

□ File No.: PS/00193/2022

RESOLUTION OF SANCTIONING PROCEDURE

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

BACKGROUND

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

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

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

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

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

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

During the investigation actions, publications were found, more than those initially denounced by the complaining party, where the voice of the complainant could be heard undistorted victim. Among them, the following publication by DIARIO ABC, S.L., with NIF B82824194 (hereinafter, the claimed party or ABC):

- ***URL.1

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

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On ***DATE.5, a letter sent by this entity was received by the AEPD reporting:

- That the video object of the requirement "has been provided by the Atlas Agency, within the framework of an agreement for the provision of news content drawn up by the own Atlas Agency, which includes both text and audiovisual material, and on the that Diario ABC does not hold transformation rights."
- That as soon as it has become aware of the AEPD's requirement, it has proceeded to the immediate withdrawal of the video both on the web page indicated in the requirement, as well as in the reply made on the website of the edition of

Seville from Diario ABC (**URL.2). It has also requested Google deindexation of the url in which the video appeared.

- That it has informed the Atlas Agency of the requirement of the AEPD to act consequently.
- That it keeps a copy of such content "for the purpose of safeguarding the evidence that may become accurate in the course of the police or administrative investigation or the judicial process that could be instructed."
- That it has notified Vocento (the communication group to which ABC belongs) of the requirement of the AEPD.

It was found that the news had been removed.

FOURTH: On April 27, 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).

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 6, 2022, the claimed party requested a copy of the file, as well as an extension of the term to present allegations.

On May 9, 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 19, 2022, in which, in summary, he stated:

1.- Its immediate action once it receives the request from the AEPD for

removal or distortion of the victim's voice in audiovisual content published on

its web page, since the notification was received on ***DATE.4 and the withdrawal of the video was made that same day before 7:00 p.m.

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It also shows that the news item in which the video "was

incardinado was an "agency news" provided by the Atlas Agency, belonging to

Mediaset España Comunicación, S.A., within the framework of a contract for the supply of informative content of your property. (...).

The publication of agency news on the ABC website is done

automatic; i.e. the newsfeed is produced via a dump

automated, without ABC being able to decide what news and materials are published and

which ones are not, and without being able to alter their content either, since ABC does not hold

transformation rights over said contents. In this sense, the authorship and

third party news ownership is specifically mentioned in the

headings of each of the publications. (...)."

2.- The difficulty that the voice by itself allows the identification of the victim.

He considers that "a voice only acquires identity when it is associated with some other data

(an image, a name, a specific profile...), and therefore only allows the

identification in the company of additional information that, in the case at hand, does not

was facilitated, since the image of the victim was not shown, nor did he indicate his identity.

name or any other identifying feature. For this reason, and even if someone could

having heard the voice of the victim in that audio, that does not mean in the least

that he was able to identify her."

He criticizes the various judgments invoked by the initiation agreement, since none of them does not refer specifically to the voice, but to other personal data, either independently or jointly.

It maintains that the sound recording has a lighter interference in the rights to the honor and personal and family privacy that the publication of the image of a victim, invoking the Constitutional Court Judgment No. 57/2004, of 19 of April.

3.- There has not been an intense impact on the privacy of the victim for various reasons:

- No damage or harm has been proven, nor is there even evidence that the victim is aware of the dissemination of the video by ABC, since there is no record any statement about the victim.

- Unlike other media outlets, the defendant posted the video on a single point of its web page, without disseminating it through networks social or some other channel.

- There was little viewing of the video published on the party's website claimed, being, therefore, its repercussion little and practically nil chances that someone who had seen the video that ABC posted would have ascertained the identity of the victim.

4.- It was the Provincial Court of
, body in charge of

prosecution of the case, who distributed the video of the trial session held on

***LOCATION.1

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day ***DATE.6, on which the victim's statement was made, among the media communication and news agencies.

The defendant considers that when the courts share content with the media can do so in three ways: "(i) complete form, as they were obtained, (ii) with the distorted voice and the image diffused, in those cases in which they consider that the adoption of such measures; or (iii) with express indications to the media to carry out, by their own means, the application of these measures that have in order to protect the integrity of the victims."

It indicates that in this case "the video was provided by the Atlas Agency, which in turn received the material provided directly by the Provincial Court of

***LOCATION.1. And as the Atlas Agency has confirmed to ABC, the Hearing Provincial of ***LOCALIDAD.1 distributed the video with the voice of the victim in clear and without distorting. Additionally, neither in the aforementioned diffusion did it include no express indication, on the part of the Hearing, that it would be necessary distort the victim's voice."

Therefore, it considers that there is no violation of article 5.1.c) of the GDPR, since the diffusion of the audio with the victim's statement without distorting it did so "from the full understanding that: (i) the Provincial Court had released the video of the declaration of the victim with all the necessary guarantees aimed at their protection, and (ii) the Atlas Agency, prior to the publication of the news item, had made in turn a filtering of the contents to verify that the news would be published respecting all legal guarantees, as part of the supply agreement of

informative content subscribed with ABC.”

5.- He considers the amount of the sanction excessive because, in his opinion, the circumstances to apply the aggravating factors used by the AEPD in its initiation agreement, while considering that it has forgotten a series of extenuating.

SEVENTH: On May 30, 2022, it is agreed to open a practice phase of proof. It is also agreed to incorporate into the file, for evidence purposes, the claim that gave rise to the disciplinary procedure and its attached documentation; the documents obtained and generated during the phase of admission to processing of the claim, the report of previous investigation actions and the allegations to the initiation agreement of PS/00193/2022 submitted by the claimed party together with its attached documentation.

The following test procedures are carried out:

to. Before the claimed:

1. In the same letter dated May 30, 2022 in which the opening of the test phase, you are required to submit the following information and documentation:

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- Copy of the contract for the supply of informative content that you have signed with the Atlas Agency.

- Copy of all the documentation on your relationship, in terms of protection of personal data, with the Atlas Agency.

- In its allegations to the initiation agreement, the defendant indicated that "the publication of agency news on the ABC website is done automatic; i.e. the newsfeed is produced via a dump automated, without ABC being able to decide what news and materials are published and which are not, and without being able to alter their content either". To this end, report that indicate:

a) How the automated dumping of news from the Atlas Agency is carried out on its website, from a technical point of view, with specific mention of eventual access of the aforementioned agency to the ABC website.

b) What is the system of access profiles, users and authorizations of access to its web page established for this purpose so that the Atlas Agency can carry out the automated dumping of news. Also, report whether there is any type of authorization by the claimed party, and its form of operation, in relation to the automated dumping of news from the Atlas Agency.

c) How the publication is made on your website, from the point of view of technical view, of the news dumped automatically by the Atlas Agency.

d) If, in relation to the publication and automated dumping of news from different agencies on their website, have carried out an evaluation of impact of data protection, expressly mentioning the one carried out regarding the Atlas Agency. Referral, if applicable, of such evaluation of impact, with express indication of the date of its realization.

e) If, in relation to the automated dumping of news from different agencies on their website, have implemented a system of analysis of risks in terms of data protection, prior to such dumping, with express indication of whether they carry out checks in relation to the data

of a personal nature contained in the news. Remission, if applicable, of the analysis of risks carried out in relation to the treatment examined in the this disciplinary proceeding, expressly indicating the date of its realization.

- Copy of the Record of Treatment Activities.
- Technical or organizational security measures implemented to guarantee that only personal data that is necessary for each of the specific purposes of the treatment.

2. On June 14, 2022, a response was received from the claimed party to the evidence requested, in which:

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- It states that the commercial relationship with the Atlas Agency "has not been formalized in writing through a contract signed by both parties, but it is product of the subscription by ABC to the service provided by ATLAS (...). HE It is therefore an adhesion contract subject to the clauses marked by ATLAS in their website."

- It states that "ATLAS provides a news supply service to which accesses by prior unconditional adherence to the clauses included in the General Conditions that appear published on its website, without such accession is open to the inclusion or negotiation of specific clauses on Personal data protection."

- Regarding the automated news dump process of the Atlas Agency

On the ABC website, he states:

a) That, from a technical point of view, the automated dump "is

occurs using a file transfer protocol, also known as

FTP, which allows ABC, through the implementation of a mechanism of

monitoring, download ATLAS videos in an automated way

that are being uploaded by it. In this sense, ATLAS uploads its contents to its

FTP, and the system keeps track of said FTP in order to detect if it exists

new content, in order to dump it and publish it directly on the website."

b) That, in accordance with the automated dumping procedure

explained, "it is not necessary for ABC to issue a permit in favor of ATLAS to

that it accesses the ABC website."

c) Regarding how the publication is made on its website, from

the technical point of view, of the news dumped automatically by the Agency

Atlas, reiterates what was said in section a).

d) That "the publication of news from agencies is

considers a variation in the origin of the data with respect to the treatment of

journalistic information made from the ABC Newsroom itself, not having

differences in terms of the treatment itself, and thus addressing its review of

jointly through risk analysis of information processing

information that is contributed to this writing", which is the risk analysis on the

treatment of journalistic information that he carried out in October 2020. Indicates the part

claimed that from said analysis it is inferred that "the treatment of publication of

journalistic information does not entail a high risk for the rights and freedoms of

interested parties whose data is published given that, following the internal methodology of the

analysis, two or more of the parameters that would determine such a circumstance are not given and

would make it necessary to prepare an impact evaluation."

e) That "As stated in the previous section, ABC does not considers that the treatment of publication of journalistic information entails a high risk to the rights and freedoms of those involved in the published news by ABC, which is why an Impact Assessment has not been carried out."

