File No.: PS/00197/2022

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 claim is directed, among others, against LA VANGUARDIA EDICIONES,

S.L., with NIF B61475257 (hereinafter, the claimed party). The reasons on which it is based

the claim are as follows:

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 websites of the claimed media, those relating to the claimed party being:

- ***URL.1

- ***URL.2

- ***URL.3

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 in which it was still available, including a tweet from the

claimed part.

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. Regarding the claimed part, the following were found:

publications:

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***URL.2

***URL.4

***URL.5

***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 addresses from which this was accessible

content.

On the same day of the aforementioned notification, the AEPD received a letter sent by

this entity informing that the videos had been removed from all the

places of publication, distorting the voice of the intervener in those videos

that they had been kept published; verifying that the tweets had been

deleted and that in the case of the digital page of La Vanguardia, it had been

distorted voice of the victim's statement on the video.

FOURTH: On May 3, 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) of the GDPR.

The aforementioned initiation agreement was notified to the claimed party, in accordance with the rules

established in the LPACAP, on May 3, 2022.

FIFTH: With the registration date of May 11, 2022, the party

The defendant requested a copy of the file as well as an extension of the term to present

allegations.

On May 12, 2022, the file was forwarded to the defendant, granting the

At the same time, a new term to present allegations.

SIXTH: The claimed party submitted a brief of allegations on May 25, 2022,

in which, in summary, he stated:

1.- The inadmissibility of the admission to processing of the claim that has originated the

present disciplinary procedure in application of the provisions of article 65.3

of the LOPDGDD, which provides that the AEPD may reject the claim when the

person responsible, prior warning issued by the competent authority, would have

adopted the corrective measures aimed at putting an end to the possible non-compliance

of data legislation.

It indicates that "if we turn to the aforementioned Title VIII of the LOPDGDD, we observe that

expressly detail three different procedural moments in which the Agency

may agree on the adoption of measures": before the admission for processing (article 65.3

of the LOPDGDD), before the adoption of the agreement to start the procedure and a

Once the claim has been admitted for processing (article 67.1 of the LOPDGDD) and a

procedure for the exercise of the sanctioning power (article 68 LOPDGDD).

Understanding that in this case "the adoption of prior or provisional measures

agreed prior to admission for processing, but the course was not followed

provided for in article 65.3 of the LOPDGDD."

He makes such a statement because "On *** DATE.2, according to folio 10 of the file

and with reference E/05505/2021, it is indicated that in procedure E/05479/2021, the

AEPD "agreed to carry out these investigative actions in relation to

with the claimed facts." And on ***DATE.3 the admission for processing of the

complaining party.

It goes on to indicate that "The report on pages 18 to 23 indicates that as

Result of the research actions are the publications

indicated in the complaint and in which the voice of the victim can be heard without

distort, proceeding for all those responsible for the treatment to the emission with

date ***DATE.5, of the resolution of provisional measure of urgent withdrawal of

content or distorted voice of the intervener in such a way that it would be

unidentifiable in the web addresses from which this content was accessible."

Therefore, on ***DATE.4, the claimed party immediately proceeded to comply

such requirement, which was communicated to the AEPD on that same date.

Based on the foregoing, it indicates that, by virtue of article 65.3 of the LOPDGDD, of the

general principles that govern the disciplinary procedure and since it adopted

immediately the measures required by the AEPD, leaving the right

fundamental to the protection of personal data of the fully affected

guaranteed, the claim should have been rejected for processing and the

file of proceedings.

It invokes the principles of proportionality, of least restriction and interference of the

administrative action on the rights of citizens and rationality, all

They are included in article 4.1 of Law 40/2015, of October 1, on the Regime

Law of the Public Sector, regarding the "Principles of intervention of the

Public Administrations for the development of an activity". Consider that such

principles have not been taken into account by the AEPD in this case because, all

once the corrective measures that it required were taken care of immediately

and that such measures should have been carried out prior to admission to

procedure, what proceeded was the inadmissibility of the claim and the filing of the

performances.

For all of the above, he understands that the procedure suffers from a formal defect.

in the processing for the violation of articles 64 and 65 of the LOPDGDD.

2.- The reason for this proceeding is the claim made by

A.A.A., not a claim made by the interested party. That is, the request has

been processed "by a third party who in no case has proven to meet the requirements

sufficient minimums of having been affected in their rights or interests

legitimate to obtain the status of interested party in the administrative procedure

in the terms provided in article 4.1.a) of Law 39/2015, of October 1, of

Common Administrative Procedure of Public Administrations."

For this reason, it considers that "if rational indications of a possible violation of

of article 6.1 a) GDPR, the administrative procedure should have been initiated by

own initiative of the AEPD, in accordance with the provisions of articles 64 and 65 of the

LOPDGDD, relating to the way in which the procedure is initiated and its duration, and

not as admission for processing of the complaint from a third party that does not justify what their

legitimation, nor does it prove in a proven way the existence of a violation of

rights."

Based on the foregoing, he again understands that the procedure suffers from a defect of

form in the processing for the violation of articles 64 and 65 of the LOPDGDD.

3.- The qualification of the data object of treatment, since "the voice, data regarding the

which the compliance with the principle of minimization is questioned, does not constitute, in

in any way, sensitive data", so we are not dealing with data processing

categorized in article 9 of the GDPR.

For this reason, it criticizes the agreement to start the disciplinary procedure when it indicates that

“by weighing the conflicting interests and, taking into account the concurrent circumstances

of this case, that is, the especially sensitive nature of the personal data and

the intense affectation to the privacy of the victim, […]”

The claimed party disagrees that the content of the victim's statement keeps

relation to the sexual life of the interested party since, "although the criminal offense prosecuted

violates the sexual freedom of the victim, it has nothing to do with sexual life

(orientation, tastes or sexual behaviors) of the latter.”

Likewise, it considers that "the qualification of the facts contained in the news item and its

affectation of the fundamental rights to honor, privacy and own image, of the

victim would be capable of being determined before the civil courts of justice, not

In our opinion, it is the responsibility of the Control Authority to evaluate whether

produced or not, a violation of the aforementioned rights.”

4.- The voice as personal data and its consideration of excessive treatment within the framework

of the content object of claim.

The party claimed does not question that the voice is personal data, but that

It will only be so in some cases, specifically in those cases in which the

data allows individualization directly, associating with an individual

concrete.

He points out that, to date, the only information about the victim that has come out has been his

sex, age and physical location at the time of the events, attributes

which, together with her voice, she considers do not allow the general public to identify her without

use additional information.

In addition, he considers that there are three elements that increase the difficulty of a

possible identification of the interested party:

- The intrinsic variability of vocal data,

- the need for prior contact to recognize the speaker,

- and the immediacy of the withdrawal of the original recording.

5.- Regarding the right to data protection, the claimed party asserts

manifest that the purpose of including the audio of the victim's statement before

the judge was not to illustrate the news concerning the holding of the trial in a case that was

very media, but "to draw the attention of the reader, and when necessary denounce, as

the prosecutor had conducted the interrogation in the first session of the trial, without any

empathy for the victim, forcing the young woman to recount what happened over and over again

that night, constantly interrupting her and forcing her to back off and go back to

explain the details of the attack when he had already told them."

He points out that "video published without deep masking of the voice contributes to the

I report the ability to demonstrate the tension to which the victim was subjected in the

course of the interrogation, their reactions, their state of mind and, ultimately and as

makes the news explicit, verifying the prosecutor's lack of empathy, and the ignorance of the "evil

the drink she was going through has forced the young woman to reminisce over and over again

time the scenes of the rape delving into her suffering."

Therefore, it considers that the voice of the victim was necessary for the purpose

informative, it does add value to the information echoed by the news,

therefore, consequently, it has complied with article 5.1.c) of the GDPR, since it does not

there has been excessive processing of personal data.

6.- Existence of balance between the Fundamental Right to Freedom of Information

and the Fundamental Right to the Protection of Personal Data in the

present case, so there is no violation of the GDPR or the

LOPDGDD, nor damage to the rights and freedoms of the victim.

It considers that in the present case, when weighing the conflicting interests,

taking into account the circumstances of the present case and the nature of the news object

of reproach, that is, the complaint of the prosecutor's actions and the non-existence of

measures adopted by the criminal court itself beyond the inclusion of a folding screen

that concealed the image of the victim, it must be concluded that the right to

information, and there has been no real affectation to the privacy of the victim.

He criticizes the invocation made by the initiation agreement to the STS, of its First Chamber of the

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

disclosure in court of the image of a victim of gender violence whenever

that case referred to the broadcast of close-up images of the appellant together

with other additional data that allowed the identification of the person, unlike

of what happens in the present case, in which the claimed party has omitted

any other information that is excessive or superfluous.

He also criticizes the reproach made by the AEPD regarding the lack of

consent for the dissemination of voice data, since "it is not said basis

law that enables the media to process personal data of

who are the subject of news in exercise and guarantee of the right to free

information."

It shows that the trial was oral, in a public hearing, with the presence of

public and the media and without the court applying restrictive measures to

the diffusion of the voice, such as distortion or masking, said court being

the one who distributed the questioned audio among the different news agencies and these,

in turn, between the different media. In the specific case of the part

claimed, the recording was provided by Agencia EFE because the part was found

claimed adhered to the framework agreement that said agency maintains signed with the

Information Media Association (AMI).

For this purpose, it invokes article 681 of the Criminal Procedure Law (hereinafter,

Lecrim), which establishes that sessions can take place behind closed doors "when

so required by reasons of morality or public order or the respect due to the person

offended by the crime or her family", as it also contemplates that the judge or court,

ex officio or at the request of a party, has the possibility of adopting measures for the

protection of the privacy of the victim and their relatives, such as:

“a) Prohibit the disclosure or publication of information related to the identity

of the victim, of data that may facilitate their identification directly or

indirectly, or those personal circumstances that would have been valued for

decide on your protection needs.

b) Prohibit the obtaining, disclosure or publication of images of the victim or

of their relatives."

