 File No.: PS/00196/2022

RESOLUTION OF SANCTIONING PROCEDURE

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

to the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the claiming party), dated ***DATE.1,

filed a claim with the Spanish Data Protection Agency. The

The claim is directed, among others, against EL DIARIO DE PRENSA DIGITAL, S.L. with

NIF B86509254 (hereinafter, the claimed party or elDiario.es). The reasons on which

The claim is based on the following:

The complaining party reports that several media outlets published on 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 provides the links to the news published in the

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

***URL.1

On ***DATE.2, a new letter sent by the complaining party is received

stating that he has been able to verify that there are means that have eliminated that

information, although it accompanies publications made by some media

communication on Twitter where it is still available.

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

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

THIRD: The General 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 where it was possible to

hear the victim's voice without distortion. For all data controllers,

issued, with dates of ***DATE.4 and ***DATE.5, precautionary measure of urgent withdrawal

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

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

These extremes could be verified in relation to EL DIARIO DE PRENSA

DIGITAL, S.L. with NIF B86509254:

***URL.1

On April 5, 2022, this Agency received a letter sent by this

entity stating that they have immediately withdrawn the video,

making it impossible to access or dispose of it by third parties.

FOURTH: On May 6, 2022, the Director of the Spanish Agency for

Data Protection agreed to initiate disciplinary proceedings against the claimed party,

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

of the Common Administrative Procedure of Public Administrations (in

hereafter, LPACAP), for the alleged infringement of article 5.1.c) of the GDPR, classified as

in article 83.5 a) of the GDPR.

The aforementioned start-up agreement, in accordance with the rules established in the LPACAP, was notified to the claimed party on May 9, 2022.

FIFTH: With the registration date of May 20, 2022, the party

The defendant requested a copy of the file, as well as suspension of the deadlines for the submission of pleadings.

On May 20, 2022, the file was forwarded to the defendant, granting the

At the same time, extension of the term to present allegations.

SIXTH: With the registration date of May 23, 2022, the claimed party

requested transfer of the complete administrative file and that it be granted

extension of term for the presentation of pleadings.

In a letter dated May 26, sent on May 30, 2022, it was sent to the

claimed party the proof of entry registration corresponding to the letter

submitted by the complaining party on ***DATE.1 and a new extension was granted

deadline for filing claims. As for the rest of the documentation

sent, it was indicated that the documentation sent allowed to know the evidence,

that, with respect to that part, provided the AEPD.

SEVENTH: The claimed party submitted a pleadings brief on May 27,

2022. In said letter, Diario.es begins by raising a question of nature

formal:

“(…). On May 19, 2022, access to the file was requested and by resolution

tion of May 20 of the current year we are given a partial transfer of the file, extended

extending the term to make allegations in 5 more days from the day after the

expiration of the first period of allegations. It is expressly stated that

Having requested on May 23, 2022 new access to the complete file,

said request has not been attended to.”

The rest of the allegations made are summarized below:

1. The voice as personal data

The brief of allegations includes several references to the voice as information of

personal character:

"The debate should not be discussed or focused on whether there has been identification of the victim

through some plane of his face or figure, nor should the diffusion

of the personal data of the victim such as name and surname, since they are

circumstances that simply did not occur. Regarding the reference

of the victim's place of residence, it is provided by the parents themselves in

interview granted to the television program in the year XXXX, which was indicated in the

previous allegation.

The controversial fact is whether the diffusion of the victim's voice makes it

identifiable (…).”

The statement of allegations also states:

“(…). The debate must focus on the protection of the voice, as personal data

personnel, according to its definition in article 4.1 of the General Regulation of

Data Protection (hereinafter, GDPR) and if the treatment carried out by means of

communication, eldiario.es, was correct, taking into account the right to

information that is exercised, in its double aspect (freedom of action and the right

of all citizens to receive truthful information, as a development of public opinion

free)."

In relation to the voice and the weighting carried out by the Court, the following stand out:

"4. In this balancing exercise, the Tribunal, in full exercise of its function

jurisdiction, has considered not imposing further limitations on the dissemination of this

judicial information, that is, the court has considered it appropriate not to distort the voice

of the victim in his statement."

Likewise, the brief of allegations indicates:

"In another order of things, the Agreement itself that initiates this procedure

sanctioner collects in its first fact that the diffusion of the voice served to "illustrate

a piece of news related to the holding of the trial in a case that was highly covered by the media". (he

highlighted is ours)."

On the other hand, in the pleadings brief, after referring to the interview

granted by the parents of the victim in "***PROGRAM.1", it is stated:

"So, with these data, provided by the family itself, in the town of

***LOCATION.1, (...), and the convulsion generated in the population by these events

occurred, the victim could be identifiable by known people or by their closest environment

nearby.

This is not the case for any reader of the media outlet eldiario.es or

any viewer of the television network who is not from the closest environment

of the victim, since the voice of the victim or that of the parents are not elements

enough to make it identifiable, since there is no doubt that the voice did not

it is as determining an element as a facial feature could be." (underlining is

our).

The first section of the pleadings brief concludes:

"Consequently, and for all the reasons cited in this allegation, the

inclusion of the voice in the journalistic publication has been the subject of treatment

complying with the obligations set forth in the GDPR, and in accordance with the provisions of the

Article 6 of the aforementioned law, so there should not be any reproach to his actions,

especially considering that it is the judicial body itself that gives direct access to

judicial information, having carried out the previous weighting on the content

that can spread. Thus, the court considered that the only limitation was that

the institutional signal will be oriented to the ceiling of the room."

***CCAA.1

2. The data controller is the Superior Court of Justice of

:

"(...) there is no doubt that the data controller is none other than the Court

Superior Justice of ***CCAA.1 who is the one who distributed the images object of the

present procedure for its disclosure and, therefore, it will be before said body

jurisdiction before whom any type of responsibility must be sought if the

there was or, failing that, whose disclosure decision, without further limitations, should have been

contested in due time and form.

In short, in the case at hand, we can extract the following facts and

conclusions:

1. The image and sound provided by the Communication Office was institutional.

2.The camera points to the ceiling, in such a way that there is no shot of those who

are involved in the statement.

3. The Court has previously weighed the right to privacy of the

victim and the right to information, hence the camera records the ceiling.

4. In this balancing exercise, the Tribunal, in full exercise of its function

jurisdiction, has considered not imposing further limitations on the dissemination of this judicial information, that is, the court has considered it appropriate not to distort the voice of the victim in his statement.

5. Given that the court has carried out the weighting between the merited rights, without consider that there are more limitations to the dissemination of information than the recording of the statement with a plan of the ceiling of the Chamber, there is no resolution court under Article 6 of the GDPR.

6. This absence of major limitations is evident in the decision of the Tribunal: it has been carried out taking into account that it was a hearing or a judgment of great public repercussion and that the only recording of the hearing was the institutional one, that is, there was no other media recording the trial and only the recording of the Court exists. Consequently, responsibility for excessive treatment cannot be attributed to the environment. eldiario.es, by maintaining the real voice of the victim in the video disclosed, because in all case the media has respected the principles contained in article 5 of the GDPR, also understanding that it is of vital importance what has been the basis

law legitimizing the treatment. As we say, by virtue of the provisions of the Article 6 e) and f), there has been express authorization from the Court, who consideration of the victim's right to privacy and the right to information, has The dissemination of this specific judicial action was considered lawful and timely, despite the public repercussion of the matter, without further limitations."

In addition, the pleadings brief states:

“In conclusion and in relation to the diffusion carried out by EL DIARIO DE PRENSA

DIGITAL S.L, it is not up to this or any other means of communication to make

no limitation on the dissemination of what happened in the Chamber of Justice, since it is at

Court through reasoned resolution to whom corresponds to limit the right

essential to receive truthful information. Such is the case, that as can be seen in the

video file released to the media by the state news agency EFE, and which

among others published EL DIARIO DE PRENSA DIGITAL S.L, the camera offers a shot

from the ceiling of the hearing room, which shows that the Court, whom in the

exercise of the judicial function corresponds to carry out the weighting of

fundamental rights, has already done so, considering that the image of the victim

that is deposing in the act of trial is the timely limitation of the

right to information, with nothing more to restrict the public act that

constitutes the Oral Trial.”