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- Provide a copy of the record of information processing activities

journalistic

- Regarding the request for a report on technical security measures or

organizational measures implemented to guarantee that only those

personal data that is necessary for each of the specific purposes of the

treatment, the claimed party indicates that in the present case "the measures that are

to implement are those dictated by the court that has recorded the

content and that it has proceeded to disseminate it to the media, since it cannot be assumed that

ABC may have better judgment than someone who has known the facts first hand,

He has prosecuted them and has considered their dissemination legitimate (...).

In addition to the measures originally adopted by the Provincial Court of

***LOCATION.1, there is a second filter, which is the one carried out by ATLAS when

prepare the contents that it distributes through its service to verify that the

The news is published respecting all legal guarantees, (...)."

3. Second request for evidence to the defendant:

On June 20, 2022, the procedure instructor agreed to practice a new

diligence of evidence before the claimed party.

Since in the brief of the defendant party of June 14, 2022, it indicated,

Regarding the requirement to provide a copy of the content supply contract notices that it has signed with the Atlas Agency, that "This commercial relationship does not has been formalized in writing in a contract signed by both parties, but it is product of the subscription by ABC to the service provided by ATLAS and whose General Conditions are published on its website (www.atlas-news.com), being a necessary requirement for such subscription the full and unconditional acceptance of said General Conditions by the client, to whom the condition is attributed of "user" of the service. It is therefore an adhesion contract subject to the clause marked by ATLAS on its website.", she was required to submit:

- Document certifying that ABC has subscribed to the electricity supply service. information provided by the Atlas Agency, indicating the date of subscription.
- Copy of the General and Particular Conditions of the commercial relationship between Atlas Agency and the claimed party existing at the time of publication of the news now examined.

4. On June 27, 2022, a response was received from the claimed party to the second test request, in which you provide:

- Written, dated June 24, 2022, from the Sole Administrator of the company Comunica Mediatrader, S.L.U. (owner of the Atlas Agency) in which it is indicated that the contract for the transfer of images to ABC dates from April 16, 2007, referring to various aspects of such a contract.
- Copy of the General Conditions of the Atlas Agency as well as the General Conditions of Internet Service of the Atlas Agency.

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b. Proceedings regarding the ownership of the domain of the web page ***URL.1 and the

Ownership of the content of the web page ***URL.1.

For this purpose, on June 2, 2022, the instructor of the procedure carried out a procedure in the one that considers reproduced the legal notice of the web page ***URL.1, by which the owner of it is DIARIO ABC, S.L., with CIF B-82824194, this entity being responsible for all content that is published under that domain.

EIGHTH: On October 3, 2022, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency penalize DIARIO ABC, S.L., with NIF B82824194, 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 SOCIEDAD ESPAÑOLA OF RADIODIFUSION, 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.

NINTH: With the registration date of October 14, 2022, the party

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

On October 17, 2022, the defendant was notified of the granting of a new term

to present claims.

TENTH: The claimed party submitted a brief of allegations on October 27, 2022, in which, in summary, he states the following:

1.- It is reiterated that the news object of this sanctioning procedure is a notice provided by the Atlas Agency to the claimed party about which the latter did not holds content transformation rights.

Likewise, it criticizes that the proposed resolution indicates that it has not accredited irrefutably "that after the date of the supply contract there has been opted for the automation of the publication process, nor that this modality has been the one used with respect to the publication of the news object of the present procedure.", alleging in this regard that:

- "The AEPD was already informed in the response to the request for information dated June 14, 2022 that the automated dump of the ATLAS content is produced using a file transfer protocol.

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- There is no record of having opted for the automation of the news publication "because (i) it is not the usual practice in relations formalized between the News Agencies and the media, nor, more Importantly, (ii) there is a legal obligation to leave a written record through a formal document for the purpose of the dumping method chosen."

2.- It reiterates that it has acted diligently once it received the request from the AEPD removal of content or distortion of the victim's voice, alleging to the elderly that,

Although it is true that such action is mandatory, it understands that "the extremely fast and diligent attitude that ABC had when serving you is not mandatory nor is it derived as such from article 58.2 of the GDPR and 69 of the LOPDGDD mentioned by this AEPD, but it is a voluntary attitude of ABC that is not but one more sample of his predisposition and diligent attitude regarding the privacy of the victim and with respect to the AEPD itself, and that it has not been taken into taken into account by this AEPD when graduating the sanction proposal in this procedure."

3.- It reiterates the difficulty that the voice by itself allows the identification of the victim, criticizing that the proposed resolution indicates "that the voice of any person is personal data and identifies or makes it uniquely identifiable, regardless of the additional data that is in the assumption."

He does not share this "affirmation, since despite the fact that the voice can make identifiable to a person:

I. It does not do it by itself in an unequivocal way, since the confusion about the identity of people's voices is a recurring and common mistake, even with familiar voices that people are accustomed to hearing day after day.

II. For there to be a unique and seamless identification, data is required additions that did not accompany, in this case, the news object of the present procedure."

He also criticizes the proposed resolution when it states that "the voice of the The victim identifies her directly in her environment (understood in a broad sense, encompassing the family and the social), (...) it is clear that the voice of any person can ensure that it is identified at least by those who are part of the circle closest to the victim.

It considers in this regard that "The AEPD is not taking into consideration that this

identification of the victim who alleges as direct within that environment, probably not necessary since it is practically impossible for the the victim's closest circle, as we have mentioned, was not aware of of this unpleasant situation prior to the publication of the news", subsequently stating that it is not possible to "claim non-compliance for the mere fact that ABC publishes a voice that recounts already known facts", invoking to this effect the Judgment of the National Court of September 9, 2022.

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For this reason, he understands that "the object of discussion and analysis should be, not the possibility of recognition of the victim within an environment that, predictably, is already aware of such circumstances, but the possibility of recognition beyond that nearby environment. And for this, as the AEPD asserts, the combination of voice with other data. In the case at hand, no public more data than the voice of the victim".

4.- It is reiterated that there has not been an intense impact on the privacy of the victim for the reasons stated in his pleadings to the initiation agreement.

Likewise, it criticizes the fact that the proposed resolution states that "the treatment now debated is characterized by:

- Its durability (...) as soon as the request from the AEPD was received on the date

***DATE.4, the news was not edited, but directly deleted. thus having withdrawn it, any access and/or disposition by third parties to the copy of this content controlled by ABC is absolutely impossible.

- Its amplifying effect as ABC is a means of communication. Nevertheless,

The mere fact of being a means of communication does not imply, under any circumstances, concept, the disclosure to the public of this information in a manner

exponential and ubiquitous as the AEPD points out. (...), the repercussion of the news during the brief time it was published was minimal. This shows that, although

As a means of communication, ABC can have an amplifying effect

of the information that it transmits, of course that was not the case in the news object of sanction."

5.- He doubts that "the indications that the judicial bodies give to the media

communication on certain occasions in relation to the contents that

share are warnings or mere recommendations, and not a mandate as such.

(...) Well, as we have indicated, the courts are guarantors of the

protection of victims in the framework of procedures in which they are

part, and it must be understood that such indications have been issued with a criterion

founded. Notwithstanding the foregoing, and if in the eyes of the AEPD the indications of the

effectively judged were mere warnings or recommendations of the body

court, then it should be noted that ABC is being sanctioned for not carrying out

carry out an act -such as the distortion of the voice- which, if requested

expressly by the Provincial Court, would have been classified by the AEPD as

a mere warning or recommendation."

6.- Considers that the matter at trial was of general interest and public relevance,

since "the condition of "public" also falls on private persons considered

newsworthy due to supervening circumstances, in events of public interest in which

are protagonists regardless of their own will, as, unfortunately, is

the case."

Therefore, he understands that in the present case the Fundamental Right to

Freedom of Information on the Fundamental Right to Data Protection

Personal whenever:

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“- The voice by itself has a low degree of connection with the victim.

- Being such a media case, as the AEPD insists on pointing out, it is easy to deduce that the people in the victim's environment who would be able to recognize his voice are aware of these facts, and that therefore the damage presumed by the AEPD does not would exist.”

Likewise, and in relation to "this struggle between Fundamental Rights in conflict", criticizes that both the start-up agreement and the proposed resolution invoke judicial pronouncements that are not comparable to the present case, referring specifically to the Judgment of the Constitutional Court 27/2020, of 24 February (recurso de amparo 1369-2017) and the Judgment of the Supreme Court, of its First Civil Chamber, 661/2016, of November 10 (rec. 3318/2014).

7.- It is reiterated that it has not violated article 5.1.c) of the GDPR, since "the The publication of the victim's statement was made with the full understanding of its legitimacy, insofar as it had been disseminated directly by the judicial body in charge of prosecuting the case, without distortion of the voice of the itself or any guideline for news agencies and the media to this respect.”

8.- It is reiterated that the sanction is excessive because it improperly applies a series of aggravating factors and forgets to apply a series of mitigating factors.

Regarding the argument of the proposed resolution that indicates that "with the dissemination from her voice she is identified, putting her at a certain risk of being identified by people who were unaware of their status as victims," says the defendant that:

- "So that the voice could have identified the victim clearly and unequivocally

Additional data would have been necessary, which in the present case was not provided."

- "The AEPD is basing its thesis on the certain risk that the victim could be identified by people who were unaware of their status as victims, which is no more than a conjecture of the AEPD not based on proven facts."

He criticizes the proposed resolution when it indicates that "The damage or harm that is caused to the victim is, as previously stated, the certain risk of being identified by people who were unaware of their status as victims (...)", since "the alleged harm: (i) it has not been stated by the victim herself; and (ii) has not been investigated since the victim has never been part of this procedure."