Since the court did not adopt additional protection measures for the most

beyond a screen to prevent direct visualization of the victim, and that neither the victim

nor the Public Prosecutor, as expressly provided for in article 301 bis of the Lecrim,

interested in the adoption of additional precautions, understands that they do not

considered necessary, so the media outlet has not carried out a

excessive data processing.

7.- Regarding the action of the data controller to distort the voice of the

victim when required by the AEPD, considers that "it should not be interpreted as

an evidence that the treatment was not necessary, but as an act of diligence

of the person responsible at the request of the control authority, and that, in any

case, it was the adoption of a provisional measure, which should not prejudge

on the merits of the matter."

8.- Finally, in the other, I say, the claimed party requests, secondarily, that in

In the event that this sanctioning procedure is not archived, it is agreed to have

as mitigating factors when imposing the sanction, "the lack of adoption of measures

by the judicial body that distributed the published audio tending to prohibit or

limit the dissemination of the voice of the victim, the non-request by the public prosecutor's office or

of the defense of the victim of such measures, the short time that the aforementioned video

was published, the non-sensitive nature of the voice data, as well as the difficulty to

identify the victim through her voice alone."

SEVENTH: On September 30, 2022, a resolution proposal was formulated,

proposing that the Director of the Spanish Data Protection Agency

penalize LA VANGUARDIA EDICIONES, S.L., with NIF B61475257, for a

violation 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).

As well as that by the Director of the Spanish Data Protection Agency

confirm the following provisional measures imposed on LA VANGUARDIA

EDITIONS, S.L.:

- 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.

EIGHTH: With the registration date of October 6, 2022, the part

The defendant requested an extension of the term to present allegations.

On October 10, 2022, the defendant was notified of the granting of a new term

to present claims.

NINTH: The claimed party submitted a pleadings brief on October 21,

2022, in which, in summary, it stated, as additional allegations to all and

each of those made in his brief of May 25, 2022, the following:

1.- Incorrect interpretation of the assumption regulated in article 65.3 of the LOPDGDD.

The defendant considers that from the reading of the aforementioned precept "it is not

It follows that the "warning" to which it refers is the one that

authority can carry out before data processing is carried out."

It goes on to indicate that article 65.3 of the LOPDGDD "establishes that in order to

to reject the claim in application of said article, it is necessary that the

responsible or in charge has adopted the corrective measure that has been

warned, but also that one of the following measures occurs:

a) That no harm has been caused to the affected party in the case of infringements

provided for in article 74 of the LOPDGDD.

b) That the right of the affected party is fully guaranteed through the

application of the measures.

For this reason, the defendant considers that the case regulated in article 65.3 of

The LOPDGDD "is one in which the treatment has already started at the time the

that the Authority can send the person in charge or person in charge the appropriate warning,

Well, how else would there have been damage to the affected party as a consequence of

of an infraction? If the treatment has not yet been carried out, it is impossible for it to

suppose a fraction and that said infraction has caused damage to the affected party."

It also points out that:

- "If we turn to the aforementioned article 74 of the GDPR, we see that the infractions collected

in it are infractions that require that the treatment has been initiated."

- "it is unlikely that anyone can make a claim for a

treatment that has not yet been carried out."

It goes on to indicate that it cannot be interpreted that article 65.3 of the LOPDGDD

"refers solely to the measure contained in section 2.a) of article 58 of the

GDPR since, while said section does refer to the possibility of sanctioning for

"planned treatment operations", article 65.3 of the LOPDGDD speaks of

"put an end to potential non-compliance." Pointing out the claimed party that "to put

The end of something requires that something previously be started.

It ends by noting that when article 65.3 of the LOPDGDD refers to "possible non-compliance" cannot be interpreted as referring to non-compliance treatment. initiated, "but to an "alleged non-compliance" since it cannot yet be affirmed that the denounced treatment does not comply with the applicable regulations (...) since the presumption of innocence at that procedural moment.

2.- The improper admission of the claim for processing is reiterated since it has been presented by a person who is not the interested party or his representative, indicating that if the Agency "observed rational indications of a possible violation of the GDPR should have acted on its own initiative, either to carry out the proceedings investigation, which according to this authority began after admit the aforementioned claim for processing, either to carry out any other performance."

The defendant indicates that "he did not claim and does not claim now that the initiation of the procedure has not been carried out ex officio, but rather all previous actions should have been initiated on the EEPD's own initiative and not as a consequence of the admission for processing of a claim presented by a third party outside the interested."

For this reason, it considers that "The fact that the disciplinary procedure is initiated correctly does not make the form defect disappear from all performances previous ones on which it is based and that, therefore, make it flawed and it is null, and its file must be agreed."

The claimed party ends stating that it cannot be "understood that the admission to processing of the claim, the previous actions carried out and the provisional measure requirement issued are acts unrelated to this procedure, since far from it, they are acts directly related to it, since this procedure is based on the aforementioned claim and the confirmation of

the aforementioned provisional measure is the object of the same.”

3.- Non-compliance with article 56 of the LPACAP: The claimed party indicates that "the

measure of withdrawal or distortion of the voice and contents will be agreed in (...) and the agreement

initiation of the procedure will not take place until May 2022. The period elapsed

between one date and another is (...), time that exceeds the period of 15 days established by the

Article 56.2 of the LPACAP.

On the other hand, the Agreement to start the Disciplinary Procedure does not contain

express pronouncement on said measures, as required by article 56.2 of the

LPACAP.”

The foregoing is considered by the claimed party as another defect of form for which it proceeds

that this proceeding be archived.

4.- The claimed party indicates that the rating of the published content does not

should be taken into account by the AEPD when sanctioning, notwithstanding that,

understood, such content is not considered "special" for the purposes of the

Article 9 of the GDPR.

He criticizes that the proposed resolution defends that having been the victim of a crime

sex is linked to sexual life, because, considers the defendant, "it is not

it can be argued that by publishing the facts relating to a violation one is

informed or seeking information about the future sexual relations of the victim.”

It also criticizes the fact that the proposed resolution indicates that the immediate risk that

cause to the interested party is the certain possibility of recognizing the victim of a crime

violent and against sexual integrity, since it has not been shown that the

interested party has suffered immediate or future damages or losses due to the

treatment carried out by the claimed party.

And for the foregoing, it understands that the

Guidelines of the European Data Protection Board on the calculation of fines

administrative procedures in accordance with the GDPR, in its version of May 12, 2022.

5.- Regarding the voice as personal data and its consideration of excessive treatment

within the framework of the content object of claim, in addition to reiterating in the

allegations made to the initiation agreement, states that "the AEPD cannot guarantee

that said recognition has taken place, since there is no proof in this regard."

It continues indicating that "the authority cannot sanction based on possibilities or

probabilities, but only by certain and proven facts, there being no

said facts in the specific case at hand."

Therefore, it requests "that he not be penalized for some facts and damages that have not been

could prove."

6.- Regarding the right to data protection, the defendant states that "yes

there is a prevalent informative public interest in disseminating the voice of the victim,

such as reflecting the anguish experienced by the victim given the circumstances,

anguish that would have been aggravated by the actions of the prosecutor.", which was not

get with the current video.

7.- Point out that there is a balance between the Fundamental Right to Freedom of

whenever:

- The undistorted voice of the victim is necessary for the informational purpose.

- It considers that it did specify and justify the weighting of the conflicting interests in

his brief of May 25, 2022, criticizing that the proposed resolution indicates

there is no such justification.

- Regarding the lack of measures adopted by the court at the time of holding the hearing

oral indicates that "it has no doubts regarding the data processing that is being

analysing, nor who is responsible for it", but "to the extent that the

judicial body allowed the media free access to the courtroom

views and did not adopt or promote measures to prevent the dissemination of the voice of the

victim once distributed the audio, neither having requested the victim nor the ministry

fiscal measures of anonymization, it can be affirmed that there is no interference in the

rights of the victim, and that, considering the balance between the rights

faced, it can be concluded that the Right to Information would prevail."

8.- In relation to the obligations of those responsible for the treatment, the party

claimed criticism that the motion for a resolution indicates that it is tremendously

It is significant that, as a result of the request of the AEPD, the voice of the

victim and that the information continues to be available and is maintained with all

its breadth, then, according to the defendant:

- "by distorting the voice, the information is not provided in all its amplitude, since it does not

the listener is allowed to know the effect that the prosecutor's attitude had on the victim."

- He had no other possibility than to attend to the corrective measure imposed, reiterating in

that this "should not be interpreted as evidence that the treatment was not

necessary, but as an act of diligence by the person responsible at the request of the

supervisory authority, and that, in any case, it was the adoption of a

provisional measure, which should not prejudge the merits of the matter.”

9.- It considers the fine imposed by:

- The prior imposition of a measure contemplated in article 58 of the GDPR.

