic principles for the treatment, including the conditions for the consent under articles 5, 6, 7 and 9;

In this regard, the LOPDGDD, in its article 71 establishes that "They constitute offenses the acts and behaviors referred to in sections 4, 5 and 6 of the Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the present organic law".

For the purposes of the limitation period, article 72 of the LOPDGDD indicates:

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

28/32

Article 72. Offenses considered very serious.

"1. Based on what is established in article 83.5 of Regulation (EU) 2016/679, are considered very serious and will prescribe after three years the infractions that a substantial violation of the articles mentioned therein and, in particular, the following:

a) The processing of personal data in violation of the principles and guarantees established in article 5 of Regulation (EU) 2016/679."

fourteenth

In order to determine the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the GDPR, precepts that state:

"Each control authority will guarantee that the imposition of administrative fines under this Article for infringements of this Regulation indicated in sections 4, 5 and 6 are effective in each individual case, proportionate and dissuasive."

"Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or in lieu of the measures contemplated in Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case shall be duly taken into account:

- a) the nature, seriousness and duration of the offence, taking into account the nature nature, scope or purpose of the processing operation in question, as well as the number number of interested parties affected and the level of damages they have suffered;
- b) intentionality or negligence in the infraction;
- c) any measure taken by the person in charge or in charge of the treatment to settle 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, habi-gives an account of the technical or organizational measures that have been applied by virtue of the articles 25 and 32;
- e) any previous infringement committed by the controller or processor;
- f) the degree of cooperation with the supervisory authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement, in particular whether the person in charge or the person in charge notified the infringement and, if so, in what extent;
- i) when the measures indicated in article 58, paragraph 2, have been ordered

previously against the person in charge or the person in charge in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or to mechanisms of certification approved in accordance with article 42, and

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

Regarding section k) of article 83.2 of the GDPR, the LOPDGDD, article 76,

"Sanctions and corrective measures", provides:

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

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of data processing. personal information.
- c) The benefits obtained as a consequence of the commission of the infraction.
- d) The possibility that the conduct of the affected party could have led to the commission of the offence.
- e) The existence of a merger by absorption process subsequent to the commission of the violation, which cannot be attributed to the absorbing entity.
- f) The affectation of the rights of minors.
- g) Have, when it is not mandatory, a data protection delegate.
- h) Submission by the person responsible or in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which

there are controversies between those and any interested party.”

In this case, the following graduation criteria are considered concurrent:

□ Aggravating:

- Article 83.2.a) of the GDPR:

Nature, seriousness and duration of the infringement: It is considered that the nature of the infraction is very serious since it entails a loss of disposition and control over the personal data of your voice to a person who has been the victim of a violent crime and against sexual integrity and that by disseminating said personal data there was a certain risk that it could be recognized by third parties, with the serious damages that this it would cause

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

30/32

- Article 83.2.b) of the GDPR.

Intentional or negligent infringement: Although the Agency considers that it is not there was intentionality on the part of the communication medium, the Agency concludes that was negligent in not ensuring a procedure that guaranteed the protection of the personal data in such sensitive circumstances, especially when in many Sometimes the voice in the news is distorted so that it is not recognized to the person speaking.

- Article 83.2.g) of the GDPR.

Categories of personal data affected by the infringement: The certain possibility of recognize the victim of a crime as the one reporting the news, very serious, violent

and against sexual integrity (multiple rape), is seriously detrimental to the affected, since what happened is linked to their sexual life.

fifteenth

The text of the resolution establishes the offense committed and the facts that have given rise to the violation of data protection regulations, of which clearly infers what are the measures to adopt, notwithstanding that the type of procedures, mechanisms or concrete instruments to implement them corresponds to the sanctioned party, since it is the person responsible for the treatment who He fully knows his organization and has to decide, based on the responsibility proactive and risk approach, how to comply with the GDPR and the LOPDGDD.

Therefore, in accordance with the applicable legislation and assessed the criteria of graduation of sanctions whose existence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE CONECTA5 TELECINCO, S.A.U., with NIF A82432279, for an infringement of article 5.1.c) of the GDPR, typified in article 83.5 of the GDPR, a fine of 50,000.00 euros (FIFTY THOUSAND euros).

SECOND: Confirm the following provisional measures imposed on CONECTA5

TELECINCO, S.A.U.:

- Withdrawal or distortion of the victim's voice from their web addresses, avoiding, in the to the extent that the state of technology allows it, the re-uploading or re-uploading of copies or exact replicas by the same or other users.
- Withdrawal or modification of the contents in such a way that it makes it impossible to access them and disposition of the original by third parties, but guarantees its preservation, for the purposes of guard the evidence that may be necessary in the course of the investigation police or administrative or judicial process that may be investigated.

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

31/32

THIRD: NOTIFY this resolution to CONECTA5 TELECINCO, S.A.U..

FOURTH: Warn the sanctioned party that he must enforce the sanction imposed

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

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

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

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

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

of December 17, by means of its income, indicating the NIF of the sanctioned and the number

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

restricted number ES00 0000 0000 0000 0000 0000, open in the name of the Agency

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

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

Once the notification has been received and once executed, if the execution date is

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

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

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

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

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

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

Against this resolution, which puts an end to the administrative process in accordance with art. 48.6 of the

LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from count from the day following the notification of this resolution or directly contentious-administrative appeal before the Contentious-administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided for in article 46.1 of the referred Law.

Finally, it is noted that in accordance with the provisions of art. 90.3.a) of the LPACAP, may provisionally suspend the firm resolution in administrative proceedings if the The interested party expresses his intention to file a contentious-administrative appeal. If this is the case, the interested party must formally communicate this fact through writing addressed to the Spanish Data Protection Agency, presenting it through of the Electronic Registry of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other registries provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative proceedings within a period of two months from the day following the Notification of this resolution would terminate the precautionary suspension.

C / Jorge Juan, 6

28001 – Madrid

938-120722

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](https://sedeagpd.gob.es)

Mar Spain Marti

Director of the Spanish Data Protection Agency

C / Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)