Regarding the argument of the proposed resolution that indicates that "the withdrawal of content would not have derived from a spontaneous action on the part claimed, which is when there really would have been a more diligent expedited practice by the media.", understands that "the diligent attitude is not only derived from acts carried out on their own initiative, but is based also in the speed in the elimination of the news as soon as it had knowledge that an illegal act could potentially be committed, as well as in

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the predisposition and collaboration that characterize ABC's attitude throughout the process, and that the AEPD does not seem to have taken into account.”

With regard to the argument in the motion for a resolution that there has been no acted with the due diligence as it is a means of communication, which habitually distort the voice so that the voice is not recognized person speaking, it is reiterated that "he acted with the full understanding that: (i) the Provincial Court had broadcast the video of the victim's statement with all the necessary guarantees aimed at their protection, and (ii) the Atlas Agency, in a manner prior to the publication of the news, had in turn filtered the contents to verify that the news would be published respecting all the guarantees legal (...).”

Regarding the aggravating circumstance of the personal data affected by the infringement (article 83.2.g) of the GDPR) criticizes the resolution proposal for considering the voice as data staff that identifies the victim or makes it univocally identifiable, then, understands that in order for the victim to be unequivocally identified additional data would have been needed. Likewise, it understands that "it is not considered proven that the publication object of this requirement has caused a actual harm to the victim.”

Finally, it mentions the decision to file the actions of the AEPD in the file EXP202100646, related to a "case of circumstances similar to those today they are tried, but whose result differs greatly from the proposal of disciplinary resolution against ABC”.

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 outlets published on their websites the audio of the statement before the judge of a victim of multiple rape, to illustrate the news regarding the holding of the trial in a case that was highly mediated, providing links to news published on media websites claimed.

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

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

- ***URL.1

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THIRD: Within the framework of the previous investigation actions, with the date of ***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:

- ***URL.1

FOURTH: On ***DATE.5, the AEPD received a letter sent by this

reporting entity:

- That the video object of the requirement "has been provided by the Atlas Agency, within the framework of an agreement for the provision of news content drawn up by the own Atlas Agency, which includes both text and audiovisual material, and on the that Diario ABC does not hold transformation rights."
- That as soon as it has become aware of the AEPD's requirement, it has proceeded to the immediate withdrawal of the video both on the web page indicated in the requirement, as well as in the reply made on the website of the edition of Seville from Diario ABC (**URL.2). It has also requested Google deindexation of the url in which the video appeared.
- That it has informed the Atlas Agency of the requirement of the AEPD to act consequently.
- That it keeps a copy of such content "for the purpose of safeguarding the evidence that may become accurate in the course of the police or administrative investigation or the judicial process that could be instructed."
- That it has notified Vocento (the communication group to which ABC belongs) of the requirement of the AEPD.

FIFTH: 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 writing ***DATE.5, that is, it was verified that the news is no longer available in this address:

- ***URL.1

SIXTH: Work in the file diligence of the instructor of the date procedure

June 2, 2022, by which the notice of the website is reproduced

***URL.1, by which the owner of the same is DIARIO ABC, S.L., with CIF B-82824194,

being this entity responsible for all the content that is published under that

domain.

SEVENTH: The claimed party, in response to the evidence that has been requested, has manifested, regarding the request for a report on the technical security measures or organizational measures implemented to guarantee that only those personal data that is necessary for each of the specific purposes of the treatment, that in the present case "the measures that must be implemented are the www.aepd.es

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that the court that has recorded the content and that has proceeded to its dissemination to the media, since it cannot be assumed that ABC can have a better criterion that whoever has known the facts first hand, has judged them and has its dissemination is considered legitimate, (...).

In addition to the measures originally adopted by the Provincial Court of ***LOCATION.1, there is a second filter, which is the one carried out by ATLAS when prepare the contents that it distributes through its service to verify that the The news is published respecting all legal guarantees, (...)."

EIGHTH: It appears in the written file, dated June 24, 2022, of the Sole Administrator of the company Comunica Mediatrader, S.L.U. (owner of the Atlas Agency) in which he exposes:

"That the image assignment contract (to ABC) dates from April 16, 2007. This The contract was formalized with Vocento Madiatrader (VMT), a company that at that time was formed 100% by the capital of Vocento.

The contract says the following:

Atlas undertakes to provide ABC (as set out in Annex II of the mentioned contract) the basic modality of the e-news service consisting of the supply of 900 monthly video news 80% produced by Atlas and 20% Reuters production, at a rate of 30 daily video news on average to be selected from all available offer

Procedure. Through the Atlas or Mediaset website. Where Atlas places the contents available to ABC so that it selects those that are of its interest (point 2).

Ownership of images and information. Atlas will respond and hold harmless ABC against any demand or similar claim related to the property intellectual (point 6).

Legality and responsibility for the contents. Atlas are responsible for the service update and warranty."

NINTH: The file contains a copy of the General Conditions of the Agency Atlas, which are indicated in section 4, regarding the responsibility for the use of the contents on the internet, the following:

"MEDIASET ESPAÑA does not guarantee the quality, accuracy, reliability, correctness or morality of the data, programs, information or opinions, whatever their origin, that could circulate through its network or through the networks to which the Client can access through the portal www.atlas-news.com. The Client expressly accepts exempt MEDIASET ESPAÑA from any claim derived from the mentioned in this section. The Client assumes under his sole responsibility the consequences, damages or actions that may derive from access to said contents, as well as its unauthorized reproduction or dissemination expressly and documented by MEDIASET ESPAÑA. This limited warranty and the limitation of

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responsibility mentioned in the previous paragraphs will not affect or harm

the mandatory rights that assist you according to your place of residence.”

TENTH: The file contains a copy of the General Conditions of the Service of Internet Agency Atlas.

The General Conditions of Internet Service of the Atlas Agency indicate

regarding the distribution the following:

“The contents are published within the distribution channel www.atlas-news.com. In

the professional access section are enabled the functions that allow the

customers quickly and easily download video, photo and text files for

proceed to its publication on its pages.

For subscribers to all production it is possible to automate the process of

publication, so that the news is automatically published on your website.”

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In accordance with the powers that article 58.2 of the GDPR grants to each authority of

control and as established in articles 47 and 48.1 of LOPDGDD, is competent

to initiate and resolve this procedure, the Director of the Spanish Agency for

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

The claimed party states that, once ***DATE.4 was received, the requirement of the AEPD regarding the withdrawal or distortion of the voice of the victim in the audiovisual content published on its website, immediately proceeded to the Withdrawal of the video, specifically, it was made that same day at 7:00 p.m.

Beforehand, we must clarify that through this procedure disciplinary action, the data processing consisting of the dissemination of the voice of the victim of a multiple violation that has been carried out by the claimed party.

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 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, comparison or interconnection, limitation, suppression or destruction”. (underlining is ours).

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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 its subsequent action, no matter how quickly and diligent that has been, with respect to the order to remove content from the AEPD, the which is mandatory in accordance with the provisions of article 58.2 of the GDPR and article 69 of the LOPDGDD.

Furthermore, it should be noted that the withdrawal of the content did not derive from a spontaneous action of the claimed party based on the performance of an analysis of risks. Rather, it proceeded to such action when required by the AEPD and, therefore, therefore, being obliged to comply with such measure, to the point that its non-compliance implies the commission of an administrative offense under the terms of article 83.6 of the GDPR.

II

The claimed party indicates in its pleadings to the initiation agreement that the news in which the video "was embedded was an "agency news" provided by the Atlas Agency, belonging to Mediaset España Comunicación, S.A., within the framework of a contract for the supply of information content owned by you. (...).

The publication of agency news on the ABC website is done automatic; i.e. the newsfeed is produced via a dump automated, without ABC being able to decide what news and materials are published and which ones are not, and without being able to alter their content either, since ABC does not hold transformation rights over said contents. In this sense, the authorship and third party news ownership is specifically mentioned in the headings of each of the publications. (...)."

Therefore, next, we must identify who is responsible for the treatment object of this file.

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

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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".

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)".

Whenever it is clear that the claimed party decides on the purposes of the processing,

that is, it determines that the purpose of the treatment is informative, we have to

focus on whether he also has the power to decide on the means of treatment, which

which the claimed party denies since the news under discussion is news

which comes from the Atlas Agency.

In the letter of the Sole Administrator of the company Comunica Mediatrader, S.L.U.

(owner of the Atlas Agency) dated June 24, 2022, it is indicated that the

contract for the transfer of images to ABC, dated April 16, 2007, reads as follows:

"Atlas undertakes to provide ABC (...) the basic modality of the e-news service

consisting of the supply of 900 monthly news videos 80% own production

of Atlas and 20% Reuters production, at a rate of 30 daily news videos from media to

select from all the available offer (point 1.2)

Procedure. Through the Atlas or Mediaset website. Where Atlas places the

contents available to ABC so that it selects those that are of its

interest. (Point 2)."

On the other hand, in the General Conditions of the Internet service of the Agency

Atlas, we find, in the section related to distribution, the following:

"The contents are published within the distribution channel www.atlas-news.com. In

the professional access section are enabled the functions that allow the

customers quickly and easily download video, photo and text files for

proceed to its publication on its pages.

For subscribers to all production it is possible to automate the process of

publication, so that the news is automatically published on your website."

Although the claimed party indicates that the publication process on its website is

automated, in the aforementioned supply contract of April 16, 2007,

indicates that the supply procedure will be carried out "Through the Atlas website or

Mediaset. Where Atlas makes the content available to ABC so that it

select those that are of interest to you.", without the claimed party having

reliably accredited that after the date of the supply contract

has opted for the automation of the publication process, nor that this modality

has been the one used with respect to the publication of the news object of the present procedure.