- The fine does not meet the criteria of article 83 of the GDPR because it is neither effective,

neither proportionate nor dissuasive:

a) It lacks effectiveness because every time "the treatment had already ceased

and, therefore, the cessation of a

treatment that was no longer given.”

b) It lacks deterrent capacity because "the administrative fine should

have the ability to induce this part to cease its purpose to continue

publishing the voice of the victim. However (...), since (...) said treatment no longer

It occurred as a consequence of the measure imposed by the AEPD to prohibit it.”

c) It is not proportional:

i) Because there is an indetermination of the initial amount on which

apply aggravating factors, as well as a lack of justification of the criteria and scales

used to quantify the penalty.

ii) Due to the incorrect application of the aggravating circumstances, reiterating in the

allegations made to the initiation agreement.

iii) A series of extenuating factors have not been taken into account:

o The video with the undistorted voice of the victim was

available for a few days, criticizing the fact that the motion for a resolution did not take into account

account this mitigation because the withdrawal of the video was not produced in a

spontaneous, since he considers that this aspect has nothing to do with the time that

was published (article 83.2.a) of the GDPR).

o “The purpose of the processing was none other than to inform of

completely newsworthy and current events, taking into account that

this part is a means of communication (…) (article 83.2.a) of the GDPR).”

one (article 83.2.a) of the GDPR).

o The number of interested parties affected by the treatment is

o No damages have been proven to the interested party as

direct or indirect consequence of the treatment carried out by the claimed party

(article 83.2.a) of the GDPR).

o There is no intention (article 83.2.b) of the GDPR).

o Lack of previous infractions committed (art 83.2.e) GDPR).

o Absolute cooperation with the supervisory authority (article

83.2.f) of the GDPR).

previously in application of article 58.2 of the GDPR (article 83.2.i) of the GDPR).

o Full and prompt compliance with the ordered corrective measure

o The status of communication medium of the claimed party

and the right to information recognized by the Spanish Constitution itself (article

83.2.k) of the GDPR).

o The video was provided by a media agency to which, at its discretion,

time, it had been provided by the court itself without adopting any concealment measure

or distortion of the victim's voice (article 83.2.k) of the GDPR).

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

AEPD denouncing that various media, including the part

claimed, published on their websites the audio of the statement before the judge of a

victim of a multiple rape, to illustrate the news regarding the celebration of the

trial in a case that was highly publicized, providing links to the news

published on the websites of the media claimed, being those related to the part

claimed:

- ***URL.1

- ***URL.2

- ***URL.3

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 in which it was still available, including a tweet from the

claimed part.

SECOND: On ***DATE.3, in accordance with article 65 of the

LOPDGDD, the claim presented by the claimant party was admitted for processing.

THIRD: Once the claim has been accepted for processing, the General Subdirectorate of

Data Inspection, in the exercise of its research activities, found

Respondent's postings where the victim's voice could be heard without

distort in the following directions:

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***URL.2

***URL.4

***URL.5

***URL.1

FOURTH: Within the framework of the previous investigation actions, dated

***DATE.4, the party claimed was notified of an urgent precautionary measure to withdraw

content or distorted voice of the intervener in such a way that it would be

unidentifiable in the web addresses from which this content was accessible, in

concrete of:

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***URL.2

***URL.4

***URL.5

***URL.6

***URL.1

FIFTH: With date ***DATE.4 the letter sent by the party was received in the AEPD

claimed informing that the videos had been removed from all

places of publication, distorting the voice of the intervener in those videos

that had been published.

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 letter of ***DATE.6, that is, that the tweets had been deleted and that in the link

***URL.1 had distorted the voice of the victim's statement in the video.

FUNDAMENTALS OF LAW

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In accordance with the powers that article 58.2 of the RGPD 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

In advance, the claimed party refers, in its statement of allegations to the initiation agreement, to the inadmissibility of the admission for processing of the claim that has originated the present disciplinary procedure, since article 65.3 of the LOPDGDD provides that the AEPD may reject the claim when the person responsible, previous warning formulated by the competent authority, would have adopted the corrective measures aimed at putting an end to possible non-compliance with the data legislation.

In this regard, it should be noted that the "warning" referred to in article 65.3 of The LOPDGDD is one of the corrective powers that article 58.2 of the GDPR grants to the control authorities, specifically it is the one included in section a): "direct to all controllers or processors a warning when the planned treatment operations may infringe the provisions of this Regulations" (emphasis added).

The foregoing assumes that the aforementioned warnings can be made by the authority of control before data processing is carried out by the responsible, which is not the case in the present case, where there has already been a data processing such as the publication of the voice of the victim without distorting.

However, the claimed party considers, in its pleadings to the motion for a resolution, that the foregoing is an incorrect interpretation of the mentioned precept because from reading it "it does not follow that the "warning" to which it refers is the one that the authority can

carry out before data processing is carried out.”

For this purpose, the defendant points out that article 65.3 of the LOPDGDD

"establishes that in order to reject the claim in application of said article it is

necessary that the person in charge or in charge has adopted the corrective measure that is

I have warned you (…)” (emphasis added).

Corrective measures are regulated in article 58.2 of the GDPR, which

sets the following:

"2. Each control authority will have all the corrective powers indicated in

continuation:

a) send a warning to all data controllers or processors when the

planned treatment operations may infringe the provisions of the Regulation;

b) send a warning to any person in charge or person in charge of the treatment when the

processing operations have infringed the provisions of this Regulation;

c) order the person in charge or person in charge of the treatment to attend to the requests for

exercise of the rights of the interested party under this Regulation;

d) order the person in charge or person in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period;

e) order the controller to notify the data subject of the violations

the security of personal data;

f) impose a temporary or permanent limitation of the treatment, including its prohibition;

g) order the rectification or deletion of personal data or the limitation of

treatment under articles 16, 17 and 18 and notification of such measures to

the recipients to whom personal data have been communicated in accordance with the

Article 17(2) and Article 19;

h) withdraw a certification or direct the certification body to withdraw a

certification issued in accordance with articles 42 and 43, or order the certification body

certification that a certification is not issued if they are not met or cease to be met

the requirements for certification;

i) impose an administrative fine in accordance with article 83, in addition to or instead of

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

particular case;

j) order the suspension of data flows towards a recipient located in a

third country or towards an international organization." (underlining is ours).

That is, the only warning that the control authorities can address to the

responsible or in charge of the treatment is regulated in section a) of the

article 58.2 of the RGPD, being the other corrective measures included in such

precept warnings, impositions or orders of the control authority.

The diction of article 58.2.a) of the GDPR makes clear mention of cases in which there is

Planned treatment operations that may infringe the provisions of the GDPR. Of

hence the warnings that the control authority can make to those responsible

or those in charge of the treatment have to be before such treatment is carried out,

since its purpose is to avoid possible future breaches of the regulations on

of data protection. And that article 65.3 of the LOPDGDD indicates "when the

responsible or in charge of the treatment, prior warning formulated by the Agency

Spanish Data Protection Agency, would have adopted corrective measures

aimed at putting an end to possible non-compliance with the legislation for the protection of

data (…)" (emphasis added).

The aforementioned precept continues indicating that, in addition, "some of the

following circumstances:

a) That no harm has been caused to the affected party in the case of infringements

provided for in article 74 of this organic law.

b) That the right of the affected party is fully guaranteed through the application

of the measures."

For this reason, it considers the claimed party in its statement of allegations to the proposal of

resolution, that the assumption regulated in article 65.3 of the LOPDGDD "is the one in

which the treatment has already started", because:

- "How else will there have been damage to the affected party as a result of

an infraction? If the treatment has not yet been carried out, it is impossible for it to

suppose a fraction and that said infraction has caused damage to the affected party."

- "If we turn to the aforementioned article 74 of the GDPR, we see that the infractions collected

in it are infractions that require that the treatment has been initiated."

- "it is unlikely that anyone can make a claim for a

treatment that has not yet been carried out."

As indicated above, the warning can be directed by the control authority

when the processing of personal data is planned, but has not yet been

effected. The purpose of such a warning is that the person in charge or in charge of the

treatment carry out what has been warned in order to avoid a subsequent and possible

breach of data protection regulations. Subsequently, it will be put into

the processing of personal data is underway, from that moment on when

there may be affected by such treatment who present claims.

Presented a claim by an interested party, derived from the treatment that has already been carried out

carried out by the person in charge or the person in charge of the treatment, it can

be inadmissible by the AEPD, by virtue of article 65.3 of the LOPDGDD, if the prior

warning directed by the AEPD was taken into account by the person in charge or in charge

of the treatment, adopting the corrective measures provided in the aforementioned

warning.

This implies that the interested party claims as a consequence of the treatment carried out

carried out by the person in charge or in charge of the treatment; treatment carried out after

the warning issued by the AEPD.

It will also be necessary to deny that, in addition to having adopted the measures

corrections of the warning prior to the treatment, if any of the following

following circumstances, as indicated above:

- That no damage has been caused to the affected party in the case of the foreseen infractions

in article 74 of the LOPDGDD.

Article 74 of the LOPDGDD states that "They will be considered minor and will prescribe after one year.

the remaining infringements of a merely formal nature of the aforementioned articles

in sections 4 and 5 of article 83 of Regulation (EU) 2016/679". (The underline

is ours).

This implies that we have to find ourselves before an infraction classified as minor to

the effects of the prescription in the LOPDGDD, considered as such those

offenses typified in articles 83.4 and 83.5 of the GDPR that have a

merely formal. Therefore, infringements classified as very

serious or serious for the purposes of the prescription of articles 72 and 73 of the

LOPDGDD that do not have a merely formal character.

And all this without forgetting that such an offense classified as minor for the purposes of the

prescription of article 74 of the LOPDGDD must cause harm to the affected party

as a result of the treatment carried out.

- That the right of the affected party is fully guaranteed through the application

of measurements.

Thus, the application of the corrective measures derived from the warning directed

Prior to the start of the treatment, it ensures that the right of the

affected by further processing has been fully guaranteed.

In this way we can infer without a doubt that when a

warning there is no processing of personal data by the

responsible or the person in charge of the treatment. It is their subsequent treatment and a

eventual claim by the interested party as a consequence thereof, which may

determine the application of article 65.3 of the LOPDGDD.

Furthermore, it should be noted that the aforementioned article 65.3 of the LOPDGDD

states that "the Spanish Agency for Data Protection may reject the

claim", which means that it does not have the obligation to reject the claims

when the budgets regulated in such precept are given. For this purpose, it is necessary to bring

to collate the Judgment of the National Court of July 12, 2022 (rec.

601/2020): "The presentation of a claim before the Spanish Agency of

Data Protection does not determine, without more, the initiation of any of the

procedures contemplated in the LOPDGDD but, in accordance with the provisions of article 65.1, the Agency is obliged ("must" says the legal text) to evaluate its admissibility and is obliged to reject a certain class of claims (art. 65.2) or may reject others (art. 65.3)." (The underlining is ours).