Finally, by way of conclusion, in the statement of allegations, it is indicated:

"In conclusion and for all the above, we remember that judicial proceedings are

public, with exceptions and the right to freedom of information is not compatible

with a general prohibition of access, therefore, in the present case, having

the judicial body carried out the opportune examination, in accordance with the requirements of the

principle of proportionality and weighting, considering that it should not limit

access to the information of this judicial action in any other way, so it is not

there should be some reproach regarding the action carried out by means of

communication."

3. Legality of the treatment carried out by elDiario.es.

The statement of allegations analyzes the content of article 6 of the GDPR and indicates:

"In the case at hand, the requirements contained in sections e) and

f) of article 6 of the GDPR, in such a way that the treatment carried out is lawful, without

the Agency to which we are addressing has observed these prescriptions."

In another section of said letter it is highlighted:

"On the one hand, in what refers to the" fulfillment of a mission carried out in the interest public" referred to in the first of these assumptions included in the aforementioned article, it is evident that the exercise of the right to information (20 CE), in relation to the principle of publicity of Justice, constitutes an activity, in addition constitutionally protected, carried out in the general public interest.

The same should be said with regard to the concurrence of the assumption included in the following section of the same article, (…)"

"In this sense, as has been indicated throughout this document, the right to information, is a fundamental right included in article 20.1.d) EC, which is is linked to the principle of publicity of justice (120 CE) that establishes the publicity of judicial proceedings, with the exceptions provided by the laws of procedure.

The link between freedom of information and the principle of publicity was established, from the outset, by constitutional jurisprudence (SSTC 30/1982 and 13/1985), considering that procedural publicity is immediately linked to the subjective positions of citizens, who have the status of rights Fundamentals: the right to a public process of article 24.2 of the Constitution and the right to freely receive information. The right to a public trial is a an unavoidable requirement in democratic systems since publicity allows

that the judicial activity can be known by the citizens, thus, both the Power

Judiciary and the media play a key role in the

Spanish constitutional model based on its conformation as a State

democratic rule of law, since effective control cannot be carried out by the

public opinion of the Judiciary without publicity of the procedure.

Based on the foregoing, it is more than evident that the treatment of the data by

of EL DIARIO DE PRENSA DIGITAL S.L is lawful in light of article 6 of the GDPR."

4. Freedom of information and right to privacy and right to data protection

of a personal nature

At the beginning of the statement of allegations it is stated:

"In order to address the problem at hand, it is necessary to indicate that we are

Faced with a conflict between two fundamental rights, between the right to privacy and the

right to freedom of information and expression."

In a section of the pleadings, freedom of information is analyzed in

relation to the right to privacy and the right to one's own image, concluding:

"(...) the interference in the fundamental rights of third parties resulting from the exercise

of the freedom of information will be legitimate to the extent that the affectation of said

rights is adequate, necessary and proportionate for the realization

constitutional right to freedom of information."

Subsequently, it examines the limits of said rights and highlights:

"In the present case, it is unquestionable that the information transmitted is

truthful and has obvious public significance. Likewise, it is unquestionable that the

informative treatment by the media eldiario.es has been absolutely

respectful towards the victim, by not providing any personal information about the victim or exceeding

the informative end in its diffusion. The disclosure of the voice has been allowed by the

judicial body, without imposing further limitations, and it is also necessary to take into account

account that the video has been disseminated by a multitude of media with same treatment. In short, if the victim is identifiable, it will be due to the concurrence of other circumstances, such as the interview granted by the own parents, in which their voice is equally recognizable, having given their express consent for this purpose or for the data that in said interview are offered voluntarily, such as the place of residence of your daughter."

The pleadings document analyzes the informative interest and public relevance of information:

"The controversial fact is whether the diffusion of the victim's voice makes it identifiable and if the treatment carried out by the communication medium is lawful. In this sense, we reiterate once again that there should be no discussion at this in this regard, since there is no limitation agreed in this regard by the judicial body, not being able to question the informative interest and the public relevance of this information."

It also indicates:

"Indeed, the judicial process that gives rise to numerous publications reports on the case was enormously mediatic.

In recent years, this type of crime against sexual freedom has been gaining visibility, a presence that became very necessary, in which the media communication have collaborated, in their function of disseminating information and formation of public opinion, as it is a crime deserving of a high

social reproach.

In the case at hand, and due to this need for visibility of the crime, they have been

multiple journalistic publications on the criminal case in question. In them, it

has disclosed, for example, the age of the victim or the town where the victim resides

victim, in a social context in which sexual assaults practiced in groups

have become recurring offences, which have been discussed in the

majority of the media, and several members have even referred to it

of the government. (…)”

"(...), the victim's parents even granted a personal interview in

television, in “***PROGRAM.1”, in ***CHANNEL.1. This television space is the leader of

audience in “day time” format.

“In this interview given on ***DATE.6 two years before publication

of the video of the trial by eldiario.es, the parents hide their faces, which appear

shadowed, although the voice of both the victim's father and mother is

absolutely recognizable. This information removes them from anonymity automatically.

Parents have given their consent to broadcast their voice without distorting,

offering in said interview other relevant data for the purposes of data protection,

What is the locality - ***LOCATION.1- where his own daughter and victim of the crime reside?

crime against sexual freedom.”

In the pleadings, he questions that the start-up agreement may consider

excessive treatment of the victim's voice:

(...) as we have seen, the treatment carried out is lawful in accordance with those established by

the GDPR itself, despite the argument that "they were excessive for the purpose for

which they were treated". This criterion, contrary to that established by our Court

Constitutional in STC 57/2004, of April 19, already mentioned.

It is evident, in view of its jurisprudence, that it is the Constitutional Court

who does not make any distinction between the written press and the audiovisual media,

who are allowed to capture images and sound during the sessions of the

judgment.

On the same idea, the same STC 57/2004, of April 19, deepens when

states that the right to information, in relation to audiovisual media,

that both the capture and the dissemination by audiovisual media of image and sound

in the act of the Oral Trial are constitutionally protected ex article

20.1 d) CE, forming part of the same fundamental right."

"It should be remembered that the fundamental right to information is a double right.

slope: it is the means of communication that exercises it and conveys it to the

citizens and public opinion, who are the true holders of these rights in

for the proper functioning of a democratic system.

Taking all of the above into account, it is true that as we said and thus expresses

the Constitutional Court, there are a series of dangers and circumstances that can

limit access to public judicial hearings by the media and

even if they are held behind closed doors, although whenever this happens, at

If it is a limitation of the right to information, it must be done through

a reasoned resolution in which the weighting of rights is argued

carried out and what or what are the reasons, risks or rights to be protected.

It is already a consolidated question that the Chambers of Justice, in the exercise of their

jurisdictional power, who must carry out this weighting of rights and

criteria."

"In the case at hand, the judicial body, in accordance with the requirements of the principle of proportionality and balancing, decided not to limit the exercise of the freedom of information, distorting, for example, the voice of the victim in his statement in the act of oral trial.

In conclusion and in relation to the diffusion carried out by EL DIARIO DE PRENSA DIGITAL S.L, it is not up to this or any other means of communication to make no limitation on the dissemination of what happened in the Chamber of Justice, since it is at Court through reasoned resolution to whom corresponds to limit the right essential to receive truthful information. Such is the case, that as can be seen in the video file released to the media by the state news agency EFE, and which among others published EL DIARIO DE PRENSA DIGITAL S.L, the camera offers a shot from the ceiling of the hearing room, which shows that the Court, whom in the exercise of the judicial function corresponds to carry out the weighting of

fundamental rights, has already done so, considering that the image of the victim that is deposing in the act of trial is the timely limitation of the right to information, with nothing more to restrict the public act that constitutes the Oral Trial.

It is not appropriate nor is it for EL DIARIO DE PRENSA DIGITAL S.L to carry out weighting of rights and limit the right to information whose owner is the general public."

5. Administrative cooperation

"The good faith of the company is duly accredited as long as in the same

day that it receives the agreement to adopt a provisional measure, it proceeds to

the immediate withdrawal of the video, as well as to respond to that Agency,

placing himself at the entire disposal of the same."

6. Violation of the principle of equality:

"(…). All discrimination violates the principle of equality: inequality devoid of

an objective and reasonable justification constitutes discrimination contrary to

Right.