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However, the claimed party, in its statement of allegations to the proposal for resolution, criticizes that it is considered that there is no reliable proof that the news item was produced by an automated dump because:

- "The AEPD was already informed in the response to the request for information dated June 14, 2022 that the automated dump of the ATLAS content is produced using a file transfer protocol.

- There is no record of having opted for the automation of the news publication "because (i) it is not the usual practice in relations formalized between the News Agencies and the media, nor, more

Importantly, (ii) there is a legal obligation to leave a written record through a formal document for the purpose of the dumping method chosen."

In this regard, it should be noted that, although the defendant says that the procedure that was used to publish the news was the automated dump, and that there is no legal obligation to record in writing that the provision of content is done automatically, the truth is that it is duly proven that

between the claimed party and the news agency a contract was signed by which the content supply is carried out "Through the Atlas or Mediaset website. Where Atlas makes the contents available to ABC so that it selects those that

be of interest to you." This implies that in order to take into account the manifestations

made by the claimed party, it is necessary for the defendant to present proof, for any means admitted by law, that ratifies them, since they are contrary to what signed in the supply contract. And since no such proof has been presented, the allegations made in this regard cannot be taken into account.

So, in accordance with the above, Atlas makes available to ABC a series of news, from which the latter selects those that it considers in view of them, He downloads them and includes them on his website.

In short, the claimed party has decision-making power regarding what contents of the Atlas Agency publishes and which does not.

Furthermore, the respondent party has the power to decide how obtain the information, therefore, instead of having opted for it to be supplied by a news agency, could have chosen to have the event covered by one of its journalists. Although this would not change the commission of the offense.

For all the above, it is clear that the claimed party is responsible for the treatment being analyzed, since it holds the power to decide on the ends and means of the treatment.

IV.

Indicates the claimed party in its brief of allegations to the initiation agreement that is difficult for the voice by itself to allow the identification of the victim, understanding that "A voice only acquires identity when it is associated with some other data (an image, a name, a specific profile...), and therefore only enables identification in company of additional information that, in the case at hand, was not provided, given

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that the image of the victim was not shown, nor was his name indicated or any other identifying trait. For this reason, and even if someone could have heard the voice of the victim in that audio, that does not mean that he could have been identify."

Notwithstanding its more detailed examination in Law Basis X of this resolution, it should be noted that the voice of any person is personal data and identifies it or makes it univocally identifiable, regardless of the data additional to the assumption.

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.

However, the claimed party, in its statement of allegations to the proposal for resolution, does not share such "affirmation, since despite the fact that the voice can make identifiable to a person:

I. It does not do it by itself in an unequivocal way, since the confusion about the identity of people's voices is a recurring and common mistake, even with familiar voices that people are accustomed to hearing day after day."

In this regard, it should be noted that the voice is a personal and individual attribute of each natural person that is defined by its height, intensity and timbre. endowed with traits unique and singular hallmarks that individualize it directly, associating it with a concrete individual, 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, their hormonal, emotional and psychic state. Elements of expression, idiolect or intonation, are also personal data considered together with the voice.

Voice is produced when air passes from the lungs through the airways. (windpipe) and through the larynx, causing the vocal cords to vibrate, creating Sound. Sound that becomes words thanks to the muscles that control the soft palate, tongue and lips, without forgetting the cavity where find these muscles, which acts as a sounding board. How can appreciate, there are various organs involved in speech, different in each of people, in fact, and by way of example, the vocal cords of the Men are longer and thicker than those of women and children, which is why the voice of those is deeper than that of these, like the sound of a double bass It is deeper than that of a violin. But even so, not all men's vocal cords are equally long, which is why for which there are men with a more or less serious voice, as happens with those of women, which is why there are women with more or less high-pitched voices.

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In addition, we have already seen that not only the vocal cords, but many more organs that, depending on their strength and structure will make each voice unique and different. Therefore, we can identify the people we know by voice without having to see them (for example, when

we have a telephone conversation with someone close to us or we heard someone acquaintance on the radio). Therefore, anyone who knows the victim can be identified by hearing his voice.

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 there is a clear treatment if the voice has spread through the media claimed, under the terms of art. 4.2) of the GDPR.

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.

The foregoing is criticized by the claimed party in its pleadings to the resolution proposal, understanding that "The AEPD is not taking into consideration that the identification of the victim that he alleges as direct within that environment, probably not necessary since it is practically impossible for the the victim's closest circle, as we have mentioned, was not aware of of this unpleasant situation prior to the publication of the news", subsequently stating that it is not possible to "claim non-compliance for the mere fact that ABC publishes a voice that recounts already known facts", invoking to this effect the Judgment of the National Court of September 9, 2022.

Regardless of whether the statement of the defendant regarding that it is practically impossible that the circle closest to the victim was not aware of of such circumstance is a mere speculation, with it it is observed that the part The defendant has forgotten that the motion for a resolution not only referred to such circle close to the victim, but also, as we have explained previously, to all those people who "can know it in any way", which implies, in the end, that there really was a risk that it could have been identified by people who were unaware of their status as victims.

On the other hand, it must be indicated that the claimed party, when stating that it is not possible to "claim a breach merely because ABC publishes a voice recounting facts already known", is confusing what is the object of debate in the present proceeding: At no time has it been considered that the publication of the content of the victim's statement before the judge constituted a violation of the regulations on data protection, since the narrative of the facts

It is not personal data in accordance with the definition established by the

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Article 4 of the GDPR, in addition to being protected by the Fundamental Right to the Freedom of Information of the media. What is being resolved in the present procedure is whether the victim's voice without distorting, once we have determined that it is a personal data that identifies or makes it unequivocally identifiable, it was necessary to publish it so that the means of communication was able to fulfill its informative purpose, an aspect that

will develop in the Foundation of Law VIII of this resolution.

In view of the foregoing, the aforementioned Judgment is not applicable to this case either.

of the National Court of September 9, 2022, in which case it is not

prosecuted whether there had been a violation of article 5.1.c) of the GDPR, which is the

that is the object of study in the present procedure, but if there had been a

violation of article 5.1.f) of the GDPR.

In short, it has become clear that the voice of any person can make the

itself is identified at least by those who make up its closest circle or

they can meet her anyway.

But it is also that the voice also makes the victim identifiable indirectly

for 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. (The underlining is ours).

In this regard, the defendant party points out in its pleadings to the proposal for

resolution that "In the case at hand, no more information was made public than the

victim's voice.

However, and in view of the aforementioned Opinion 4/2007, it is irrelevant if the

additional information has not been disclosed by the requested party or is unknown to it. to such

effect, the Judgment of the CJUE of October 19, 2016 is brought up, in the

case C-582/14, procedure between Patrick Breyer and Bundesrepublik Deutschland, the

which states that "for data to be classified as" personal data ", in the

meaning of Article 2(a) of that Directive, it is not necessary that the entire

information that allows the interested party to be identified must be in the possession of a single person.” (underlining is ours).

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

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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...”

On the other hand, the criticisms made by the claimed party cannot be shared.

relating to the fact that the judgments invoked by both the initiation agreement and the proposal resolution do not refer to voice specifically, but to other data

personal, either independently or jointly. Well, obviously the claimed party that the invocations to such judgments were made to justify that the Fundamental Right to Freedom of Information is not absolute, not to determine what data or identifiers are sufficient to identify a person, as claimed by the defendant.

Nor can the invocation made by the claimed party to the Ruling of the Constitutional Court no. 57/2004, of April 19, which indicates that "the rights to honor and personal and family privacy that can be seen compromised by the taking and dissemination of images of those who act in hearings public judicial proceedings in a more serious way than for the information that is produced through of the written report or the sound recording."

In this disciplinary proceeding, it is not being determined whether the reproduction of the voice implies a greater or lesser interference in the Fundamental Right to Honor and to Personal Privacy, but if said reproduction involves the risk that the victim of a crime can be identified. Risk, which as previously indicated, is occurs in a certain way with the publication and dissemination of the voice of the victim, which constitutes a clear interference in the Fundamental Right to Data Protection Personal, without adjectives.

For this purpose, it is necessary to bring up the STC 292/2000, of November 30, which states that "This fundamental right to data protection, unlike the right to privacy of art. 18.1 C.E., with whom it shares the objective of offering a effective constitutional protection of personal and family private life, attributes to his holder of a bundle of powers consisting for the most part of the legal power of impose on third parties the performance or omission of certain behaviors whose specific regulation must be established by law, the one that according to art. 18.4 C.E. must limit the use of information technology, either developing the fundamental right to information

data protection (art. 81.1 C.E.), or regulating its exercise (art. 53.1 C.E.). The

peculiarity of this fundamental right to data protection with respect to that

fundamental right as related as that of privacy lies, then, in its different

function, which entails, therefore, that also its object and content differ."

In the case of the Fundamental Right to the Protection of Personal Data, the purpose

it is to protect people without ambiguity and without exception. Especially in this case,

given that what has occurred is the dissemination of the story of a victim of a

multiple violation.

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In conclusion, a person can be identified by their voice. The publication of the data

the victim's voice alone and undistorted put her at risk

certain of being identified by people who were unaware of her status as a victim.

V

The claimed party considers in its pleadings to the start-up agreement that it did not

there has been an intense impact on the privacy of the victim for various reasons:

- No damage or harm has been proven, nor is there even evidence that the

victim is aware of the dissemination of the video by ABC, since there is no record

any statement about the victim.