In any case, in the present case there has not been a "warning", but rather a request for urgent removal of content or distorted voice of the intervening in such a way that it would be unidentifiable in the web addresses from which make this content accessible.

In this regard, the claimed party indicated in its pleadings to the beginning that "if we turn to the aforementioned Title VIII of the LOPDGDD, we observe that expressly detail three different procedural moments in which the Agency may agree to the adoption of measures": before the admission for processing (article 65.3 of the LOPDGDD), before the adoption of the agreement to start the procedure and a Once the claim has been admitted for processing (article 67.1 of the LOPDGDD) and a procedure for the exercise of the sanctioning power (article 68 LOPDGDD).

Understanding that in this case "the adoption of prior or provisional measures agreed prior to admission for processing, but the course was not followed provided for in article 65.3 of the LOPDGDD."

He makes such a statement because "On *** DATE.2, according to folio 10 of the file and with reference E/05505/2021, it is indicated that in procedure E/05479/2021, the AEPD "agreed to carry out these investigative actions in relation to

with the facts claimed."" And on ***DATE.3 the admission for processing of the

complaining party.

It goes on to indicate that "The report on pages 18 to 23 indicates that as

Result of the research actions are the publications

indicated in the complaint and in which the voice of the victim can be heard without

distort, proceeding for all those responsible for the treatment to the emission with

date ***DATE.5, of the resolution of provisional measure of urgent withdrawal of

content or distorted voice of the intervener in such a way that it would be

unidentifiable in the web addresses from which this content was accessible."

Therefore, on ***DATE.4, the claimed party immediately proceeded to comply

such requirement, which was communicated to the AEPD on that same date.

With such argumentation, the claimed party tries to misrepresent reality. Therefore, it

makes it necessary to go on to a detailed examination of what happened between (…):

- ***DATE.2: The actions carried out on that date were intended to verify the

veracity of the denounced to be able to decide on the admission or not to process the

claim, in accordance with article 65.1 of the LOPDGDD, which establishes that

"When a request is submitted to the Spanish Data Protection Agency

claim, it must assess its admissibility for processing (...)".

It is true, as stated by the defendant, that the report on previous actions

investigation indicates that on that date "the Spanish Data Protection Agency

agreed to carry out these investigative actions in relation to the

claimed facts". Such actions were aimed at determining the

admissibility or not of the claim presented, since on that same date the
complaining party submitted a second document in which it stated that it had been able to
verify that there were media outlets that had removed the audio from the
statement of the victim before the judge, although it accompanied publications made
by some media outlets on Twitter where it was still available,
among them, a tweet from the claimed party.

- ***DATE.3: Once the evaluation of admissibility for processing of the
claim presented by the claimant, the AEPD proceeded to admit it to
procedure "According to the preliminary information available" and "without prejudice to the
to be determined in the course of the processing."

- ***DATE.5: A request for a provisional measure was issued "in exercise of the faculties
conferred by article 58 of the GDPR, and in accordance with the provisions of article 69 of
Organic Law 3/2018, of December 5, on the Protection of Personal Data and
guarantee of digital rights", consisting of urgent withdrawal of content or
distorted voice of the victim.

In summary: The actions carried out by the AEPD on ***DATE.2 consisted of
a prior analysis of the admissibility of the claim. Once done, it is
admitted for processing on ***DATE.3. Subsequently, previous actions were carried out
investigation, in accordance with article 67 of the LOPDGDD, within which
found, in the case of the claimed party, more publications with the voice of the
victim without distorting those initially denounced. And once you start these
previous investigation actions, was when the measure requirement was issued
provisional, in accordance with article 69 of the LOPDGDD, to safeguard the
Fundamental Right to the Protection of Personal Data of the victim.

For all of the foregoing, the previous allegations relating to the

violation of articles 64 and 65.3 of the LOPDGDD.

II

The claimed party indicates in its pleadings to the initiation agreement that the

This procedure was initiated by the claim made by A.A.A., not by a

claim made by the interested party, therefore, if rational evidence is found

of a possible violation of article 6.1 a) GDPR, the

administrative procedure on the initiative of the AEPD (...) and not as an admission

to process the complaint from a third party that does not justify what its legitimacy is, nor

proves in a verified way the existence of a violation of rights."

In this regard, it should be noted that this disciplinary proceeding has been

initiated ex officio on May 3, 2022, in accordance with article 63 of the

LPACAP and article 68 of the LOPDGDD, there being no formal defect in the

processing of this procedure that may have produced any defenselessness

to the claimed party.

However, the claimed party, in its statement of allegations to the proposal for

resolution, states that "it did not allege and does not allege now that the initiation of the procedure

has not been carried out ex officio, but rather all previous actions should

have been initiated on the EEPD's own initiative and not as a consequence of the

admission to processing of a claim submitted by a third party outside the

interested."

Adding that "The fact that the disciplinary procedure is initiated

correctly does not make the form defect disappear from all performances

previous ones on which it is based and that, therefore, make it flawed

and it is null, and its file must be agreed."

It ends by indicating that it cannot be "understood that the agreement for admission to the

the claim, the previous actions carried out and the measure requirement

provisional issued are acts outside the present procedure, because far from it, they are

acts directly related to it, since this procedure is based on

the aforementioned claim and confirmation of the aforementioned provisional measure is the subject of the

same".

It is not possible to agree with the affirmation made by the claimed party with respect to the fact that the

admission to processing of the claim is not an act unrelated to this procedure,

since the disciplinary procedure begins with the start agreement, so the

actions carried out previously, are alien and previous acts. different question

is whether the admission for processing of the claim is null and void and if such nullity

contaminates the agreement to start the disciplinary procedure, as the party intends

claimed, since it derives from the above.

The Supreme Court Judgment of February 1, 1992 states that, "since

declared this Chamber ... not all the defects or infractions committed in the processing

of an administrative procedure have sufficient legal entity to cover a

annulment claim for formal cause, given that only very serious defects that

prevent the final act from reaching its end or that render the interested parties defenseless

may determine the voidability; constituting this a jurisprudential doctrine that

has been progressively reducing the vices that determine disability for

limit them to those that represent an effective, real and significant decrease in

guarantees (STS of April 15, 1996, RA 3276)".

In the present case, if the AEPD had processed the documents presented by Mr.

A.A.A. as complaints under article 62 of the LPACAP:

- It would have given rise to the AEPD acting, prior to the adoption of the agreement initiation of the disciplinary procedure, "on their own initiative", in accordance with the article 59 of the LPACAP (“the action derived from direct or indirect knowledge of the circumstances, conduct or facts that are the object of the procedure by the body that has been attributed the power of initiation.”)

- Likewise, it would have carried out the previous investigative actions that it has carried out. carried out under article 67 of the LOPDGDD, after which it was verified that the claimed party had published the voice of the victim without distortion, adopting the corresponding provisional measures.

It is necessary to bring up the Judgment of the National Court of its Chamber of Administrative Litigation, Section 1, of June 25, 2009 (rec. 638/2008), the

which states that "this Chamber has reiterated on numerous occasions (SAN 3-8-2006, Rec. 319/2004, for all), echoing the doctrine of the Constitutional Court,

In order for the procedural defect to lead to the nullity of the appealed act, it is necessary that these are not mere procedural irregularities, but defects that cause a situation of defenselessness of a material nature, not merely a formal one, this is, that they have caused the appellant a real impairment of his right defense, causing real and effective damage (SSTC 155/1988, of July 22, 212/1994, of July 13 and 78/1999, of April 26)”.

In other words, it is necessary for the interested party to see himself, in effect, in a situation of

defenselessness, it being necessary that the defenselessness be material and not merely formal

(Sentences of the Constitutional Court 90/1988, 181/1994, 314/1994, 15/1995,

126/1996, 86/1997 and 118/1997, among others), which implies that the aforementioned defect has

caused real and effective damage to the defendant in his possibilities of

defense (Sentences of the Constitutional Court 43/1989, 101/1990, 6/1992 and

105/1995, among others).

And in the case examined, there has not been a decrease in the exercise of the

right of defense of the claimed party, since it has been able to allege and prove throughout

of the disciplinary procedure what has been agreed upon by his right.

IV.

Indicates the claimed party in its pleadings to the proposed resolution

that "the measure of withdrawal or distortion of the voice and contents be agreed in (...) and the

The agreement to start the procedure will not take place until May 2022. The term

elapsed between one date and another is (...), time that exceeds the period of 15 days

which establishes article 56.2 of the LPACAP.

On the other hand, the Agreement to start the Disciplinary Procedure does not contain

express pronouncement on said measures, as required by article 56.2 of the

LPACAP."

Considering the claimed party that what is stated is a defect of form for which

It is appropriate that this procedure be archived.

If we turn to article 56.2 of the LPACAP, invoked by the claimed party, we will see

that its literal tenor is the following:

"2. Before the initiation of the administrative procedure, the body competent to

initiate or instruct the procedure, ex officio or at the request of a party, in cases of

urgency that cannot be postponed and for the provisional protection of the interests involved,

may adopt in a reasoned way the provisional measures that are necessary and

provided. Provisional measures must be confirmed, modified or

raised in the agreement to initiate the procedure, which must be carried out

within the fifteen days following its adoption, which may be subject to

appropriate resource.

In any case, said measures will be without effect if the procedure is not initiated in

said term or when the initiation agreement does not contain a pronouncement

expressed about them." (underlining is ours).

From the reading of the aforementioned precept it can be deduced that the adoption of the resolution of

commencement beyond fifteen days from the adoption of the provisional measures, as well as

such as the lack of express pronouncement on them in said initiation agreement,

it does not have the effect of annulling the disciplinary procedure for formal defect.