Therefore, given the consideration regarding the right to information and its

limitations in the act of the Oral Trial that has been carried out by the supreme interpreter of the

constitutional text, as well as the consideration of legality of treatment

established in the GDPR itself in article 6, sections e) and f) when it is

carried out for the satisfaction of legitimate interests by the data controller,

It is not appropriate to impose any sanction on EL DIARIO DE PRENSA DIGITAL S.L for the

fulfillment of its constitutional function as a vehicle of the right to information.

In short, there has been on the part of EL DIARIO DE PRENSA DIGITAL, S.L., the

intention to comply at all times with the regulatory framework applicable to the

present case and it is from this perspective that we understand that they should

interpret the events that occurred.

For this reason, it seems to us clearly unfair, and that it violates the principle of equality, for

how much the company, even complying with the data protection guidelines, is seen

obliged to defend itself against a possible sanction, at least disproportionate,

understanding that the fairest measure is to render this agreement null and void.

initiation of disciplinary proceedings and the present sanction proposal."

7. Violation of the principles of typicity and proportionality:

(...), we understand that the proposed sanction would be inadmissible, since it would violate

the principle of criminality because the sanction could never be classified as very serious,

but as light, since we understand that, taking into account the criteria followed, in order to

to determine any possible sanction (that is, degree of culpability or the existence

intentionality, continuity or persistence in the infringing conduct, nature of

the damages caused and recidivism, by commission of more than one infraction of the

of the same nature, when it has been so declared by final resolution in the

administration), in the case at hand:

1. There has been no intentionality in the action, since as has been

accredited at all times, it has been intended to comply in the strictest manner

possible with a respectful informative treatment, without generating a headline that could

be sensationalized The media has limited itself to disseminating material

information provided by the judicial body itself, after analyzing and weighing the

limitations, based on the principle of proportionality.

2. The outlet proceeded to immediately remove the video, on the same day that the

AEPD requested it as a precautionary measure, also providing all possible collaboration

to that agency.

3. No harm has been caused. It must be taken into account that the victim of the

crime, in the event that his identity may have been exposed, consented to

that his parents gave an interview on television, offering data such as the

place of residence of the same, and agreed to publish their own voices.

The proportionality between the administrative activity and the public purpose to which it must responding assumes that the means used correspond to the results, without that these exceed public needs, adopting the intervention technique less aggressive.

The fact of having an express authorization from the Court itself that allows the dissemination of the video that is the subject of this file is sufficient reason to annul the agreement to initiate disciplinary proceedings and the proposal of sanction.

This principle of proportionality operates in accordance with article 25 of the Constitution, forcing the existence of a norm that typifies the sanctions."

"In the present case, the damage entailed by the sanction proposal for this party interested party is, to a greater extent, superior and more burdensome than the public interest to whose purpose the public administration attends, above all. Damage that, with due respects, we request that you be valued again by that Excmo. organism, after an improvement and subsequent null effect of the sanction proposal received.

We understand that in the case at hand, the sanction is neither adjusted nor to the alleged seriousness of the alleged act constituting an infringement is neither suitable nor it is necessary."

He then questions whether the infringement is considered very serious, as well as the concurrence of different aggravating circumstances.

The brief of allegations concludes with the request for the taking of evidence:

"What is the interest of whoever signs the opening of a probationary period in order to demonstrate the non-existence of acts carried out by eldiario.es that constitute

any administrative infraction, for the proof of the same, the undersigned tries to

use the following evidence:

- A communication is issued to the Press Office of ***COURT.1, in relation to the oral trial

followed before the *** COURT.2 to report on whether in the matter known as

case of the so-called "***CASE.1", as it is a particularly vulnerable victim,

due to the nature of the crime, if the signal that they applied – and that they apply in situations

similar, was the institutional. If, for this reason, they did not issue an order on limitations to the

there is no restriction on public access, but only a limitation of dissemination

from image.

- A letter is issued to ***COMPANY.1, with address at ***ADDRESS.1, so that

provide the full video of the interview with the victim's parents last day in

date ***DATE.6 in ***PROGRAM.1: ***URL.2."

EIGHTH: On October 6, 2022, a resolution proposal was formulated,

proposing:

"FIRST: That by the Director of the Spanish Data Protection Agency

penalize EL DIARIO DE PRENSA DIGITAL, S.L. with NIF B86509254, for one

infringement of Article 5.1.c) of the GDPR, typified in Article 83.5 a) of the GDPR, with

a fine of €50,000 (fifty thousand euros).

SECOND: That by the Director of the Spanish Data Protection Agency

confirm the following provisional measures imposed on EL DIARIO DE PRENSA

DIGITAL, S.L. with NIF B86509254:

- 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 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: Notification of the proposed resolution in accordance with the established norms in the LPACAP, the claimed party submitted a written statement of allegations to the proposal of resolution on October 21, 2022.

Said letter is divided into the following sections:

1. Regarding the lack of access to the file.

2. In relation to the protection of the voice as personal data.

3. About the responsibility of the treatment.

4. On the necessary balance of the right to data protection with the Right to information.

5. On the violation of the principle of equality.

6. On the violation of the principles of proportionality and classification of the infringement.

7. Violation of effective judicial protection due to lack of motivation in relation to the inadmissibility of the test.

1) Regarding the lack of access to the file :

ElDiario.es highlights that they have been given partial transfer of the file and that, despite

having requested new access to the complete file, said request has not been

attended.

In his opinion, the motion for a resolution refers to the arguments contained

in the brief of May 20, 2022, by which access to the file was granted

without detailing the reasons for the protection of public safety, of

criminal, administrative or disciplinary investigation, nor of economic and

commercial or professional secret or intellectual and industrial property.

The claimed party emphasizes that it has not had access to the briefs presented by the

claimant on dates ***DATE.1 and ***DATE.2, of which they have not been sent

copy, limiting the AEPD to sending the receipt of the presentation. ElDiario.es

emphasizes that the content and grounds alleged in said writings result from

undeniable importance for said means of communication, in order to exercise their right

defense with full guarantees.

Next, it cites articles 53 and 70.2 of the Administrative Procedure Law.

The defendant affirms that the fact of not having been able to access the file

complete, without having justified said deprivation, supposes a flagrant defenselessness and

may, in case of non-compliance or non-satisfaction, be grounds for sanction

administrative or even judicial for the entity that denies your access. manifests his

strangeness, having been deprived of such an elementary right, without the slightest

duly reasoned justification.

It considers that the reference to article 5.1.b) of the GDPR formulated by the AEPD to

Denying access to the entire file is inappropriate. Add that bliss

interpretation contravenes the provisions of article 41.2 second paragraph of the Charter

of the Fundamental Rights of the European Union, which must be related

with those provided for in articles 12.2, 15 and 16 of said Charter.

In the opinion of said means of communication, the restriction of access to the integrity

of the file affects the right of defense in its material aspect, referring to the

Judgment of the CJUE (Sixth Chamber) of June 4, 2020, relapsed in case C-

430/19.

2) In relation to the protection of the voice as personal data.

ElDiario.es states:

There is no doubt about the character of the voice as identifying data of the

person,(…)

“The consideration of the voice as personal data is therefore out of the question. He

debate should focus rather on the protection of the voice, as defined

in article 4.1 of the General Data Protection Regulation (hereinafter,

GDPR) and if the treatment carried out by the communication medium, eldiario.es, was

correct, taking into account the right to information that is exercised, in its

double aspect (freedom of action and the right of every citizen to receive

truthful information, such as the development of free public opinion).”

However, in its allegations to the resolution proposal it also indicates:

“(…). The voice, by itself and without any supplementary data, could not be a means

clearly identifying the person and thus, in any case, was considered by the person responsible

of data processing by indicating that only the ceiling of his room was filmed

jurisdiction, without further limitation. (…)”,

“When we say that the victim could be identifiable by known people or by their

closest environment we are not referring, then, to his voice (no reader of the media

communication eldiario.es or any viewer of the television network that is not

of the closest environment of the victim can recognize neither the victim nor his parents

by the voice, since the voice is not as determining an element as it could be a

facial feature), but we are referring to the data provided by their parents in said

interview, as is the locality, an extreme in no case would have been disseminated by

eldiario.es accompanying the undistorted voice of the victim or her parents. No

It is appropriate, therefore, that this Agency alleges that we admit that the victim may be

recognized for her voice, a clearly insufficient element in the media

but we stress that such identification would be completely impossible for

readers of eldiario.es or viewers of ***CANAL.1 without specifying

more information such as, unfortunately, the specific location of the victim."