- Unlike other media outlets, the defendant posted the video on

a single point of its web page, without disseminating it through networks

social or some other channel.

- There was little viewing of the video published on the party's website

claimed, being, therefore, its repercussion little and practically nil

chances that someone who had seen the video that ABC posted would have ascertained the identity of the victim.

As already indicated in the previous Basis of Law, the purpose of the Law Fundamental to the Protection of Personal Data is to protect people without ambiguity and without exception, the statements being irrelevant in this case that the respondent party performs because:

- It must be remembered that the claimed party has in any case the obligation to respect the principles related to the treatment included in article 5 of the GDPR, among which that the principle of data minimization is found, even without there being statement in this regard by the victim.
- The treatment carried out by the claimed party is characterized by its durability in time, because once the news is published, it remains on the network, making it possible to access its content (and, in this case, the voice of the victim) both through the newspaper archives and through search engines, as many times as desired and without time limitation.
- Such treatment is also characterized by its amplifying effect: as it is a means of communication that facilitates information through the Internet, making accessible knowledge of that information exponentially and ubiquitously.

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

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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.

However, the claimed party, in its statement of allegations to the proposal for resolution, criticizes that "the treatment now debated" is characterized by its durability and its amplifying effect, then:

- "as soon as the request from the AEPD was received on ***DATE.4, the news was, not edited, but directly deleted.
- "the repercussion of the news during the brief time in which it was published it was minimal."

It should be noted in this regard that when the motion for a resolution referred to such characteristics did not refer to the "treatment now debated", but to any treatment carried out by the communication medium as data controller when you publish personal data.

- That the scarce display of the video published on the web page supposes that they are the chances that someone who had seen it would have found out the identity of the victim is a mere speculation of the claimed party.

It depends on who it is, on their degree of connection with it, on the how often you interact with that person, etc. It would suffice for a nucleus small number of people, or even a single person, to recognize the victim through the news so that their identity would be compromised and even spread to other

people.

- 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.

SAW

Indicates the claimed party in its brief of allegations to the initiation agreement that was the Provincial Court of ***LOCALIDAD.1, body in charge of prosecuting case, who distributed the video of the trial session held on ***DATE.6, in which the victim's statement was made, between the media and the news agencies.

And that in the specific case of ABC, "the video was supplied by the Atlas Agency, who in turn received the material provided directly by the Audiencia Provincial of ***LOCATION.1. And as the Atlas Agency has confirmed to ABC, the Provincial Court of ***LOCALIDAD.1 distributed the video with the voice of the victim clear and undistorted. Additionally, neither in the aforementioned diffusion included no express indication, by the Court, that it would be necessary to distort the voice of the victim."

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It has already been pointed out in Fundamentals of Law II that it is the diffusion of the voice of the victim who has carried out the claimed party which is the object of this procedure, while in Fundamentals of Law III it has been indicated that this is the

responsible for such treatment.

The distribution of the video of the sight with the undistorted voice of the victim by from the Provincial Court to the media and news agencies is another treatment of data different from the one being analysed. Therefore, the origin of the information has been the Provincial Court is not enough to exempt the party claimed from its responsibility, because what is being prosecuted is not the provision of information by the Provincial Court to the media communication and news agencies, but the treatment for which the claimed party, such as the dissemination of personal data such as the voice of the victim. As soon as the information reaches the media, the latter, as the person responsible for the treatment, is responsible for complying with the data protection regulations, without be able to cover the breach of the same in the fact that the Hearing The Provincial Council thus sent the information to the media and news agencies. news, assuming that such forecast allows you to publish it without paying attention to the requirements of the GDPR and the LOPDGDD. The distribution of the video by the Provincial Court does not imply that it has to be the court that indicates to the media and news agencies how they should proceed with the information material supplied, a fact that the party The defendant acknowledges both in its pleadings to the start-up agreement and in his pleadings to the resolution proposal, when he indicates that when spread the news, it did so with the full understanding that “(ii) the Atlas Agency, of Prior to the publication of the news, it had filtered the contents to verify that the news would be published respecting all legal guarantees”. Regarding the allegation made by the defendant in its pleadings brief to the initiation agreement regarding the fact that there was no express indication, by the Hearing, that it was necessary to distort the voice of the victim, it should be noted that what

the Court can do, in accordance with the Communication Protocol of the

Justice 2020 is a warning, a mere recommendation, not a mandate.

And as has been indicated, it corresponds to the media, as

responsible for the treatment, decide what and how public. I might decide to post the

information despite the warning received, choose not to publish or decide

distort the victim's voice in order to prevent it from being recognized, even in the case of

not having received any warning in this regard.

It can be concluded that the warning that the Court can make does not prevent the publication

of personal data, in the same way that the absence of it does not legitimize

publish all personal data. Nor does it exempt the media from the

obligation to carry out a risk analysis prior to the publication of the news.

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

resolution, doubts that the indications that the judicial bodies give to the

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media on certain occasions in relation to the contents

they share are warnings or mere recommendations, and not a mandate like

such. (...) Well, as we have indicated, the courts are guarantors of the

protection of victims in the framework of procedures in which they are

part, and it must be understood that such indications have been issued with a criterion

founded. Notwithstanding the foregoing, and if in the eyes of the AEPD the indications of the

effectively judged were mere warnings or recommendations of the body

court, then it should be noted that ABC is being sanctioned for not carrying out

carry out an act -such as the distortion of the voice- which, if requested expressly by the Provincial Court, would have been classified by the AEPD as a mere warning or recommendation.”

In this regard, a distinction must be made between the adoption of measures by the body jurisdiction within the development of judicial proceedings, on the one hand, and the warnings or recommendations made by said body when it provides information to the media, on the other hand. Bearing in any case clear that both a treatment like the other are not the subject of this disciplinary file.

In the first case, that is, when the court adopts measures within the development of the judicial procedure, it performs a weighting of the rights and liberties at stake that seeks to protect the identity of the victim of a crime violent, without violating the right to effective judicial protection of the defendants.

On the other hand, as we have already explained, the indications made by the court to the media when it provides them with information, they are mere warnings or recommendations.

It is not possible to understand what the defendant means when he states that if “the indications of the court were indeed mere warnings or recommendations of the judicial body, then it should be noted that ABC is being penalized for not carrying out an act -such as the distortion of the voice- that, in had been expressly requested by the Provincial Court, it would have been qualified by the AEPD as a mere warning or recommendation.”

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

Therefore, the motion for a resolution indicated that this last line of argument of the

claimed party, is not consistent with section 6 of the Communication Protocol of Justice 2020, regarding the protection of personal data, which makes reference to the transmission, by the Communication Offices, of the text of the court decision to social media.

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

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

In any case, the provisions of the data protection regulations will apply.

of a personal nature to the treatment that the recipients of this information carry out out of the personal data contained in the attached judicial resolution, which does not may be transferred or communicated for purposes contrary to the law.” (underlining is

our).

On the other hand, neither can the claimed party be exempted from its responsibility for the action of the Atlas Agency, since section 4 of the General Conditions of the said news agency indicates that "MEDIASET ESPAÑA does not guarantee the quality, accuracy, reliability, correctness or morality of the data, programs, information or opinions, whatever their origin, that may circulate through its network or through the networks that the Client can access through the portal www.atlas-news.com. He Customer expressly agrees to exempt MEDIASET ESPAÑA from any claim derived from what is mentioned in this section."

And it is that the RGPD has supposed a transcendental change in the way of understanding the right to the protection of personal data, being one of the novelties most relevant proactive responsibility, contemplated in article 5.2 of said Regulation:

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

Proactive liability implies that the data controller is responsible for the data processing that it carries out. You not only have to meet the principles enshrined in article 5.1, but must be able to prove it.

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

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

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

In particular, the person responsible must be obliged to apply timely and effective measures and must be able to demonstrate the compliance of the processing activities with the

this Regulation, including the effectiveness of the measures. These measures must have into account the nature, scope, context and purposes of the processing, as well as the risk to the rights and freedoms of natural persons.” (underlining is our).

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

In this sense, it is worth mentioning the Judgment of the Court of Justice of the European Union in Fashion ID, C-40/17, ECLI:EU:2018:1039, which rules on a case in which an e-commerce company inserted the module on its website social "likes" of the social network Facebook, which implied that they were transmitted to it personal data of visitors to the trading company's website email regardless of whether the visitors were members of the aforementioned social network or if they clicked on the "like" button on Facebook. In its section 74 establishes that "On the other hand, and without prejudice to a possible civil liability provided for in national law in this regard, that natural or legal person cannot be held liable, within the meaning of that provision, for operations

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

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. The media, as data controllers multiple data that they know within the exercise of their journalistic work, they must know and comply with the regulations on data protection, applying, among them, the principle of data minimization enshrined in article 5.1.c) of the GDPR.

VII

It considers the claimed party in its brief of allegations to the proposal of resolution that the matter at trial was of general interest and public relevance, since "the condition of "public" also falls on private persons considered newsworthy due to supervening circumstances, in events of public interest in which are protagonists regardless of their own will, as, unfortunately, is the case."

For this reason, the defendant understands that in the present case the Fundamental Right to Freedom of Information on the Fundamental Right to Protection of Personal Data whenever:

"- The voice by itself has a low degree of connection with the victim.
- Being such a media case, as the AEPD insists on pointing out, it is easy to deduce that the people in the victim's environment who would be able to recognize his voice are aware of these facts, and that therefore the damage presumed by the AEPD does not would exist."