After all, we cannot forget that such measures are provisional in nature and their

purpose is, in this case, to safeguard the fundamental right to protection

of personal data, as expressed in article 69.1 of the LOPDGDD:

"During the carrying out of the previous investigation actions or initiated a

procedure for the exercise of sanctioning power, the Spanish Agency for

Data Protection may reasonably agree on provisional measures

necessary and proportionate to safeguard the fundamental right to

Data Protection".

Along the same lines, the Supreme Court Judgment of November 14, 2007

indicates that the provisional measures “Constitute, therefore, provisional actions

that are adopted to protect the general interest, ordinarily within a

procedure, but also prior to its investigation when there are reasons

urgently. It is about avoiding that while a procedure is being instructed and finished

situations may be maintained that reduce or eliminate the real effectiveness of the decision

or resolution that was finally adopted." (underlining is ours).

For these reasons, the allegation relating to non-compliance cannot be taken into account.

of article 56 of the LPACAP.

V

The claimed party, in its pleadings to the initiation agreement, makes a

criticizes the latter when he points out that "by weighing the conflicting interests and, taking into account

to the concurrent circumstances of this case, that is, the nature especially

sensitive personal data and the intense impact on the privacy of the victim,

[…]"; since the voice is not a sensitive data of those categorized as such in the article

9 of the GDPR.

Certainly, the voice is not a personal data of a special category of those collected in

Article 9 of the GDPR. But it is also true that the startup agreement in making such

manifestation, does not refer to the voice as sensitive data.

To understand it, it is necessary to transcribe literally and completely the paragraph where

contains the expression to be parsed:

"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."

We see, therefore, that the expression object of criticism by the defendant is part of the of the story related to the balance between the right to freedom of information and the right to data protection. And that when carrying out this consideration and referring to "the especially sensitive nature of personal data" referred to data relating to that the person has been the victim of a multiple rape, which is indeed of a sensitive.

The claimed party considers, in its statement of allegations to the proposal of resolution, that the qualification of the published content should not be taken into account account by the AEPD at the time of sanctioning, notwithstanding that, it understands, such contents are not considered "special" for the purposes of article 9 of the GDPR.

As already indicated in the proposed resolution, Guidelines 04/2022 of the Committee European Data Protection Committee on the calculation of administrative fines with according to the RGPD, in its version of May 12, 2022, submitted to public consultation, indicate that "Regarding the requirement to take into account the categories of data affected individuals (article 83, paragraph 2, letter g), of the GDPR), the GDPR highlights

clearly the types of data that deserve special protection and, therefore, a

stricter response in terms of fines. This refers, at least, to the

types of data contemplated in articles 9 and 10 of the GDPR, and to data that does not

fall within the scope of these articles whose dissemination causes damage or

immediate difficulties to the interested party." Immediate damage which, in the present case, is the

certain risk of recognizing the victim of a violent crime and crime against integrity

sexual (multiple rape).

However, the claimed party, in its statement of allegations to the proposal for

resolution, considers that the Guidelines of the

European Data Protection Committee on the calculation of administrative fines

in accordance with the GDPR, in its version of May 12, 2022, since it has not been

demonstrated that the interested party has suffered immediate or future damages or losses

due to the treatment carried out by the claimed party.

The thesis of the claimed party cannot be shared, because in the field of Law

Fundamental to the Protection of Personal Data, the important thing is if there is a risk

that someone who listens to the victim's voice without distorting identifies it, risk,

which in the present case is true.

Furthermore, the fact of having been the victim of a crime of this nature does

that is linked to her sexual life, despite the discrepancy in this regard

formulated by the defendant, since it is a verified fact that the victims of

Such experiences are marked for their subsequent relationships.

However, the claimed party, in its statement of allegations to the proposal for

resolution, states that "it cannot be defended that by publishing the facts relating to

a violation is reported or information about future relationships is being processed

victim's sex."

Such an affirmation has never been defended, it has only been maintained, as has been

stated above, that being a victim of a sexual crime is linked to life

person's sexuality.

On the other hand, the claimed party considers, in its pleadings to the agreement

from the beginning, that "the qualification of the facts contained in the news and its affectation to

the fundamental rights to honor, privacy and self-image, of the victim would be

capable of being determined before the civil courts of justice, not being

In our opinion, it is the responsibility of the Control Authority to evaluate whether or not it has occurred,

a violation of the aforementioned rights."

One cannot agree more with such an allegation, in fact, it is not the claim of the

AEPD evaluate whether or not there has been a violation of the aforementioned rights

fundamental, but if there has been a violation of the provisions of the GDPR and in

the LOPDGDD.

However, it is obvious that, at the point of need for the data to supply the

information, the Fundamental Right to the Protection of Personal Data and

The Fundamental Right to Honor, to Personal and Family Privacy and to One's Own

Image intertwine.

SAW

The party claimed does not question that the voice is personal data, but that

It will only be so in some cases, specifically in those cases in which the

data allows individualization directly, associating with an individual

concrete.

In the first place, and without prejudice to its more detailed examination in the Fundamento

of Law XII of this resolution, it must be indicated that the voice of any person is

personal data and identifies it or makes it uniquely identifiable,

regardless of the number of people who can recognize it.

Thus, the voice fits perfectly into the definition of what is a character data

personnel of article 4.1) of the GDPR, verifying that the four

components indicated in Opinion 4/2007 of the Article 29 Working Group

on the concept of personal data: all information about a natural person

identified or identifiable. The reference to all information refers to the concept

broad definition of what constitutes personal data, which requires a

broad interpretation.

In the present case examined, the victim's voice identifies her directly

in their environment (understood in a broad sense, encompassing the family and the social),

that, as determined in the aforementioned Opinion 4/2007, "it can be

consider a natural person "identified" when, within a group of

persons, it is "distinguished" from all other members of the group.

And it is clear that the voice of any person can make it be identified

at least by those who are part of the circle closest to the victim or may

meet her anyway. Let's imagine relatives or co-workers or

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

assumed the certain risk that it could have been identified by persons

who were unaware of their status as victims. Which is a particularly serious fact

in an event like the one that gives rise to the news.

In addition, 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

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.

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…”

Let us remember once again that the purpose of the Fundamental Right to the Protection of Personal Data is to protect people without ambiguity and without exception: such protection should not decline in this case in response to the greater or lesser number of people who can recognize the victim, the greater or lesser number of people who have listened to the video of the victim's account with his undistorted voice, or the subjective considerations about the ease or difficulty of identifying the victim who is carried out by the data controller, even more so in this case, given that what has been produced is the dissemination of a story from a victim of multiple rape.

Furthermore, the considerations made by the claimed party with respect to the elements that make it difficult to identify the victim through the dissemination of his undistorted voice (intrinsic variability of speech data, the need for prior contact with the speaker and the immediacy of removal of the original recording) are subjective and irrelevant, since it would suffice for a small group of people, or even a single person, recognized the victim through the news so that his identity was compromised and even spread to other people. And it is that such elements "could" make identification difficult, but in no way avoid it.

Notwithstanding the foregoing, the claimed party states in its pleadings brief to the proposed resolution, that "the AEPD cannot guarantee that said recognition has taken place, since there is no proof in this regard.", therefore it considers that "it does not can the authority sanction based on possibilities or probabilities, but solely based on certain and proven facts, and there are no such facts in the case

particular that we are dealing with."

As we already indicated in the previous legal basis, what is important is not whether the

risk of the victim being recognized has materialized or not, but rather whether the

risk of being identified by someone listening to the victim's voice without distortion.

In other words, it makes no difference whether or not someone has identified the victim through his

voice, because the important thing is that there was a certain risk that someone would identify it,

which is a particularly serious fact in an event such as the one that gives rise to the

news.

VII

The claimed party states, in its pleadings to the agreement of

beginning, that the purpose of including the audio of the statement before the judge of the

victim was not to illustrate the news regarding the holding of the trial in a case that was

very media, but "to draw the attention of the reader, and when necessary denounce, as

the prosecutor had conducted the interrogation in the first session of the trial, without any

empathy for the victim, forcing the young woman to recount what happened over and over again

that night, constantly interrupting her and forcing her to back off and go back to

explain the details of the attack when he had already told them."

He points out that "video published without deep masking of the voice contributes to the

I report the ability to demonstrate the tension to which the victim was subjected in the

course of the interrogation, their reactions, their state of mind and, ultimately and as

makes the news explicit, verifying the prosecutor's lack of empathy, and the ignorance of the "evil

the drink she was going through has forced the young woman to reminisce over and over again

time the scenes of the rape delving into her suffering."

Therefore, it considers that the voice of the victim was necessary for the purpose

informative, it does add value to the information echoed by the news,

therefore, consequently, it has complied with article 5.1.c) of the GDPR, since it does not

there has been excessive processing of personal data.

Currently, the claimed party maintains a video in its digital diary in which there are

fragments of the prosecutor's interrogation of the victim, the victim's voice being

distorted while his remains undistorted, an interrogation that,

in turn, it is subtitled. These fragments are accompanied by comments from a

relative journalist, as indicated in the brief of allegations to the agreement of

beginning, to draw attention to the prosecutor's lack of empathy for the victim and generate a

debate on the processes of revictimization that victims of

these crimes.

Looking at the video, it becomes clear that the victim's voice is not necessary to

manage to convey to the listener the prosecutor's lack of empathy, it is enough to hear the questions

that he does to the victim, as well as the information that the journalist adds, which is

who really leads the listener to empathize with the victim and wonder about her

revictimization.

Notwithstanding the foregoing, the party claimed points out in its pleadings to the

proposed resolution, that "there is a prevalent informational public interest in the

diffusion of the victim's voice, such as reflecting the anguish experienced by the

victim given the circumstances, anguish that would have been aggravated by the

Prosecutor's performance.", which is not achieved with the current video.