"(...) and when the victim's voice is personal data that, without being related

with other data not provided by this medium (such as its location or the voice of its

parents), cannot be considered as sufficient element for identification by

part of the readers of the medium."

3) Both in the pleadings to the start-up agreement and in the pleadings

allegations to the proposed resolution elDiario.es affirms that the person in charge of the

***CCAA.1

treatment is none other than the Superior Court of Justice of

.

In the brief of allegations to the resolution proposal, it reproduces the content of

articles 236 bis, 236 ter of the LOPJ, stating below:

"And only, according to article 236 quater, "when the treatment is carried out for purposes not

jurisdictions, the provisions of Regulation (EU) 2016/679, Law

Organic 3/2018 and its development regulations", that is, it can be understood (only in

this case, far from the one at hand) that the person responsible may eventually be another

than the court on which the case falls.

It is therefore impossible to conclude as this Agency does in its Resolution Proposal

that "the data processing carried out by the judicial body and the media

communication are different, not being the subject of this procedure the first

of them", when precisely the LOPJ explicitly determines the bodies

courts as sole controllers of personal data processing

when the purposes of said treatment, as is the case, are jurisdictional.

Understanding otherwise would mean ignoring the function that the LOPJ attributes to the organs

courts in cases such as this, outside of whose responsibility,

We understand that any legal asset to be protected must at least come together, and

adapt to the existence of the fundamental right to information.

In the case at hand, we can draw the following facts and conclusions:

1. The image and sound provided by the Communication Office was institutional, it is

that is, processed for jurisdictional purposes.

2. The camera points to the ceiling, in such a way that there is no shot of those who

are involved in the statement.

3. The Court has previously weighed the right to privacy of the

victim and the right to information, hence the camera records the ceiling.

4. In this balancing exercise, the Tribunal, in full exercise of its function

jurisdiction, has considered not imposing further limitations on the dissemination of this

judicial information, that is, the court has considered it appropriate not to distort the voice

of the victim in his statement.

5. Given that the court has carried out the weighting between the merited rights, without consider that there are more limitations to the dissemination of information than the recording of the statement with a plan of the ceiling of the Chamber, there is no resolution court under Article 6 of the GDPR.

6. This absence of major limitations is evident in the decision of the Tribunal: it has been carried out taking into account that it was a hearing or a judgment of great public repercussion and that the only recording of the hearing was the institutional one, that is, there was no other media recording the trial and only the recording of the Court exists. Consequently, responsibility for excessive treatment cannot be attributed to the environment. eldiario.es, by maintaining the real voice of the victim in the video disclosed, because in all case the media has respected the principles contained in article 5 of the GDPR, also understanding that it is of vital importance, in addition to having demonstrated the identity of the data controller (the judicial body), determine what has been the legitimizing legal basis of the treatment.

As we say, by virtue of the provisions of Article 6 e) and f), there has been express authorization of the Court, who after considering the right to privacy of the victim and the right to information, has considered lawful and timely the dissemination of this specific judicial action, despite the public repercussion of the matter, without further limitations.

But, what is more, it seems that the present sanctioning procedure is

doing is questioning the jurisdictional function and, also, the guardianship of the Court

Superior Court of Justice of ***CCAA.1 and, at the same time, attribute a disagreement

in matters of data protection as if said Court had not carried out, together with

with the aforementioned weightings, the one corresponding to data protection

of all those potentially affected. No doubt such an understanding is going too far.

far."

4) In relation to the necessary balance of the right to data protection with the

Right to information:

Indicates elDiario.es in its allegations:

“The Resolution Proposal argues that it is not about resolving the conflict between

these two fundamental rights, but to find a balance between the two, which

It is surprising given the null recognition that in this specific case is given to the

right to information, in the sense that this legal concept explains the facts

just as they happened. Therefore, we do not consider that the Motion for a Resolution

finds no "balance" between both rights, neither in its argumentation nor on

everything in his proposal for a sanction, clearly disproportionate.

Our bet is precisely for the weighting, and not for the incompatibility of

both rights or supremacy of one over the other, such as, for the purposes

practical, is derived from the text of the Resolution Proposal.”

Next, elDiario.es provides examples of constitutional jurisprudence that, in

opinion of said means of communication, try to ponder the Fundamental Right

to Freedom of Information with the rights to privacy and one's own image.

After the jurisprudential analysis, Diario.es stands out in its allegations to the Proposal

Resolution a series of conclusions.

“In the present case, it is unquestionable that:

-The information transmitted is truthful and has obvious public significance.

-the informative treatment by the medium eldiario.es has been absolutely

respectful towards the victim, by not providing any personal information about the victim or exceeding

the informative end in its diffusion.

-The disclosure of the voice has been allowed by the judicial body, without imposing more

limitations, which already presupposes, in our opinion, full compliance with the "principle

of data minimization" required by article 5 of the General Regulation of

Data Protection within what this means of communication could guarantee in

at any time, with the media and with the only information (conveniently filtered

per jurisdictional route) that he had.

-The video has been disseminated by a multitude of media with equal

treatment, or even providing data truly likely to achieve the

identification of the victim.

-If the victim is identifiable, it will be due to the concurrence of other circumstances,

such as the interview granted by the parents themselves, in which the voice of

these is equally recognizable, having given their express consent to

for this purpose or for those (...) who volunteered in said interview, such as the

your daughter's place of residence.

All these circumstances deserve to be considered for the sake of weighing

both fundamental rights, (..:)”

5) The section on the alleged violation of the principle of equality concludes

stating:

“In conclusion and in relation to the diffusion carried out by EL DIARIO DE PRENSA DIGITIAL S.L, does not correspond to this or any other means of communication to make no limitation on the dissemination of what happened in the Chamber of Justice, since it is at Court through reasoned resolution to whom corresponds to limit the right essential to receive truthful information.

Such is the case, that as can be seen in the video file broadcast to the media by the state news agency EFE, and which, among others, published EL DIARIO DE PRENSA DIGITAL S.L, the camera offers a plan of the courtroom ceiling, which which shows that the Court, as responsible for data processing through who, in the exercise of the jurisdictional function, is responsible for weighing of fundamental rights and the minimization of data contemplated in article 5 of the GDPR, has already carried them out, estimating that the image of the victim that is finds deposing in the act of trial is the opportune limitation of the right to information, with nothing more to restrict about the public act that constitutes the Judgment Oral.

It is not appropriate nor is it for EL DIARIO DE PRENSA DIGITAL S.L to carry out weighting of rights and limit the right to information whose owner is the general public, when there is already a data controller who has weighed said rights, by virtue of its jurisdictional powers, and has minimized the data as required by article 5 of the GDPR.

The good faith of the company is duly accredited insofar as, as has been said above, on the same day that it receives the adoption agreement provisional measure proceeds to the immediate withdrawal of the video, as well as to give response to that Agency, placing itself at its entire disposal.

It is in this context, and in the case at hand, where it is necessary to observe duly the principle of equality, which is imposed on the public administration

by article 14 of the Spanish Constitution, as well as by community regulations:

All administrative activity must be inspired by the equality of all before the
law both in a material and formal sense, without prejudice to the fact that in the performance
administration, differentiated treatments can be proposed to achieve
results that promote real equality. All discrimination violates the principle of
equality: inequality lacking an objective and reasonable justification constitutes
unlawful discrimination. Therefore, given the consideration regarding the
right to information and its limitations in the act of the Oral Trial that is coming
performing the supreme interpreter of the constitutional text, as well as the very
consideration of legality of treatment established in the GDPR itself in its article 6,
sections e) and f) when it is carried out to satisfy legitimate interests
by the person responsible for the treatment, it is not appropriate to impose any sanction on EL DIARIO
DE PRENSA DIGITAL S.L for the fulfillment of its constitutional function as
vehicle of the right to information.

There has been an intention of EL DIARIO DE PRENSA DIGITAL, S.L.
comply at all times with the regulatory framework applicable to this case and it is
under this perspective through which we understand that the
events that occurred For this reason, it seems to us clearly unfair, and that it violates the
principle of equality, since the company, even complying with the guidelines of
data protection is forced to defend itself against a Resolution Proposal
penalty of 50,000 euros, at least disproportionate, understanding that the

The fairest measure is to render the same Agreement to initiate

disciplinary file and this Resolution Proposal.”