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Without prejudice to its more detailed examination in the Fundament of Law XIV of this resolution, it must be remembered that for a matter to be considered of public relevance, it will be not only for the person who intervenes, but also for the matter to which it refers. Both requirements must concur, resulting in the assumption examined the victim is not a public person; rather the contrary, it is great interest that is not recognized by third parties, so it can mean a new penalty to the one already suffered. The victim is an anonymous person and must follow being so, in such a way that their fundamental rights are fully guaranteed, because the victims of crimes are not on the same level of equality as the people who have committed them, as stated in the V Law Foundation of the startup agreement.

Among the judgments referred to in the aforementioned legal basis, We will highlight the Judgment of the Supreme Court, of its First Civil Chamber, 661/2016, of November 10 (rec. 3318/2014), which in relation to the recruitment and disclosure in court of the image of a victim of gender violence provided that "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). (underlining is ours).

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 is the last guarantee that the company has. victim.

In any case, it is not a matter of giving precedence to a fundamental right over another, nor of a "fight between conflicting Fundamental Rights", as expresses the claimed party in its brief of allegations to the proposed resolution.

It is treated, rather, as indicated in the Legal Basis VI of the agreement start, to find a balance between both rights to achieve the achievement of the purpose of the Fundamental Right to Freedom of Information without distorting the Fundamental Right to the Protection of Personal Data.

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Furthermore, the argument of the party cannot be shared

claimed that in this case the Fundamental Law should prevail

to Freedom of Information on the Fundamental Right to Data Protection

Personal because, in the opinion of the claimed party, (i) "The voice by itself has a

low degree of connection with the victim.", and because (ii) "it is easy to deduce that the

people in the victim's environment who would be able to recognize his voice are already

aware of these facts, and that therefore the damage presumed by the AEPD does not

would exist."

And it cannot be shared because, as already stated in the Fundamentals of Law IV

of this resolution, the voice of any person is personal data and the

identifies or makes it univocally identifiable, at least by the persons

who are part of her closest circle or who may know her in any way.

On the other hand, the defendant criticizes in its statement of allegations the proposal for

resolution that both the start-up agreement and the proposed resolution invoke

judicial pronouncements that are not comparable to the present case,

referring specifically to the Judgment of the Constitutional Court 27/2020, of 24

February (recurso de amparo 1369-2017) and the Judgment of the Supreme Court, of its

First Civil Chamber, 661/2016, of November 10 (rec. 3318/2014).

The defendant indicates that the Judgment of the

Constitutional Court 27/2020, of February 24 (amparo appeal 1369-2017)

because this "is about the incompatibility of the publication of an image in

Facebook published by the owner of the data with the publication of the image

in a communication medium, while, in the case prosecuted through this

disciplinary process, the purpose of making available by the Hearing

Provincial of ***LOCALIDAD.1 in favor of news agencies and mass media

communication itself was specifically its publication in such media."

It seems that the claimed party has forgotten that the appointment that has been made, both in the initiation agreement as in the resolution proposal, to the aforementioned judgment of the Constitutional Court is within the Foundation of Law V of such judicial pronouncement, called "The non-consensual use of the image alien". And that with such an invocation it was a question of delimiting if "someone who is not a character public, but which suddenly and involuntarily acquires a role in the fact newsworthy, in this case as a victim" has the nature of public interest, regardless of where the image comes from, reaching such a legal basis to indicate that "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".

Likewise, from the reading of the aforementioned sentence, it is observed that the argumentation relative to the extreme related to the right to the image is carried out independently to the one related to the unauthorized use of an image derived from a social network, aspect on which the Constitutional Court pronounces both in the Fundamento of Law III ("The digital society and the unauthorized use of the image of others"),

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as in Fundamentals of Law IV ("The need for express authorization to the authorization by third parties of the image of others in the digital environment") of the aforementioned

judicial pronouncement.

For these reasons, we cannot share the thesis of the defendant regarding the fact that in STC 27/2020, of February 24, cannot be taken into account in this case (amparo appeal 1369/2017).

It also indicates the party claimed in its pleadings to the proposal of resolution, that the Judgment of the Court is not applicable to the present case Supreme Court, 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 since in that case "data are made public such as first name, place of residence, close-up images that clearly imply a complete and unequivocal identification of the victim, which has not happened in the present case."

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

demanding to transmit truthful information or, on the contrary, was limited by the fundamental rights of the plaintiff to her personal privacy and to her own image."

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

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defendant and the victim are not on an equal footing, because in terms of that one does allow a complete identification, and not only by its initials, due to the nature and social significance of the crimes of mistreatment (judgment 547/2011, of July 20).

[...]

6th) In short, the defendant television channel should have acted with the prudence of the diligent professional and avoid issuing images that represented the

recurring in close-up, either refraining from issuing the corresponding shots, well using technical procedures to blur their features and prevent their recognition (judgment 311/2013, of May 8). Similarly, it should also avoid mentioning your first name, because this information, insufficient by itself to constitute illegitimate interference, became relevant when pronounced on the screen simultaneously with the image of the applicant and add the mention of her town of residence, data all of them unnecessary for the essence of the content information, as evidenced by the news about the same trial published in the next day in other media.

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

Furthermore, in this case there is also additional information, as as stated in the Fundamentals of Law IV, which further facilitates the identification of the victim through his voice, since we are referring to a highly mediated judicial procedure, continuously followed by various media that provide information about the victim, his environment, the violators and the violation suffered.

"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

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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.

VIII

The claimed party indicates in its pleadings to the proposed resolution that it has not violated article 5.1.c) of the GDPR, since "the publication of the The victim's statement was made with full understanding of the legitimacy of the same, since it had been disseminated directly by the judicial body in charge of prosecuting the case, without distortion of the voice of the same or directive

any for news agencies and media in this regard.”

We have already indicated in the Legal Basis VI of this resolution that any processing operation carried out within the scope of the claimed party 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.

In addition, as already anticipated in the Fundamentals of Law IV of the present resolution, it should be noted that "the statement of the victim" is not a personal data in accordance with the definition established in article 4 of the GDPR. The personal data that is the subject of this procedure sanctioner is the voice of the victim, regardless of the content of his statement before the judicial body, a voice that is not necessary to know the content of the narration and, therefore, for the medium to achieve its informative purpose.

Article 5.1.c) of the GDPR does not limit the excess of data, but the need. That is to say, personal data will be "adequate, relevant and limited to the need" for the that were collected, in such a way that, if the objective pursued can be achieved without carrying out excessive data processing, this must be done in any case.

Similarly, recital 39 of the GDPR indicates that: "Personal data only should be processed if the purpose of the processing cannot reasonably be achieved by other media." Therefore, only the data that is "adequate, relevant and not excessive in relation to the purpose for which they are obtained or processed".

If the claimed party had carried out a risk analysis prior to the publication of the information, would have concluded:

- That there was a risk that someone who heard the victim's voice without distorting,

I could identify her.

- That hearing the victim's voice clearly is not necessary for the purpose

informative.

In short, the claimed party has not acted with the required diligence, that of

a professional, since the media are responsible for the treatment of

data of a personal nature, which habitually distort the voice with the purpose of

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that the person speaking is not recognized. In the exercise of his responsibility

proactively, they must know and comply with the regulations on the protection of

data, applying, among them, the principle of data minimization enshrined in the

Article 5.1.c) of the GDPR, which has not been contemplated by the claimed party in the

subject matter of this file.

IX

Finally, the claimed party considers that the amount of the penalty is excessive.

because, in his opinion, the circumstances do not exist for the application of the

aggravating factors used by the AEPD in its initial agreement, while considering

that he has forgotten a series of extenuating factors.

Regarding the aggravating circumstances:

- In relation to the nature, seriousness and duration of the infringement

(article 83.2.a) of the GDPR), the defendant states that the precept that regulates it

states that it will take into account "the nature, scope or purpose of the operation of

treatment in question as well as the number of interested parties affected and the level of

the damages they have suffered."

Whenever (i) the treatment has a clear informative intention, (ii) the number of affected is one, (iii) no damage or harm has been proven that has been produced on the start date of the agreement of the disciplinary procedure, (iv) the complainant did not address ABC at any time, which would have prevented the delay at the time of exposure of the victim's voice and (v) the published video had a virtually zero impact, the claimed party considers that there should not have been applied this aggravating factor.

In this regard it should be noted:

(i) It is irrelevant that the purpose of the means of communication when publishing the video with the victim's voice without distorting the information, because the truth is that with the diffusion of the voice of that one without distorting, it has been put in certain risk of being identified by people who were unaware of their status as victims, a risk that should have been valued by the media and for which it is responsible.

The foregoing is criticized by the claimed party in its pleadings to the motion for a resolution because:

- "So that the voice could have identified the victim clearly and unequivocally

Additional data would have been necessary, which in the present case was not provided."

- "The AEPD is basing its thesis on the certain risk that the victim could be

identified by people who were unaware of their status as victims, which is no more than a conjecture of the AEPD not based on proven facts."

We have already indicated in the Fundament of Law IV of this resolution that the

The voice of any person is personal data and identifies or makes it identifiable unequivocally, at least by the people who make up their closest circle or

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can know it in any way, as well as that it is irrelevant if the additional information has not been disclosed by the requested party or is unknown to it. On the other hand, it is not possible to share the thesis of the defendant regarding that it is a conjecture that there is a certain risk that the victim could be identified by people who were unaware of such a condition, since "certain risk" is one that is "certain, sure and indubitable", that which exists, regardless of whether it has finally caused damage or not. Which means, in the present case, that it is indifferent that whether or not someone has identified the victim through his voice, because the truth is that there was a risk that someone would identify her.