Reiterated jurisprudence, both from the Constitutional Court and the Supreme Court,

states that "The constitutional protection of freedom of information and

expression reaches a maximum level when freedom is exercised by

information professionals through the institutionalized training vehicle

of public opinion, which is the press, understood in its broadest acceptance (STS

March 11, 2009, RC No. 1457/2006, SSTC 105/1990, of June 6, FJ 4).

(SSTS, First Chamber, Civil 15/2011, of January 31 (rec 1000/2008) and 806/2013,

of January 7 (rec 1845/2010), among others).

However, as has been pointed out throughout this proceeding, the same

jurisprudence has also indicated that the Fundamental Right to Freedom of

Information is not absolute and has a series of limits in relation to other rights

essential, being necessary in each case a weighting between such

Fundamental rights.

For this purpose, it is necessary to bring up the STS, from its First Civil Chamber,

272/2011, of April 11 (rec. 1747/2008), cited both in the initiation agreement and in

the proposed resolution of this procedure, which 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);" (the underlining is

our).

We have to mean that it is indifferent that the purpose of the means of communication to the

post the video with the victim's voice undistorted outside to show the anguish of

this during the action of the prosecutor as well as denounce such action, because with the

diffusion of the voice of that person is put at risk of being identified by people who

They were unaware of their status as victims, a risk that should have been assessed by the

media and for which it is responsible.

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,

understood in a broad sense. Here the medium plays a decisive role.

communication, since the analysis of risks for the rights and freedoms that

carried out prior to publication, and that in the present case we are not aware of,

It is the last guarantee that the victim has.

VIII

The claimed party considers in its pleadings to the initiation agreement that in

In the present case, there is a balance between the Fundamental Right to Freedom

of Information and the Fundamental Right to the Protection of Character Data

Personal, because when weighing the conflicting interests, taking into account the

circumstances of the present case and the nature of the news object of reproach, it is

that is, the complaint of the prosecutor's actions and the non-existence of measures adopted by

the criminal court itself beyond the inclusion of a screen that hid the image

of the victim, it must be concluded that the right to information prevails, not

having produced real affectation to the privacy of the victim.

Since in the previous legal basis we have already referred to the fact that the

undistorted voice of the victim is not necessary for the informational purpose relating to

denounce the actions of the prosecutor, now we must focus on the rest of the issues

that the claimed party alleges to defend that there was a balance between the

mentioned fundamental rights.

On the one hand, it refers to the weighting of conflicting interests. but the part

claimed does not specify what such weighting consists of, it does not justify it.

Moreover, with respect to such supposed weighting, the claimed party mentions the

lack of affectation to the privacy of the victim, forgetting that the present

disciplinary proceedings have been initiated for the alleged violation of the Law

Fundamental to the Protection of Personal Data, a right that is the one that

should be considered, and not the Fundamental Right to Privacy.

On the other hand, the defendant refers to the lack of measures adopted by the

court at the time of holding the oral hearing.

For this reason, and previously, 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).

It is the diffusion of the voice of the victim that has been carried out by the claimed party that is object of this procedure, not entering within the scope of this other treatments, such as the recording of the oral and public trial carried out by the court or the sending that it makes to the media 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

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 recording made by the court of the interrogation carried out on the victim within the

oral and public trial, as well as the subsequent transfer of the video of such a view with the voice without misrepresenting the victim by the court to the news agencies, are other treatment of data other than the one being analysed. Therefore, the court has adopted as the only measure to protect the privacy of the victim the inclusion of a screen to avoid its direct visualization and that the origin of the information disseminated by the media has been the court is not sufficient to exempt the claimed party from liability, because what is is prosecuting is not the action of the court within the development of the process court nor the provision of information by the court to the media communication, but rather the processing for which the claimed party is responsible, such as the dissemination of the personal data of the victim's voice.

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 to be able to protect the breach of the same in the fact that the court, in the development of the criminal process, did not adopt as a measure to protect the privacy of the victim the distortion of his voice, nor can he be protected by the fact that the court thus forwarded the information to the news agencies, assuming that such forecasts allows you to publish it without paying attention to the requirements of the GDPR and the LOPDGDD.

The transfer does not imply that it has to be the court that indicates to the media communication how to proceed with the information material supplied, I will not it is up to the court to give the instruction that the voice be distorted when proceed to its dissemination, since they are the media, as responsible for the treatment of multiple data that they know within the exercise of their work journalistic, those who have to know and comply with the regulations regarding data protection, applying, among them, the principle of data minimization

enshrined in article 5.1.c) of the GDPR.

What the media, in this case the defendant, do

subsequently with the information is not the responsibility of the court.

We will cite the Judgment of the Court of Justice of the European Union in the matter

Fashion ID, C-40/17, ECLI:EU:2018:1039, ruling on a case where a

e-commerce company inserted into its website the social module "me

likes" of the social network Facebook, which implied that data was transmitted to it

Personal e-commerce company website visitors

regardless of whether the visitors were members of said social network or whether

They clicked on the “like” button on Facebook. In its section 74 it establishes that "In

change, and without prejudice to a possible civil liability provided for in the Law

national in this regard, said natural or legal person cannot be considered

responsible, within the meaning of that provision, for the previous operations or

later in the chain of treatment for which it does not determine the purposes or

the media".

In other words, any processing operation carried out within the scope of the part

claimed (in this case the dissemination of personal data on the occasion of the news)

must be attributed only to him, regardless of processing operations that are

previously carried out by other subjects and that, in no case, exempt you from your

responsibility.

Notwithstanding the foregoing, the party claimed points out in its pleadings to the

proposed resolution that "has no doubts regarding the treatment of data that is

being analyzed, nor who is responsible for it", but "to the extent that

the judicial body allowed the media free access to the courtroom

views and did not adopt or promote measures to prevent the dissemination of the voice of the

victim once distributed the audio, neither having requested the victim nor the ministry

fiscal measures of anonymization, it can be affirmed that there is no interference in the

rights of the victim, and that, considering the balance between the rights

faced, it can be concluded that the Right to Information would prevail."

As previously indicated, the treatment carried out by the organ

jurisdiction (and which is not the subject of this sanctioning file) is different from the

carried out by the claimed party, which implies that the weighting that they must bear

each other is different.

In the case of the court, the consideration of the rights and freedoms that

carried out seeks to protect the identity of the victim of a violent crime, without violating the

right to effective judicial protection of the defendants, within the development of a

Judicial procedement.

The access of the media to the hearing room is so that they

can exercise their Fundamental Right to Freedom of Information. so the

weighting that the court has carried out for the treatment of data in

judicial headquarters cannot substitute in any way for the weighting and

risk analysis that must be carried out by the party prior to publication

claimed, which we do not know. And we cannot forget that:

- The treatment carried out by the claimed party, unlike that carried out by the

court, is characterized by its durability over time, because once

published the news, it remains on the network, being possible to access its content

(and, in this case, to the voice of the victim) both through newspaper libraries and through

through search engines, as many times as you want and without limitation

temporary.

- Such treatment is also characterized, unlike that carried out by the organ

jurisdictional, due to its amplifying effect: as it is a means of communication that

facilitates information through the internet, making knowledge of that information accessible

information exponentially and ubiquitously.

In this sense, the STJUE of August 1, 2022 in case C-184/20 (OT and

Vyriausioji tanybinės etikos komisija) exposes the amplifying effect of the internet

indicating that "102 On the other hand, it is clear that this treatment leads to those

personal data are freely accessible on the Internet by the public as a whole

general and, as a result, by a potentially unlimited number of people."

The information, including the voice of the victim, has been made available to a large

number of people, allowing access to it through any type of

electronic device, twenty-four hours a day and for an unlimited time. In

Consequently, the risk that the victim runs of being able to be recognized has been

increased exponentially.

- With the diffusion of the victim's voice, the victim is made identifiable, putting her in

a certain risk of being identified by people who did not know their status

victim, a risk that should have been assessed by the media and of which

it's responsible.

IX

On the other hand, it criticizes the party claimed in its pleadings to the agreement of beginning, the invocation that it makes to the STS, of its First Civil Chamber, 661/2016, of November 10 (rec. 3318/2014), in relation to the recruitment and dissemination in trial of the image of a victim of gender violence since that case was referred to the broadcast of close-up images of the appellant along with other information that allowed the identification of the person, unlike what happens in the present case, in which the defendant has omitted any other information that would be excessive or superfluous.

We cannot share the opinion of the claimed party. To this end, let us 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.

"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 V Law Basis, 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 are his condition

as such, your sex, age and physical location at the time of the

facts.

"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.

It also criticizes the claimed party in its pleadings to the start-up agreement on

reproach made by the AEPD regarding the lack of consent for the dissemination

of the voice data, since "it is not said legal basis that enables the media to

communication to process personal data of those who are the subject of news in exercise and

guarantee of the right to free information."

The invocation of article 6.1.a) of the GDPR is made in the admission agreement to

processing of the claim and in the provisional measure requirement issued by the

AEPD on ***DATE.5, acts outside and prior to the procedure itself that is now

is processing.

The disciplinary procedure begins with the initiation agreement, which,

In accordance with article 64 of the LPACAP, it is the act where the

imputations based on the elements of judgment that are available.

And in the Basis of Law IV of the agreement to initiate this procedure

disciplinary measure, it is indicated that the Working Group of Article 29 in its Opinion

06/2014 on the concept of legitimate interest of the data controller

data under Article 7 of Directive 95/46/EC, when examining the legal basis of the

legitimate interest of article 7.1.f) of Directive 95/46/CE, fully transferable to the

current art. 6.1.f) of the GDPR, includes the right to freedom of expression or

information as one of the cases in which the question of interest may arise

legitimate, asserting that "without prejudice to whether the interests of the person responsible for the

treatment will ultimately prevail over the interests and rights of the

interested when the balancing test is carried out". So the reproach that

does the claimed part cannot be taken into account.