6) On the alleged violation of the principles of proportionality and classification of

the infraction.

"1. There has been no intentionality in the action, since as has been

accredited at all times, it has been intended to comply in the strictest manner

possible with a respectful informative treatment, without generating a headline that could

be sensationalized The media has limited itself to disseminating material

information provided by the judicial body itself, after analyzing and weighing the

limitations, based on the principle of proportionality.

2. Nor can negligence be invoked, as the Resolution Proposal claims,

since what has been more than proven in this procedure is

precisely the diligence of this means of communication in all its actions.

As is well known, "fault" or "negligence" is the "lack of care" when doing or not

to do something, which, attributed to the quick and diligent performance of this party following

all the instructions of this Agency, as well as limiting itself to disseminate the data already

treated, minimized and weighted by the person responsible for their treatment, it is

clearly inappropriate and unfair.

2. Precisely that the medium proceeded to immediately remove the video, in the

same day that the AEPD requested it as a precautionary measure, also providing all

possible collaboration with that Agency, is the opposite of a negligence that can be

considered very serious.

3. We insist that no harm has been caused by this party. It was the fact
that the victim of the crime consented to his parents granting an interview in
television, offering data such as the place of residence of the same or their own
voices, which in any case could have clearly caused damage
impossible to impute to this means of communication. The voice, by itself and without any
supplementary data, it could not be a means of clearly identifying the person and
Thus, in any case, it was considered by the data controller when indicating
that only the roof of his jurisdictional room be filmed, with no further limitation. And not
we can forget that the broadcast recording comes solely and exclusively from the
institutional sign of the prosecuting court itself and what body the obligor already carried out
data processing exam required.
The proportionality between the administrative activity and the public purpose to which it must
responding assumes that the means used correspond to the results, without
that these exceed public needs, adopting the intervention technique
less aggressive."
"In the present case, we reiterate that the damage caused by the proposed
penalty for this interested party is, to a greater extent, higher and more burdensome
that the public interest to which end the public administration attends, above all. Damage
that, with all due respect, we request that it be valued again by that Hon.
Agency, in pursuit of an improvement and subsequent null effect of the Proposal for
Resolution received.
The proposed sanction is not adjusted to the alleged seriousness of the alleged
fact constituting an infringement, it is neither ideal nor necessary."
As can be seen, elDiario.es states that:
 There was no intention.

□

Nor can negligence be invoked.

□ No damage has been caused.

□

The proposed sanction is not adjusted to the alleged seriousness of the

assumption of a fact constituting an infringement, it is neither suitable nor is it

necessary.

7) In relation to the alleged violation of effective judicial protection due to lack of

motivation in relation to the inadmissibility of evidence:

At the end of the pleadings to the initiation agreement, the practice of two

evidence:

"What is the interest of whoever signs the opening of a probationary period in order to

demonstrate the non-existence of acts carried out by eldiario.es that constitute

any administrative infraction, for the proof of the same, the undersigned tries to

use the following evidence:

- A communication is issued to the Press Office of ***COURT.1, in relation to the oral trial

followed before the *** COURT.2 to report on whether in the matter known as

case of the so-called "***CASE.1", as it is a particularly vulnerable victim,

due to the nature of the crime, if the signal that they applied – and that they apply in situations

similar, was the institutional. If, for this reason, they did not issue an order on limitations to the

there is no restriction on public access, but only a limitation of dissemination

from image.

- Free letter to ***COMPANY.1, ***ADDRESS.1, in order to provide the video

of the interview with the victim's parents last day on date

***DATE.6 in ***SCHEDULE.1: ***URL.2."

In the brief of allegations to the resolution proposal, Diario.es affirms that it has

produced an alleged violation of effective judicial protection due to lack of motivation

in relation to the inadmissibility of the test. In this sense, it stands out:

"The resolution preceding this brief of allegations does not admit two pieces of evidence

interested in our statement of allegations, which, in the opinion of this party, as

already exposed in said writing, are crucial to prove the reality of the

facts alleged by this party:

(…)

Said test practice is denied by this body arguing that they are (the

highlighted is ours): "manifestly unnecessary, since their practice could not

alter the outcome of the procedure".

Well, we consider that precisely the processing of the data carried out by

the Provincial Court of ***LOCALIDAD.2, as well as the exposure of the victim to the

submitted to him by his own parents, are clearly essential elements of the

present procedure.

Regarding the Provincial Court of ***LOCALIDAD.2, it must be remembered that

we are talking about the actual data controller

referred to, in accordance with articles 236 bis, 236 ter and 236 quater of the LOPJ, is the

court in the exercise of its activity. But it is that, in addition, it turns out

It is essential to know the degree of data minimization existing prior to its

diffusion through the EFE Agency, as well as accrediting the relationship of the publicity of the

trial with the fundamental right to information.

It is the present Spanish Agency for Data Protection who must weigh (and not

conflict) the right to privacy with the right to information,

for which, obviously, he needs to know all the antecedents related to the

protection (inadequate or not) of both rights and their exercise.

It should be added that, according to article 76.2 of the Administrative Procedure Law,

When the test consists of issuing a report from an administrative body,

public body or entity governed by public law, it shall be understood that it has a

mandatory".

With regard to the video of the television program of ***COMPANY.1,

We consider it impossible to assess the background of this case without questioning

relation all the data made public by this means, put in relation to the

voice of the victim disseminated by the Court of Justice of and the EFE Agency: it is the

present Spanish Data Protection Agency who must consider whether the simple

diffusion of the voice of the victim, without being related to the data provided by

their relatives (their voice and the location of the victim), would have been a piece of information

sufficient for its identification by the readers of eldiario.es.

We understand that the resolution against which we are making allegations today suffers from

a total absence of reasoned justification for the inadmissibility of the probative material

required. We do not know the reasons why this test has not been successful.

relevant for the purposes of elucidating this proceeding, and this taking into account

note that this party has expressed the reasons why the practice of the same

It is necessary at all times, as expressed by the STS, First Chamber, of 17 July 1990; April 15, 1991 or June 27, 1991.

We consider it appropriate to mention Judgment 1/2007, due to its special relevance, of January 15, of the Constitutional Court that pronounces in the following terms:

"the special responsibility of judicial bodies to ensure that they avoid defenselessness of the defendant in the process..., because in this area the protection of the goods in conflict acquires the greatest intensity that can disperse the Legal system…".

In greater abundance, it is worth highlighting the fundamental right that corresponds to the interested party before the Administration, to use the means of proof that deem convenient for the legitimate defense of their interests, which transcends their right of defense, so that when they are deprived of that power to use means of evidence improperly, it can be constituted in a situation of absolute defenselessness, therefore, in order to guarantee the right to defense of this party administered, it is necessary that the refusal of evidence meets certain conditions.

Said conditions are established by the TC, in its Judgment of 24 September 2007:

“a) that their practice is relevant and decisive for the resolution of the matter;

b) that is related to the facts that were not wanted and could not be proven for the inadmissibility of the test; and

c) that the test that was not admitted or not carried out would have been decisive for the decision of the matter, so that, if it had been practiced correctly, decision end of the process could have been different and could have had an impact favorable to the estimation of their claims.

Only in such a case (proven that the failure of the process a quo could, perhaps, have been

another if the test had been carried out) the impairment may also be assessed

effective right of defense who, for this reason, requests protection.

Likewise, it considers that the refusal of said evidence has seriously violated

his right of defense, for which reason he concludes his pleadings reiterating the

practice request for both tests.

Of the actions carried out in this procedure and of the documentation

in the file, the following have been accredited:

PROVEN FACTS

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

Spanish Agency for Data Protection denouncing that various media

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

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

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

published on the websites of the claimed media.

On ***DATE.2, a new letter sent by the complaining party is received

stating that he has been able to verify that there are means that have eliminated that

information, although it accompanies publications made by some media

communication on Twitter where it is still available.

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

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

THIRD: The General Sub-directorate of Data Inspection, in the exercise of its

research activities, found the publication indicated below where

the victim's voice could be heard without distortion.