In any case, it must be remembered that the Fundamental Right to Freedom of Information is not, per se, absolute, but is limited by other rights and public liberties. As stated in the Fundamentals of Law VI and will be exposed in the Fundament of Law XIV, it is not about giving prevalence to a fundamental right over another, having to choose which one has more weight in a case specific. If not, rather, to find a balance between the Fundamental Right to Freedom of Information and the Fundamental Right to Data Protection Personal, to achieve the achievement of the purpose of the first without undermining the second, requiring that the communication medium carry out, in any case, a weighting, which does not appear.

(ii) It is true that the number of victims is one. But the circumstance regulated in Article 83.2.a) of the GDPR as an aggravating factor has not considered the number of affected, but the rest of the aspects contained in the mentioned precept, the which are important enough in themselves because of the serious intrusion that has produced in the Fundamental Right to the Protection of Personal Data of a

person who has been the victim of a violent crime and crime against sexual integrity.

(iii) The damage or loss that has been caused to the victim is, as has been said

above, the certain risk of being identified by people who did not know their

condition of victim as a result of the loss of disposition and control over said data

personnel, as indicated in the initiation agreement.

This is criticized by the defendant in its statement of allegations to the proposal of

resolution because "the alleged damage: (i) has not been stated by the victim herself; and

(ii) it has not been investigated since the victim has not at any time been part of

this procedure."

With such an argument it seems that the defendant is meaning that the damage

that must be produced to the victim, for there to be an infraction of the regulations of

protection of personal data, is that it has been identified to

through his voice. And if it is what is intended to be expressed, such thesis cannot be shared

because, as indicated previously, what is important is not whether the risk that

the victim is recognized has materialized or not, but whether there is a risk that

someone listening to the victim's voice without distortion, identify it. That is, it is

regardless of whether or not someone has identified the victim through her voice, because it

The important thing is that there was a certain risk that someone would identify her, which, as

We have already pointed out, it is a particularly serious fact in an event like the one that gives

place for the news

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On the other hand, as indicated in the Legal Foundation V of the present

resolution, it must be remembered that, even without a manifestation of disagreement on the part of the victim, the claimed party has the obligation to respect the relative principles to the processing of personal data contemplated in article 5 of the GDPR, among the that the principle of data minimization is found, and be able to prove it in based on the principle of proactive responsibility (article 5.2 of the GDPR).

(iv) It could be that the exposure time of the video with the voice of the victim without distort would have been less if the complainant had addressed the party claimed and it would have decided to withdraw the video. However, even in that case, the removal of content would not have resulted from a spontaneous action of the claimed party, which is when there really would have been a faster practice more diligent by the media. And, in any case, the performance would have always been after the publication of the video with the voice of the victim.

The video was posted on ***DATE.6, acknowledging the removal of the same on ***DATE.4, the day on which she was notified of the urgent removal order of content. That is, the video with the undistorted voice of the victim was available for a little over a month.

That is, the video with the undistorted voice of the victim was published on the same day that the newsworthy event took place, being available until the AEPD notified the party claimed the aforementioned requirement, which shows that if there had not been had the AEPD intervened, the video would have been available for longer.

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."

In this regard, the defendant, in its pleadings to the proposal for resolution, understands that "the diligent attitude is not only derived from the acts performed on their own initiative, but is also based on speed in the removal of the news as soon as it became known that it was potentially could be committing an illegal act, as well as in the predisposition and collaboration that characterize ABC's attitude throughout the process, and that the AEPD does not seem to have Keeping in mind."

It must be remembered that in this section we are referring to the duration of the infraction, not to the degree of compliance with a requirement of the AEPD, an aspect that will be developed later, since such an argument is also used by the party claimed so that the proposed sanction is mitigated. So it is indifferent,

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regarding the circumstance regulated in article 83.2.a) of the GDPR as an aggravating circumstance, the degree of diligence in responding to requests.

(v) Regarding the practically null impact of the published video, we have already referred to such aspect in the Foundation of Law V.

- In relation to intentionality or negligence in the infringement (article 83.2.b) of the GDPR) indicates the claimed party in its pleadings to the initiation agreement

that "Given the different burden of responsibility that weighs on a modality of action or other, it would be imperative to attribute, in a logical interpretation of the text, to the intentional action the character of "aggravating", and negligence the character, in its case, of "mitigating", concluding that, being the action of ABC negligent, it must be considered the same as a mitigation.

The Guidelines 04/2022 of the European Committee for Data Protection on the calculation of administrative fines in accordance with the GDPR, in its version of May 12, 2022, submitted to public consultation, indicate that "the absence of intention does not equate necessarily to a decrease in severity. In fact, gross negligence constitutes an increase in perceived seriousness, and in other cases negligence could, at best, be considered neutral. On the other hand, in this regard, It should be clear that even if the infringement is unintentional, it can be considered a serious infringement, depending on the other circumstances of the case of cars."

In this regard, it is necessary to cite the Judgment of the National Court of October 17, 2007 (rec. 63/2006), which indicates, in relation to entities whose activity carries out coupled with continuous processing of customer data, that: "(...) the Supreme Court has understood that imprudence exists whenever a legal duty is neglected of care, that is, when the offender does not behave with the required diligence. AND In assessing the degree of diligence, special consideration must be given to the professionalism or not of the subject, and there is no doubt that, in the case now examined, when the activity of the appellant is constant and abundant handling of data from personal character must be insisted on the rigor and exquisite care to adjust to the legal provisions in this regard.

In relation to the aforementioned ruling, the defendant, in its pleadings brief to resolution proposal, reiterates that it acted with the full understanding of

that: (i) the Provincial Court had released the video of the victim's statement with all the necessary guarantees aimed at their protection, and (ii) the Atlas Agency, in prior to the publication of the news, had in turn filtered the contents to verify that the news would be published respecting all the guarantees legal (...).”

We have already stated in the VI Law Basis that any operation of treatment that is carried out within the scope of the claimed party must be attributed only to him, regardless of treatment operations that have been previously carried out by other subjects and that, in no case, exempt you from your responsibility. The media of communication, as managers of the treatment of multiple data that know within the exercise of their journalistic work, they must know and comply with the regulations

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regarding data protection, applying, among them, the principle of minimization of data enshrined in article 5.1.c) of the GDPR.

In the present case, the claimed party has not acted with the required diligence, the characteristic of a professional, since the media are responsible for the processing of personal data that habitually distorts the voice so that the person speaking is not recognized, which is why in

In the present case, the claim of the claimed party of consider his negligent conduct as an extenuating circumstance.

- In relation to the categories of data affected by the infringement (article 83.2.g) of the GDPR, the claimed party, in its statement of allegations to the proposal of

resolution, rejects the voice as a category of data liable to aggravate the sanction, since the voice cannot be equated to other categories of personal data more determining factors for the purpose of identifying the victim. It also considers that the AEPD focuses on the seriousness of the crime committed against the victim and not on the category of personal data processed in that context.

Since in the Fundamentals of Law IV it has already been indicated that the voice of any person is personal data and identifies or makes them identifiable in a way unequivocal, now we are going to focus on the justification of applying the circumstance regulated in article 83.2.g) of the GDPR as an aggravating circumstance.

The initiation agreement states that such application is motivated by "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 for the affected, since what happened is linked to her sexual life." This does not mean that the AEPD focuses on the seriousness of the crime committed, as interpreted by the part claimed, but in the data relative to the fact that the person has been the victim of a violation multiple, which is sensitive data.

A systematic and teleological interpretation of article 83.2.g) of the GDPR connects this precept with other classifications offered by the text of the GDPR that, in addition, respond better to the purpose pursued by the standard: graduating in the individual case the administrative fine that must be imposed respecting in any case the principles of proportionality and efficiency.

In this sense, recitals 51 and 75 of the GDPR distinguish a group of data personal data that, by their nature, are particularly sensitive because of the significant risk that they may entail, in the context of their treatment, for fundamental rights and freedoms. The common denominator of all of them is that their treatment involves a significant risk to the rights and freedoms

fundamental, as it can cause physical, material or immaterial. This group or category of particularly sensitive data includes the categories of specially protected data regulated by article 9 of the GDPR -recital 51 of the GDPR- and, in addition, many other data not regulated in that precept. Recital 75 of the GDPR mentions personal data in detail whose treatment may entail a risk, of variable severity and probability, to the rights and freedoms of natural persons as a consequence of the fact that they can cause physical, material or immaterial damages. Among them he mentions

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those whose treatment “could give rise to problems of discrimination, usurpation identity fraud or fraud, financial loss, damage to reputation, loss of confidentiality of data subject to professional secrecy, unauthorized reversal of the pseudonymization or any other significant economic or social harm; (...) data relating to health or data on sexual life, (...), in the cases in which they are processed personal data of vulnerable people, (...)”.

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, indicate that "Regarding the requirement of take into account the categories of personal data affected (article 83, paragraph 2, letter g) of the GDPR), the GDPR clearly outlines the types of data that deserve a special protection and therefore a stricter response in terms of fines.

This refers, as a minimum, to the types of data referred to in articles 9 and

10 of the GDPR, and to data that does not fall within the scope of these articles

whose dissemination causes immediate damage or difficulties to the interested party.” immediate damage that, in the present case, it is the certain possibility of recognizing the victim of a crime violent and against sexual integrity (multiple rape).

But the claimed party, in its pleadings to the proposed resolution, states that "it is not considered proven that the publication object of the present requirement has caused real harm to the victim."

As we have already said, the damage that has been caused to the victim is the certain risk that someone hearing the victim's voice without distorting, the identify. Risk that occurs in a certain way with the publication and dissemination of the victim's voice

Regarding the mitigating factors, the defendant points out that they should be taken into account the following:

- Article 83.2.b) of the GDPR, taking into account the lack of intentionality of cause any harm with his action.