X

The claimed party, both in the pleadings to the start-up agreement and in the

pleadings to the proposed resolution, indicates that compliance with the

requirement of the AEPD to distort the voice of the victim "should not be interpreted

as evidence that the treatment was not necessary, but rather as an act of

diligence of the person responsible at the request of the control authority, and that, in

In any case, it was the adoption of a provisional measure, which should not

prejudge the merits of the case."

At no time has it been interpreted that compliance with the requirement of the

AEPD by the claimed party implies that it acknowledges that the treatment was not

necessary. Rather, once the voice of the victim's statement was distorted in the

video of your digital page, the information is still available and is followed

supplying with all its breadth. What's more, it's not even necessary to get the

purpose of conveying to the listener the prosecutor's lack of empathy with the victim.

The foregoing is criticized by the claimed party in its pleadings to the

proposed resolution because "distorting the voice does not provide the information

in its full breadth, for the listener is not allowed to know the effect it had on the

victim the attitude of the prosecutor."

As already indicated in the VII Legal Basis, it is irrelevant that the purpose

of the media by publishing the video with the voice of the victim without distorting

was to show the victim's reaction during the prosecutor's interrogation, because with the

spreading the voice puts you at risk of being identified by people who

They were unaware of their status as a victim.

eleventh

Finally, the claimed party, in its statement of allegations to the proposal for

resolution, considers the fine imposed for the prior imposition of a

measure contemplated in article 58 of the GDPR.

To this end, it should be noted that the imposition of a corrective measure of the

regulated in article 58 of the GDPR does not imply that it is not possible, subsequently,

impose a fine.

For this purpose, article 58.2. i) of the GDPR states that the control authority may

“impose an administrative fine in accordance with article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case particular". (underlining is ours).

While article 83.2 of the GDPR indicates that "Administrative fines are will impose, depending on the circumstances of each individual case, additionally or substitute for the measures referred to in article 58, paragraph 2, letters a) to h) and j).” (underlining is ours).

It continues indicating the claimed party in its brief of allegations to the proposal of resolution that the fine does not meet the criteria of article 83 of the GDPR because it is not neither effective, nor proportionate nor dissuasive.

The defendant considers that the fine is ineffective because "the treatment had already ceased and therefore could not be achieved with such a measure administrative cessation of a treatment that was no longer given.”

The interpretation of the claimed party cannot be shared whenever, as We have indicated, the GDPR allows the imposition of administrative fines addition to corrective measures. In fact, recital 148 of the GDPR states that "In order to reinforce the application of the rules of this Regulation, any Violation of this must be punished with sanctions, including administrative fines, in addition to appropriate measures imposed by the control authority in under this Regulation, or in substitution of these.”

Likewise, the Guidelines of the Article 29 Working Group on the application and

setting of administrative fines for the purposes of Regulation 2016/679, adopted on 3 of October 2017, provide that "Like all corrective measures in general, administrative fines must adequately respond to the nature, seriousness and consequences of the violation, and the control authorities must evaluate all the facts of the case in a consistent and objective manner justified. The assessment of what is effective, proportionate and dissuasive in each case should also reflect the objective pursued by the corrective measure selected, either restoring regulatory compliance or punishing a unlawful behavior (or both)".

On the other hand, the defendant considers that the fine lacks capacity deterrent because "it should have the ability to induce this party to cease its purpose of continuing to publish the voice of the victim. However (...), since (...) said treatment was no longer given as a consequence of the measure imposed by the AEPD of prohibit it."

Nor can this interpretation made by the claimed party be shared. to such effect, it is necessary to take into account the Directives 04/2022 of the European Committee of Data Protection on the calculation of administrative fines in accordance with the GDPR, in its version of May 12, 2022, submitted to public consultation, which state that "a deterrent fine is one that has a genuine deterrent effect.

In this regard, a distinction can be made between general deterrence (dissuading others from commit the same offense in the future) and specific deterrence (dissuade the recipient of the fine to commit the same offense again). By imposing a fine, the supervisory authority takes into account both general and specific.

(…) Whoever commits an infraction must fear that they will be fined."

In the same sense, the CJEU Judgment in the Versalis Spa case, of June 13

of 2013, C-511/11, indicates that the "dissuasive nature may have as its objective not only

a "general deterrence", defined as an action to discourage all

companies, in general, that commit the infringement in question, but also a

'specific deterrence', consisting of dissuading the specific defendant from

break the rules again in the future."

Lastly, the defendant considers that the fine is not proportional:

1.- Because there is an indetermination of the initial amount on which to apply the

aggravating factors, as well as a lack of justification of the criteria and scales used

to quantify the penalty.

The aforementioned article 83.2 of the GDPR states that "administrative fines are

will impose, depending on the circumstances of each individual case, additionally

or substitute for the measures referred to in article 58, paragraph 2, letters a) to h) and

j). When deciding the imposition of an administrative fine and its amount in each case

will be duly taken into account:" (emphasis added). That is, foresee

the assessment of the sanction as a whole taking into account each and every one of the

concurrent circumstances in the specific case and that are provided for in the

mentioned precept.

The jurisprudence pronounces itself along the same lines when it refers to the principle of

proportionality, "fundamental principle that beats and presides over the graduation process

of sanctions and implies, in legal terms, "its adequacy to the seriousness of the

fact constituting the infringement" as provided in article 29.3 of Law 40/2015,

of the Legal Regime of the Public Sector, given that any sanction must be determined in consistency with the entity of the offense committed and according to a criterion of proportionality in relation to the circumstances of the fact." (Sentences of the Supreme Court of December 3, 2008 (rec. 6602/2004) and April 12, 2012 (rec. 5149/2009) and Judgment of the National Court of May 5, 2021 (rec. 1437/2020), among others).

Thus, the Judgment of the Third Chamber of the Supreme Court, dated May 27, 2003 (rec. 3725/1999), indicates that "Proportionality, pertaining specifically to to the scope of the sanction, constitutes one of the principles that govern the Law Sanctioning administrative, and represents an instrument of control of the exercise of the disciplinary power by the Administration within, even, the margins that, in principle, indicates the applicable rule for such exercise. It is certainly a concept difficult to determine a priori, but which tends to adjust the sanction, by establishing its specific graduation within the indicated possible margins, to the severity of the act constituting the infringement, both in its aspect of illegality and of the guilt, weighing as a whole the objective and subjective circumstances that they integrate the budget of punishable fact (…)"

We can also cite for this purpose the Supreme Court Judgment 713/2019, of 29 of May (rec. 1857/2018): "We will begin by pointing out that the proportionality of the sanctions implies that they come tempered to the particular gravity of the fact in conjunction with the circumstances of a subjective nature (which refer to the offender) and objective (which refer to the typical fact) being that in the field of law administrative sanction in general and in the field of the stock market in In particular, there are no dosimetry criteria similar to those included in the article 66 of the CP and that the modifying circumstances differ from those of the scope penal. Let us remember that there is no room for automatic application, without any qualification of the

guiding principles of criminal law to the sanctioning administrative procedure

(S.TS 6-10-2003 Rec.772/1998).”

For this reason, Directives 04/2022 of the European Committee for Data Protection on the

calculation of administrative fines in accordance with the RGPD, in its version of 12

May 2022, submitted to public consultation, indicate that "As regards the

evaluation of these elements, increases or decreases in a fine do not

They can be previously determined through tables or percentages. It is reiterated that the

The actual quantification of the fine will depend on all the elements collected during the

research and other considerations also related to the experiences

of the supervisory authority regarding fines.”

2.- The defendant also considers that the fine is not proportional due to the

incorrect application of the aggravating circumstances, specifically referring to the

sensitive of the data of the voice, to which we have referred in the Fundamental of Law

VII and to which we refer.

3.- Finally, the defendant considers that the fine is not proportional because

A series of extenuating factors have not been taken into account:

a) The video with the undistorted voice of the victim was available for a few days

(article 83.2.a) of the GDPR).

As already indicated in the proposed resolution, when analyzing the case, we found that

the video was posted on ***DATE.7, acknowledging the removal of the

itself and the distortion of the voice in the digital newspaper of the party claimed the

***DATE.4, the day the order to remove the content was notified. Is

In other words, the video with the undistorted voice of the victim was available for a

month and a few days

Bearing in mind that time is a relative concept, in the present case it is not

You can share the allegation that the content was published for a short time, since

the video with the undistorted voice of the victim was published the same day that it took place

the newsworthy fact, being available until the AEPD notified the party

demanded the aforementioned requirement, which shows that the measure of

removal of the content did not derive from a spontaneous action of the claimed party.

For this purpose, it is necessary to take into account the Guidelines 04/2022 of the Committee

European Data Protection Committee on the calculation of administrative fines with

according to the RGPD, in its version of May 12, 2022, submitted to public consultation,

which state that "The measures adopted must be evaluated, in particular, in

relation to the element of opportunity, that is, the moment in which they are applied

by the person in charge or in charge of the treatment, and its effectiveness. In this sense, it is more

It is likely that measures applied spontaneously before the start of the

investigation of the control authority are known by the person in charge or the

in charge of the treatment that the measures that have been applied after that

moment."

However, the foregoing is criticized by the defendant in its writ of

allegations to the motion for a resolution because it considers that spontaneity in the

Withdrawal of the video has nothing to do with how long it was published.

But if we go back to the aforementioned Directives 04/022, we see that not only

contemplate the opportunity criterion for the purpose of evaluating the duration criterion

temporary as mitigating, but also the effectiveness of the measure adopted.

Since the greatest impact of a piece of news occurs in the first moments

in which the newsworthy event takes place, and in the present case the voice of the victim without

distort was available for a month and a few days, it cannot be understood that

it was there for such a short time as to consider the duration of the infringement

as a mitigation.

b) The claimed party also considers the purpose of the processing a mitigation,

that "it was none other than reporting some completely newsworthy facts and

present, taking into account that this part is a means of communication

(…) (article 83.2.a) of the GDPR)".