***URL.1

FOURTH: On April 3, 2022, the defendant was notified of the measure

precautionary date ***DATE.5 of urgent withdrawal of content or distorted from the

voice of the intervener in such a way that she could not be directly or indirectly identified,

specifically of:

***URL.1

: On April 5, 2022, this Agency received a letter sent

FIFTH

by this entity informing that elDiario.es had immediately withdrawn the

video, making it impossible to access or dispose of it by third parties.

SIXTH: On April 7, 2022, it was verified that, in the link,

***URL.1

the content had been blocked. This verification being reflected in the

Diligence of April 7, 2022.

FUNDAMENTALS OF LAW

Yo

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679

(General Data Protection Regulation, hereinafter GDPR), grants each

control authority and as established in articles 47, 48.1 of the Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of the digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve this procedure the Director of the Spanish Data Protection Agency.

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

II

In response to the allegations presented by the respondent entity, it should be noted the next:

Prior to this, the first allegation raised by elDiario.es will be addressed: lack of access to the file.

In this sense, the allegations to the initiation agreement indicate:

“(…). On May 19, 2022, access to the file was requested and by resolution tion of May 20 of the current year we are given a partial transfer of the file, extended extending the term to make allegations in 5 more days from the day after the expiration of the first period of allegations. It is expressly stated that Having requested on May 23, 2022 new access to the complete file, said request has not been attended to.”

In response to it, it should be noted that:

On May 19, 2022, a document was filed with the General Registry of the AEPD writing of the party claimed by the one requesting a copy of the file, as well as the suspension of the deadlines for the presentation of the brief of allegations. On the 20th of In May, the requested party was sent a copy of the file and was granted a

extension of the term of five days, to be computed from the day following that on which

the end of the first period of allegations.

On May 23, 2022, a second brief was received from the party claimed by the

requesting the transfer of the complete administrative file, noting that there was a lack of

for notifying that party of the documents submitted by the claimant on dates

***DATE.1 and ***DATE.2, requesting a new extension of the term for the presentation

of pleadings.

On May 26, 2022, a letter was prepared in which a response to this

second request.

In the aforementioned document, the claimed party was informed that the

requested file. Likewise, it was highlighted that it had been observed that in the

brief submitted by A.A.A. on ***DATE.1 in a section the information concluded

in a few dots. In order to complete the text, proof of

entry record of said claim.

Also, it was indicated:

"3. As for the rest of the documentation submitted, the documentation sent

It allows to know the evidence, which, with respect to that part, is available by this Agency.

Consequently, he has the necessary means to be able to exercise his right to

the defense, given that he has been transferred his administrative file and all

what concerns him, while preserving access to documentation

corresponding to files in which you do not have the status of interested party.

As highlighted in his request of May 23, 2022, in the brief by which he granted the extension of the term and sent a copy of the file dated 20 May 2022 the following was warned:

"In order that his claim does not impair the impairment of other rights deserving, equally, of protection, in the copy of the documentation sent by This General Subdirectorate does not include documentation that could affect public security, the prevention, investigation and punishment of criminal offences, administrative or disciplinary, economic and commercial interests, secrecy professional and intellectual and industrial property."

Likewise, the term to formulate allegations was extended again for five days, that should be computed from the day following that on which the term ended of allegations granted by the extension granted in writing dated May 20, 2022.

Due to a technical problem, the notification of said letter could not be made until the morning of Monday, May 30, 2022.

On Friday, May 27, 2022, in the afternoon, it was entered in the General Registry of the Spanish Agency for Data Protection the pleadings presented by the claimed part.

As can be seen, the brief of May 26, 2022 and the pleadings brief crossed.

As a new term was granted, the proposed resolution was not issued during the same, giving the defendant the opportunity, if applicable, to formulate new allegations. Until the presentation of the brief of October 21, 2022 (brief of allegations to the proposed resolution), no further allegations were received from from elDiario.es.

In conclusion, the second extension of the term requested was granted and respected.

by this Agency.

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

24/74

In its allegations to the resolution proposal, elDiario.es once again affirms that its request for access to the file of May 23, 2022 was not answered. Just respond to that claim.

The ninth antecedent summarizes the allegation of said means of communication to the proposed resolution regarding the lack of access to the file.

ElDiario.es considers that it has been deprived of access to the briefs presented by the claimant on dates ***DATE.1 and ***DATE.2, limiting the AEPD to sending the supporting documents for the presentation of said writings, a circumstance that, in his opinion, It would affect his right of defense and would cause him to be flagrantly defenseless.

The claims of A.A.A. of ***DATE.1 and ***DATE.2, mentioned in the annex of the resolution proposal, are the presentation receipts at the Registry office of those same dates, which have been sent to elDiario.es.

In the case of the first letter, the document called "Receipt of presentation at the Registry office" dated ***DATE.1, together with some documents containing links to various media publications Communication.

In response to the request for a copy of the file made by elDiario.es, said receipt, as well as the document containing the link corresponding to a publication of said means of communication.

Subsequently, upon receipt of the second request from elDiario.es on May 23,

2022, it was noted that in the section called "Registration Information", "Summary/ Subject:" of the letter of ***DATE.1 sent, the information concluded in a few points suspensive In order to complete the text, you were sent the proof of registration of entry of said claim.

Regarding the second document, this Agency received the document called "Receipt of presentation at the Registry office" of *** DATE.2, together with a document in the that contained tweets (none of which corresponded to elDiario.es).

In response to the request for a copy of the file made by said medium, he was sent said receipt.

Both in the letter of May 20, 2022, by which an extension of term and a copy of the file was sent, as in the brief of May 26, 2022, which responded to the request for access to the complete file and granted a new term extension, contained the following text:

"In order that his claim does not impair the impairment of other rights deserving, equally, of protection, in the copy of the documentation sent by This General Subdirectorate does not include documentation that could affect public security, the prevention, investigation and punishment of criminal offences, administrative or disciplinary, economic and commercial interests, secrecy professional and intellectual and industrial property."

The claims filed on ***DATE.1 and ***DATE.2 referred to publications in various media.

Article 72 of Law 39/2015, of October 1, on Administrative Procedure

Common for Public Administrations provides the following:

“Article 72. Concentration of procedures. 1. According to the principle of

administrative simplification, all the procedures that, for

their nature, admit a simultaneous impulse and their compliance is not forced

successive."

Taking into account the principles of efficiency, administrative simplification and

celerity, during the admission to processing and the previous actions of investigation,

Some procedures were carried out jointly, even when they referred to

different research subjects. However, that simultaneous impulse did not affect the

fact that for each case the facts were exclusively taken into account

related to the corresponding investigated subject. Once the performances are over

investigation, several files were opened

sanctioners.

The letters of May 20 and 26, 2022 sent the evidence to elDiario.es, which

with respect to said means of communication, the AEPD provided (reason for which

affirmed that he had the means to be able to exercise his right to defense).

The documents that were part of the

your file, preserving access to the documentation corresponding to other

files in which he did not have the status of interested party.

The reference to article 5.1 b of the GDPR appeared in the letter of May 20, 2022

by which the extension of the term requested was granted and a copy of the

file, not in the brief of May 26, 2022 that responded to the request

of access to the complete file and a new extension of the term. Consequently, the

Reference to said article was not intended to justify any denial of access to the

proceedings.

Finally, regarding the alleged defenselessness, it is necessary to bring up the Judgment
of the National Court of its Contentious-Administrative Chamber, Section 1, of
June 25, 2009 (rec. 638/2008), which states that "this Chamber has reiterated in
numerous occasions (SAN 3-8-2006, Rec. 319/2004, for all), echoing
of the doctrine of the Constitutional Court, so that the procedural defect entails
the nullity of the appealed act, it is necessary that it is not mere irregularities
procedural, but of defects that cause a situation of defenselessness of
material character, not merely formal, that is, that they have originated the
appellant a real impairment of his right of defense, causing him real damage
and cash (SSTC 155/1988, of July 22, 212/1994, of July 13 and 78/1999, of 26
of April)".
In other words, it is necessary for the interested party to see himself, in effect, in a situation of
defenselessness, it being necessary that the defenselessness be material and not merely formal
(Sentences of the Constitutional Court 90/1988, 181/1994, 314/1994, 15/1995,

126/1996, 86/1997 and 118/1997, among others), which implies that the aforementioned defect has
caused real and effective damage to the defendant in his possibilities of
defense (Sentences of the Constitutional Court 43/1989, 101/1990, 6/1992 and
105/1995, among others).
And in the case examined, there has not been a decrease in the exercise of the
right of defense of the claimed party, since it has been able to allege throughout the
sanctioning procedure what has been agreed upon by his right. In fact, as

will subsequently verify, in its pleadings to the proposed resolution

has invoked, in its defense, the reference made by the claimant in his writ of

***DATE.2 regarding the fact that he observed that the media had

removed the information from their web pages.