It has already been indicated above that what has really occurred is a lack of due diligence, so such mitigation cannot be applied.

- Article 83.2.d) of the GDPR, "because their degree of responsibility must be understood in the context of the chain responsibility that derives from the communication of the personal data of the victim by the Provincial Court of ***LOCALIDAD.1, who first collected the data and distributed it to the media, as well as by the Atlas Agency, both responsible for the treatment and subject to the data protection regulations."

The precept whose mitigation the defendant intends to apply, refers to the "degree of responsibility of the controller or processor, taking into account of the technical or organizational measures that have been applied by virtue of the

articles 25 and 32".

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Since the claimed party is responsible for the content that is published on your web page, your assertion that an automated dumping is produced by of a news agency on such a web page, without the claimed party being able to decide which news and which materials are published and which are not, reveals a total absence of adoption of technical and organizational measures in order to comply with the principles of data protection, which also result in a lack of design of the treatment, which is regulated in article 25 of the GDPR.

For this reason, it was agreed to practice as evidence to request the defendant to indicate, among other things, what technical or organizational security measures had implemented to guarantee that only data personal data that are necessary for each of the specific purposes of the treatment.

The respondent party in its brief of June 14, 2022 stated in this regard that "the Logic says that the measures to be implemented are those dictated by the body jurisdiction that has recorded the content and has disseminated it to means, since it cannot be assumed that someone who has known the facts first hand, has prosecuted them and has considered their dissemination legitimate, especially in the case of a special ascending entity such as a court, to which presupposes diligence and care in all its performance.

In addition to the measures originally adopted by the Provincial Court of

***LOCATION.1, there is a second filter, which is the one carried out by ATLAS when

prepare the contents that it distributes through its service to verify that the

The news is published respecting all legal guarantees, as part of the agreement of

provision of informative content subscribed with its clients.”

It has already been indicated in the Foundation of Law VI that the actions carried out

both by the Provincial Court and by the news agency respond to other

treatments, with their own risks and security measures, not exempting

liability to the claimed party. But neither can they be considered mitigating

in the present case, because what is clear is that the defendant has not

implemented any technical or organizational measures to prevent the spread of the word

of the victim on its website, and therefore, comply with the principle of

data minimization of article 5.1.c) of the GDPR.

- Article 83.2.e) of the GDPR, "while ABC has always demonstrated a

due diligence in the processing of personal data that it processes as

responsible, not having been previously sanctioned by the AEPD.”

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”.

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- Article 83.2.f) of the GDPR, "due to ABC's prompt action before the requirement to adopt provisional measures, as well as the absolute and total ABC's cooperation with the AEPD throughout the procedure."

The degree of cooperation with the Agency cannot be considered as a mitigation either. since the withdrawal orders that it issues are mandatory in accordance with the provisions of article 69 of the LOPDGDD. The consideration of the cooperation with the Agency as mitigation, as claimed by the claimed party, is not linked to any of the cases in which there may be a collaboration or cooperation or requirement by reason of a legal mandate, when the actions are due and required by law, as in the case at hand, being indifferent to the degree of diligence in responding to requests.

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 "it must be considered that the ordinary duty of cooperation is mandatory and therefore should be considered neutral (and not a mitigating factor)."

This is confirmed in the CEPD Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679, adopted on 3 of October 2017, in which it is stated that "That said, it would not be appropriate to have In addition, take into account the cooperation that the law requires; For example, in any case requires the entity to allow the control authority access to the facilities to conduct audits or inspections.

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 in this case.

The claimed party ends its pleadings to the proposed resolution mentioning the resolution to archive the actions of the AEPD in the file EXP202100646, related to a "case of circumstances similar to those that are being prosecute, but whose result differs greatly from the proposed resolution disciplinary action against ABC".

The claimed party indicates that "In the indicated file, the the AEPD the publication of data that identifies the victim of a crime of rape in various web spaces, including the digital newspaper Ediciones y Publicaciones el Good Air, S.A. The AEPD carries out, among other actions, a request to said newspaper requesting the withdrawal of the article published on its website or, failing that, the anonymization of the data in such a way that the victim could not be identified direct or indirect way. Having made the request, without specifying the date of such action, the AEPD verified on March 28 that "it no longer appears the identification of the victim in this article", proceeding, thus, to the file of the performances."

Article 47 of the LOPDGDD states that "It corresponds to the Spanish Agency for Data Protection supervise the application of this organic law and the Regulation

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(EU) 2016/679 and, in particular, exercise the functions established in article 57 and the powers provided for in article 58 of the same regulation, in this law

organic and in its development provisions.”

Within the powers of article 58 of the GDPR is, in section 2.i), the

to “impose an administrative fine pursuant to article 83, in addition to or instead of

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

particular case;”.

If we turn to the aforementioned article 83 of the GDPR, we note that its section 1

indicates that “Each control authority will guarantee that the imposition of fines

administrative proceedings under this article for violations of this

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

effective, proportionate and dissuasive.” (underlining is ours).

The Guidelines 04/2022 of the European Committee for Data Protection on the calculation

of administrative fines in accordance with the GDPR, in its version of May 12,

2022, submitted to public consultation, state that “a dissuasive fine is one that

it has a genuine deterrent effect. In this respect, a distinction can be made between

general deterrence (dissuading others from committing the same offense in the future) and the

specific deterrence (dissuade the recipient of the fine from committing the same offense again)

infringement). When imposing a fine, the supervisory authority takes deterrence 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.”

In the case of file EXP202100646, the AEPD decided to file the proceedings

since, as indicated in the Judgment of the Supreme Court, Third Chamber, of what

Administrative Litigation, 708/2017, of April 25 (rec. 606/2016), "Indeed,

The Administration enjoys a margin of discretion when deciding whether to initiate

or not a disciplinary procedure (...)".

But it is clear that such an archive of actions has not had a dissuasive character, since

Subsequently, the claimed party has published in its digital newspaper the content of the

statement of the victim before the judge without distorting his voice, which is a

violation of article 5.1.c) of the GDPR, typified in article 83.5.a) of the GDPR.

In such a way, that the imposition of a sanction on the party claimed for violation of the

article 5.1.c) of the GDPR is not only in accordance with the aforementioned article 83.1

of the GDPR, but also with article 29.2 of Law 40/2015, of October 1, on

Legal Regime of the Public Sector, which, in relation to the principle of

proportionality of the sanctioning power, indicates that "The establishment of

pecuniary sanctions must provide that the commission of the typified offenses does not

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is more beneficial to the offender than compliance with the rules

infringed."

Sense in which the Third Chamber, of Contentious-

Administrative Court, of the Supreme Court in its judgment of May 11, 2006 (appeal

of appeal 7133/2003): "It must also be taken into account that one of the criteria

governing the application of said principle administrative penalty regime (criterion

collected under the rubric of "principle of proportionality" in section 2 of the

Article 131 of the aforementioned Law 30/1992) is that the imposition of pecuniary sanctions

It should not be assumed that the commission of the typified offenses is more beneficial to the offender than compliance with the rules violated”.

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

claimed to the initiation agreement.

X

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,

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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.

eleventh

This procedure is initiated because the claimed party published, on the website

referred to in the facts, the audio of the statement before the judge of a victim of a

multiple rape, to illustrate the news regarding the holding of the trial in a case

that was very mediatic. The victim's voice was clearly appreciated when recounting

with all the crudeness of details the multiple rape suffered. All this constitutes a processing of personal data of the victim.

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

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");"

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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.

twelfth

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".

XIII

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.

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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);".

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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

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consisting of the disclosure of information about his private life that he had not consented to make public." (underlining is ours).

As we can see, a clear reference is made to the excessive treatment of

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

fourteenth

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

Thus, it is not a question, as in other cases examined by jurisprudence, of endowing of prevalence to a fundamental right over another, having to choose which one has more weight in a specific case. If not, rather, to find a balance between both to achieve the achievement of the purpose of the first without undermining the second.

The reconciliation of both rights is nothing new, since the legislator European Union mandates such reconciliation in article 85 of the GDPR.

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

We must consider the special circumstances present in the supposed examined. It is about a woman (...) who has suffered a multiple rape. In the

published recording, she is heard recounting, with great emotional charge, the aggression sexuality suffered in all crudeness, narrating (...).

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

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

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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

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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".

fifteenth

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

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

If we add the diffusion of the victim's voice (with all its nuances), which makes it identifiable and can be recognized by third parties, with the factual account that makes in relation to the violation suffered, there is a very high and very likely risk that may suffer damage to their rights and freedoms. This has happened in other cases

of dissemination of personal data of victims of rape crimes. And this, in addition to that with the diffusion of the voice of the victim she is being sentenced again to can be recognized by third parties, when it is not a proportional treatment or necessary in relation to the information purposes pursued.

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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:

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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.

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- 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 media, it is concluded that it was

especially negligent in not ensuring a procedure that guaranteed the

protection of personal data in such sensitive circumstances, especially

when on many occasions the voice in the news is distorted in order to

that the person speaking is not recognized.

- 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

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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 DIARIO ABC, S.L., with NIF B82824194, for an infraction of Article 5.1.c) of the GDPR, defined in Article 83.5 of the GDPR, a fine of 50,000.00 euros (FIFTY THOUSAND euros).

SECOND: Confirm the following provisional measures imposed on DIARIO ABC, 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 DIARIO ABC, 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

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

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

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

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

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

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

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

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

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

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

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

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

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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-](https://sedeagpd.gob.es/sede-electronica-web/)

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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