We have already referred to the informative purpose of the media in the

Foundation of Law VII, to which we refer.

c) The number of interested parties affected by the treatment is one (article 83.2.a) of the

GDPR).

It is true that the number of victims is one. But article 83.2.a) of the GDPR

invoked by the claimed party includes more aspects than the number of injured parties

for the infringement: the nature, scope or purpose of the processing operation and the

level of damages that have been caused.

In the present case, it is considered that the nature of the infringement 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 integrity

sexual and that when disseminating said personal data there was a certain risk that it could be

recognized by third parties.

Such aspects are so important in themselves that, within what is the

circumstance of article 83.2.a) of the GDPR, must have more weight in the graduation

of the offense than the mere fact that the injured party is a person.

d) No damages or losses have been proven to the interested party as a direct consequence

or indirect treatment carried out by the claimed party (article 83.2.a) of the

GDPR).

As we have just said, and we have already indicated in Fundamentals of Law V and VI, the

damages that have been caused to the victim as a result of the

publication of your undistorted voice is the certain risk that someone will identify you,

the materialization of such risk being indifferent.

e) There is no intention (article 83.2.b) of the GDPR).

Article 83.2.b) of the GDPR not only refers to the circumstances of the

intentionality, but also negligence.

In this regard, as already indicated in the motion for a resolution, it is necessary to invoke the

Judgment of the National Court of October 17, 2007 (rec. 63/2006) which

points out, in relation to entities whose activity entails a continuous

treatment of customer data, that: "(...) the Supreme Court has understood that

recklessness exists whenever a legal duty of care is neglected, that is,

when the offender does not behave with the required diligence. And in the evaluation of

degree of diligence, the professionalism or not of the subject must be specially considered,

and there is no doubt that, in the case now examined, when the activity of the

recurring is constant and abundant handling of personal data must

insist on the rigor and the exquisite care to adjust to the legal preventions to the

regard".

f) Lack of previous infractions committed (art 83.2.e) RGPD).

In this regard, 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

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".

g) Absolute cooperation with the control authority (article 83.2.f) of the GDPR).

Nor can this aspect be considered a mitigating factor, since the orders of

withdrawal that it issues are mandatory in accordance with the provisions of the

Article 69 of the LOPDGDD.

To this end, it is necessary to take into account the Guidelines of the Working Group of the

Article 29 on the application and setting of administrative fines for the purposes of

Regulation 2016/679, approved on October 3, 2017, which states that

"That said, it would not be appropriate to take into account in addition the cooperation that the

law requires; for example, in any case the entity is required to allow the authority of

control access to the facilities to carry out audits or inspections".

In the same sense, Directives 04/2022 of the European Committee for the Protection of

Data on the calculation of administrative fines in accordance with the GDPR, in its

version of May 12, 2022, submitted to public consultation, indicate that "it must be

consider that the ordinary duty of cooperation is obligatory and, therefore, must be

considered neutral (and not a mitigating factor).”

Therefore, we can conclude that "cooperation" cannot be understood as that which

is required or mandatory by law for the person responsible for the

treatment; as it happened in this case.

h) Full and prompt compliance with the corrective measure previously ordered in

application of article 58.2 of the GDPR (article 83.2.i) of the GDPR).

However, this circumstance cannot be considered as mitigating, despite

full and prompt compliance with the ordered corrective measure, since this

action, required by law and valued on a case-by-case basis to be able to consider it or not

as mitigating, can only be considered as such if measures have been adopted

additional beyond those ordered by the control authority.

In fact, Directives 04/2022 of the European Committee for Data Protection on the

calculation of administrative fines in accordance with the RGPD, in its version of 12

May 2022, submitted to public consultation, state that "In this regard, the

controller or processor may have reasonable expectations of

that compliance with the measures previously taken against them would prevent them from

in the future there would be a violation of the same object. However, since the

compliance with previously ordered measures is mandatory for the controller

or data processor, should not be considered as a mitigating factor per se.

On the contrary, a reinforced commitment is required on the part of the person in charge or

in charge of the treatment in compliance with the previous measures so that this factor is applied as a mitigation, for example, the adoption of additional measures beyond those ordered by the control authority."

i) The condition of communication media of the claimed party and the right to information recognized by the Spanish Constitution itself (article 83.2.k) of the GDPR).

As has been indicated throughout the processing of this procedure disciplinary action, and will be developed later in the Fundament of Law XVI, not it is about the prevalence of the Fundamental Right to Freedom of Information or the Fundamental Right to the Protection of Character Data Personal, but to find a balance between both to achieve the achievement of the purpose of the second without undermining the first.

In greater abundance it is necessary to highlight, as already exposed both in the resolution proposal as in the initiation agreement, that the media communication habitually distort the voice so that it is not recognize the person speaking.

j) The video was provided by a media agency to which, in turn, it had been sent. provided by the court itself without adopting any measure of concealment or distortion of the voice of the victim (article 83.2.k) of the GDPR).

We have already stated in Law Foundation VIII that the recording made by the court of the interrogation carried out on the victim within the oral and public trial, as well as as the subsequent transfer of the video of such a view with the undistorted voice of the victim by the court to the news agencies, are different data treatments to the object of this proceeding. And that it is not the responsibility of the court or of the news agency what the claimed party subsequently does with the information that they provide.

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

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

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twelfth

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

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.

XIII

This procedure was initiated because the claimed party published, on the websites

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 could be seen clearly

recount in all crude details the multiple rape suffered. All this constitutes

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.

Thus, STC 292/2000, of November 30, provides that "the content of the right
Fundamental to data protection consists of a power of disposal and control
on personal data that empowers the person to decide which of those data
provide to a third party, be it the State or an individual, or which can this third party
collect, and which also allows the individual to know who owns that personal data
and for what, being able to oppose that possession or use. These powers of disposition and
control over personal data, which constitute part of the content of the right
fundamental to data protection are legally specified in the power to
consent to the collection, obtaining and 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 knowledge and treatment,
computerized or not, of personal data, requires as complements
essential, on the one hand, the ability to know at all times who has
these personal data and to what use you are submitting them, and, on the other hand, the power
oppose such 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.

fourteenth

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

fifteenth

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, STC 27/2020, of February 24 (amparo appeal 1369-2017) that it has, in relation to the image of a person, and based on the fact

uncontroversial that it makes it identifiable, that "…the debated question is reduced to

consider whether the non-consensual reproduction of the image of an anonymous person is

that is, of someone who is not a public figure, but who suddenly and

involuntarily a role in the newsworthy event, in this case as a victim of

failed attempted murder by his brother and his subsequent suicide,

implied an illegitimate interference in their fundamental right to their 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

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 STS, from its First Civil Chamber, 272/2011, of April 11 (rec. 1747/2008), in which, regarding the data necessary to provide a information and limits to the public interest states that "b) Trivial information is not protects (ATC 75/2006), but the fact of providing unnecessary data in a case of rape (full name, last name initials, street portal where the victim lived) that have no community relevance, do not respect the reservation, only seek to satisfy curiosity, produce disturbances or annoyances, and reveal aspects of personal and private life unnecessarily, allowing neighbors, close people and relatives full identification of the victim and knowledge in great detail about an act that seriously violated his dignity (STC 185/2002) or about a disease that has no public interest and affects direct to the irreducible field of intimacy and that reveals itself to the effect of a pure joke or joke (STC 232/1993);".

Likewise, the STS, of its First Civil Chamber, 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 "1.) The interest of the disputed information or the right of the defendant television station to broadcast

images recorded during the act of the oral trial of the criminal case, since there is no record

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

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.

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

For example, the image of a natural person obtained from a photograph published in a

social network or name and surname.

16th

In the specific case examined, as we have indicated, the claimed party

published, on the websites referred to in the facts, the audio of the statement before the

judge of a victim of 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.

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 from (…) 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

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 STJUE (Second Chamber) of February 14, 2019, in case C 345/17, Sergejs Buivids, mentions various criteria to ponder between the right to respect of 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 interested party, the content, the form and the repercussions of the publication, the form and the circumstances in which it is obtained information and its veracity (see, in this regard, the judgment of the ECtHR of June 27, 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, CE:ECHR:2017:0627JUD000093113, section 165)".

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 entity involved, which establishes that "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".

seventeenth

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, risk assessment and implementation of measures

of adequate security. Obligations that are even more relevant when, as in

In the case we are examining, this one is especially 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.

It is tremendously significant that, in the case examined, the part

claimed immediately has distorted the voice of the victim's statement in

the video of its digital page at the request of the AEPD, without prejudice to which the

Information continues to be available and continues to be supplied in full.

This shows that in order 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.

XVIII

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 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 in accordance with 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:

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.”

seventeenth

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

- Article 83.2.b) of the GDPR.

Intentional or negligent infringement: Although it is considered that there was no intentionality on the part of the communication medium, it is concluded that it was negligent by not ensuring a procedure that guarantees the protection of personal data in such sensitive circumstances, especially when on many occasions distorts the voice in the news so that the person is not recognized talking.

- 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.

XVIII

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-focused, 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 LA VANGUARDIA EDICIONES, S.L., with NIF B61475257,

for a violation of article 5.1.c) of the GDPR, typified in article 83.5.a) of the

GDPR, a fine of 50,000 euros (fifty thousand euros).

SECOND: Confirm the following provisional measures imposed on LA

VANGUARDIA EDITIONS, S.L.:

- 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.

THIRD: NOTIFY this resolution to LA VANGUARDIA EDICIONES, S.L.

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 period

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

IBAN: ES00-0000-0000-0000-0000-0000 (BIC/SWIFT Code:

restricted no.

CAIXESBBXXX), opened on behalf of the Spanish Data Protection Agency in

the banking entity CAIXABANK, S.A. Otherwise, it will proceed to its

collection in 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.

Mar Spain Marti

Director of the Spanish Data Protection Agency

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