II

In relation to the references to the voice as personal data that appear in the brief of

allegations to the initial agreement, it can be affirmed that the person's voice is information of

personal character that can, by itself, make the person to whom it is identifiable

belongs.

Indeed, the voice fits perfectly into the definition of what is data from

personal nature of article 4.1) of the GDPR:

“Personal data”: any information about an identified natural person or

identifiable (“the data subject”); An identifiable natural person shall be considered any person

whose identity can be determined, directly or indirectly, in particular by means of

an identifier, such as a name, an identification number, data of

location, an online identifier or one or more elements of identity

physical, physiological, genetic, mental, economic, cultural or social of said person;”

The voice is a personal and individual attribute of each physical person that is defined

for its height, intensity and timbre. Endowed with unique and singular distinctive features that

individualize it directly, associating it with a specific individual, it is molded

when speaking, being able to know, through it, the age, sex, state of health of the

individual, his way of being, his culture, his origin, his hormonal, emotional and

psychic. Elements of the expression, the idiolect or the intonation, are also data of

personal character considered together with the voice.

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

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

Sound. Sound that becomes words thanks to the muscles that control the

soft palate, tongue and lips, without forgetting the cavity where

find these muscles, which acts as a sounding board. How can

appreciate, there are various organs involved in speech, different in each

of people, in fact, and by way of example, the vocal cords of the

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

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

It is deeper than that of a violin.

But still, not all men's vocal cords are equally long, which is why

for which there are men with a more or less serious voice, as happens with those of

women, which is why there are women with more or less high-pitched voices.

In addition, we have already seen that not only the

vocal cords, but many more organs that, depending on their strength and

structure will make each voice unique and different. Therefore, we can identify the

people we know by voice without having to see them (for example, when

we have a telephone conversation with someone close to us or

we hear someone known on the radio); therefore, anyone who knows

the victim can be identified by hearing his voice.

In this sense, report 139/2017 of the Legal Office of this Agency states that

"The image as well as the voice of a person is personal data, just as it 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 natural persons identified or

identifiable>>, an issue that is not controversial.”

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

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

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

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

"distinguishes" from all other members of the group.

And it is clear that the voice of any person, regardless of whether their features

are more or less marked can cause it to be identified as

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

meet her anyway. Let's imagine relatives, 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.

That same voice may allow a larger segment of the population to identify the victim.

population if it is combined with other data, even with additional information, taking into account

to the context in question. Once again, Opinion 4/2007 clarifies that "In the cases

in that, at first glance, the available identifiers do not make it possible to single out a

particular person, that person may still be "identifiable" because that information

combined with other data (whether the data controller has

knowledge of them as otherwise) will allow that person to be distinguished from others".

Let us also bear in mind that, in the case examined, there is a

easier to make the victim identifiable through his voice in response to the

circumstances of the event and the context in which it is made public: within the framework of

a highly publicized judicial procedure, continuously followed by various

media that provide information about the victim, his

environment, the violators, and the violation suffered (which makes up information

additional).

In accordance with the provisions of recital 26 of the GDPR: "The principles of the

data protection should apply to all information relating to a natural person

identified or identifiable.(…)To determine if a natural person is identifiable,

all means should be taken into account, such as singling out, which

can reasonably be used by the controller or any other person

to directly or indirectly identify the natural person. To determine if there is

a reasonable probability that means will be used to identify a person

physics, all objective factors, such as costs and

time required for identification, taking into account both the technology

available at the time of treatment as technological advances. (…)"

Let us remember once again that the purpose of the Fundamental Right to the Protection of

Personal Data is to protect people without ambiguity and without exception.

Especially in this case, given that what has occurred is the dissemination of the story

of a victim of multiple rape.

The following was stated in the proposed resolution:

"The claimed party acknowledges that the holder of the voice can be recognized by the

people from the closest environment, a risk that must be avoided."

In its pleadings to said proposal, elDiario.es highlights: (underlining is

our)

"When we say that the victim could be identifiable by known people or by their

closest environment we are not referring, then, to his voice (no reader of the media

communication eldiario.es or any viewer of the television network that is not

of the closest environment of the victim can recognize neither the victim nor his parents

by the voice, since the voice is not as determining an element as it could be a

facial feature), but we are referring to the data provided by their parents in said

interview, as is the locality, an extreme in no case would have been disseminated by

eldiario.es accompanying the undistorted voice of the victim or her parents. No

It is appropriate, therefore, that this Agency alleges that we admit that the victim may be

recognized for her voice, a clearly insufficient element in the media

but we stress that such identification would be completely impossible for

readers of eldiario.es or viewers of ***CANAL.1 without specifying

more information such as, unfortunately, the specific location of the victim."

Regarding the allegation that it would be impossible for the readers of this

means of communication to identify the victim only by her voice, it can be affirmed that the

protection granted by the RGPD must not decline in attention to the greater number or

minor of persons who can recognize the victim or the considerations

subjective about its identifiability of the person responsible for the treatment, even more so in this

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

a multiple rape.

Furthermore, we must point out that when elDiario.es published the video on YouTube

in the victim's undistorted voice, also included text beginning with

the following sentence: (emphasis added).

(…)

Consequently, said means of communication provided, together with the voice, the locality

where the victim resided.

As stated, a person can be identified by their voice. The decision of

elDiario.es to publish the voice of the victim without distorting put her at a certain risk

to be able to be identified by people who were unaware of her status as a victim.

Especially serious circumstance when the voice of a victim of

a multiple rape narrating in the first person how the rape occurred.

IV.

Regarding the allegation that the data controller was the Court

***CCAA.1

Superior of Justice of

:

Beforehand, we must clarify that the disciplinary file that is being

instructing does not intend to examine or prosecute the actions of the employees of

elDiario.es in their capacity as journalism professionals, but rather tries to

determine the possible liability incurred by the party claimed as

responsible for the treatment and as a consequence of its action in the field of

Personal data protection.

In order to be able to carry out this analysis, it is essential to clarify what the

data processing that is being examined in this proceeding. To these

For 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).

The purpose of this disciplinary file is to analyze whether the claimed party has

breached the obligations contemplated in the RGPD and in the LOPDGDD, in

Specifically, due to the treatment of the victim's voice as excessive data. do not enter

within the scope of this procedure other treatments, such as the one carried out by

part of the Superior Court of Justice of ***CCAA.1.

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

responsible for it.

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

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

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

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

treatment, the person responsible for the treatment or the specific criteria for its appointment may be established by law of the Union or of the States members;".

As established in Directives 07/2020 of the European Protection Committee of Data on the concepts of data controller and manager in the GDPR, the concept has five main components: "the natural person or legal entity, public authority, service or other body", "determines", "alone or together with others", "the purposes and means" and "of the treatment".

Consequently, the data controller is the one who determines the purposes and means of treatment.

In addition, it should be taken into account that the concept of data controller is a broad concept, which seeks to provide effective and complete protection for interested. This has been determined by the jurisprudence of the Court of Justice of the European Union. For all we will cite the CJEU Judgment in the Google-Spain matter of May 13, 2014, C-131/12, which considers in a broad sense the responsible for the treatment to guarantee "an effective and complete protection of the interested".

As indicated, it is abundantly clear that you are responsible for the treatment when deciding on the means and purposes of the treatment. The treatment carried out by the media, in this case elDiario.es, is through of which they disseminate to the general public through different means (one of them is internet) information. It is indisputable that in this area, the defendant holds the power to do so by having decisive influence over said treatment. In this way, the purpose is informative and the means cover the power from the way in which the information is distributed or made available to the public information, even its content. The means of communication have, at the

purposes of fulfilling its purpose, once in the exercise of his journalistic work

has collected all the precise information, what information is provided and by what means,

on what terms, with what personal data.

Thus, Guidelines 07/2020 on the concepts of data controller and

in charge in the RGPD specify that "the person in charge of the treatment is the party that

determines why the processing is taking place (i.e. “for what purpose” or “what for”) and

how this objective will be achieved (that is, what means will be used to achieve it)”.

Despite the arguments presented by elDiario.es in its allegations to the

motion for a resolution, this Agency affirms that the court carries out

a different treatment and insists that it is not the subject of this file

sanctioning. To which it should be added that the AEPD has never questioned the

actions of the Superior Court of Justice of ***CCAA.1 nor the decisions it has

adopted, as elDiario.es intends to insinuate in its allegations.

Returning to the determination of who is responsible for the treatment, the body

Judiciary provides the media with the information available in its entirety,

so that they can subsequently exercise the right to information.

As can be seen in its allegations, ElDiario.es intends to extend the scope

from judicial treatment in order to act as a kind of protective shield.

In this way, he tries to avoid assuming the consequences derived from the decisions

which he adopted once the information was in his hands.

Because when the information reaches the media, it, as

responsible for the treatment, in the exercise of its proactive responsibility, must
accredit that it has complied, that it complies and that it will comply with the regulations on
of data protection.

It is the means of communication, as responsible for the treatment of multiple data
that he knows within the exercise of his journalistic work, which he has to carry out, a
weighting prior to the publication of the information, weighting that does not appear to be
has been done in this case.

In addition to said weighting, the communication medium must carry out a
risk analysis prior to the publication of the news. In said analysis
The risks derived from the publication will be identified, trying to
prevent them from materializing or reducing said risks to a minimum. It has been
to guarantee that the news to be published respects the principles of article 5
of the GDPR, among them, the principle of data minimization.

Therefore, before proceeding to the publication of the information, which in this case
included the undistorted voice of the victim, the responding party should, in accordance with its
proactive responsibility, having carried out an analysis that took into account
account, that, if he published the information with the voice of the victim in those conditions,
the risk that she could be identified by people around her was amplified,
understood in a broad sense, as will be explained later.

At that time, the medium should have also assessed that it was a
highly publicized judicial proceeding, widely disseminated by various media
of communication that provided information about the victim, his environment, the
rapists and rape (constituting additional information). Such information
could be combined with the victim's voice, which was to be provided along with the
news, being able to facilitate their identification, as highlighted in the Opinion
4/2007 of the previously mentioned Article 29 Working Group.

In its pleadings, elDiario.es highlights:

"3. The Court has previously weighed up the right to privacy of

the victim and the right to information, hence the camera records the ceiling.

4. In this balancing exercise, the Tribunal, in full exercise of its function

jurisdiction, has considered not imposing further limitations on the dissemination of this

judicial information, that is, the court has considered it appropriate not to distort the voice

of the victim in his statement.

5. Given that the court has carried out the weighting between the merited rights, without

consider that there are more limitations to the dissemination of information than the

recording of the statement with a plan of the ceiling of the Chamber, there is no resolution

court under Article 6 of the GDPR.

6. This absence of major limitations is evident in the decision of the

Tribunal: it has been carried out taking into account that it was a hearing or a judgment of great

public repercussion and that the only recording of the hearing was the institutional one, that is,

there was no other media recording the trial and only the recording of the Court exists.

Consequently, responsibility for excessive treatment cannot be attributed to the environment.

eldiario.es, by maintaining the real voice of the victim in the video disclosed, because in all

case the media has respected the principles contained in article 5

of the GDPR, also understanding that it is of vital importance what has been the basis

law legitimizing the treatment.

As we say, by virtue of the provisions of Article 6 e) and f), there has been

express authorization of the Court, who after considering the right to privacy

of the victim and the right to information, has considered lawful and timely the

dissemination of this specific judicial action, despite the public repercussion of the matter,

without further limitations."

In another section of the pleadings to the initiation agreement, it is indicated:

"In the case at hand, the judicial body, in accordance with the requirements of the principle

of proportionality and balancing, decided not to limit the exercise of the freedom of

information, distorting, for example, the voice of the victim in his statement in the

act of oral trial."

If the interpretation made by the claimed party is followed, the treatment that leads to

out, the means of communication would be totally subordinated or conditioned by the

weighting, which prior and as a consequence of its own treatment,

carried out by the judicial body, it was not necessary for the media to

carry out its own weighting, this not being the case.

In addition, the line of argument put forth by the claimed party is not consistent with

with the provisions of section 6 of the 2020 Justice Communication Protocol.

Said document, prepared by the General Council of the Judiciary and updated

in the year 2020, proposes formulas so that the information related to the procedures

judicial procedures reach the citizen in an effective, clear, truthful, objective and responsible manner,

giving a leading role to the Communication Offices of the different

Courts.

In the aforementioned section 6 of the Protocol, regarding the protection of data of

personal nature, which refers to the transmission, by the Offices of

Communication, from the text of the judicial resolution to the social media.

contains the text of a warning about the responsibility of the media outlet

in the dissemination of personal data contained in the text of the judicial decision, which

It must be included in all submissions to the media:

“This communication cannot be considered as the official publication of a

public document. The communication of personal data contained in

the attached judicial resolution, not previously dissociated, is carried out in compliance

of the institutional function that article 54.3 of Regulation 1/2000, of July 26,

of the governing bodies of the courts, attributes to this Office of Communication,

for the exclusive purposes of their eventual treatment for journalistic purposes in the

terms provided for in article 85 of Regulation (EU) 2016/679 of the Parliament

European Union and of the Council, of April 27, 2016, regarding the protection of persons

physical with regard to the processing of personal data.

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

of a personal nature to the treatment that the recipients of this information carry out

out of the personal data contained in the attached judicial resolution, which does not

may be transferred or communicated for purposes contrary to the law.” (underlining is

our).

As can be seen, said forecast is not compatible with the supposed extension,

intended by elDiario.es, of the limits of the treatment carried out by the body

jurisdiction in order to avoid any type of responsibility for the decisions

adopted by said means of communication.

In view of the foregoing, it can be stated:

1. The data processing carried out by the judicial body and the media

communication are different, not being the subject of this procedure the first

from them.

2. It cannot be argued that the treatment carried out by the media is

finds itself subordinated or totally conditioned by the weighting, which due to

of its own treatment, has previously been carried out by the judicial body. What he

means of communication do later with the information is not the responsibility

of the Tribunal, but of the media, as the person responsible for the

treatment.

In those cases in which there is a "chain of treatment", that is, treatment

different and subsequent processing carried out by different controllers

compliance, each person in charge will be responsible for the decisions that they adopt in their co-

responsive to your treatment. Not being able to protect himself to exempt himself from his

responsibility for what the previous data controller did, as well as not

You will be required to be responsible for the decisions adopted by the data controller.

ment 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 the Fashion ID case, C-40/17, ECLI:EU:2018:1039, which establishes in its section

74 that "On the other hand, and without prejudice to any eventual civil liability provided for in the

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

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

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

the media".

The content of said Judgment is applicable to the allegations made by him-

Diario.es to try to justify its behavior based on the decisions adopted

by the Superior Court of Justice of ***CCAA.1, in the judicial field, or in the case

shocked that the video was ceded by the EFE Agency.

3. Nor can it be said that the weighting carried out, previously, by the

judicial body in the jurisdictional sphere exempts the media from having

to carry out a new weighting as controller when

I am going to publish the news.

4. Once the corresponding weighting has been carried out, in the exercise of its

proactive liability, the claimed party should have performed a risk analysis

risks prior to the publication of the news. In this way, he would have been able to detect the

need to ensure respect for the principle of data minimization

(distorting the voice or, where appropriate, including a transcript of the declaration of

the victim). In this way, it would exercise freedom of information while

guaranteed the right to the protection of personal data.

V

In relation to the legality of the treatment carried out by elDiario.es and the freedom of

information in relation to the right to privacy and the right to the protection of

personal data or on the necessary balance to data protection with

the right to information, issues that will be analyzed jointly, given

the intimate connection with which they are treated in the brief of allegations.

In said brief of allegations to the start-up agreement, elDiario.es states the following:

"In order to address the problem at hand, it is necessary to indicate that we are

Faced with a conflict between two fundamental rights, between the right to privacy and the

right to freedom of information and expression."

This statement is not shared for two reasons:

In the first place, because the right to the protection of personal data has

own and differentiated entity with respect to the right to privacy. For this purpose, there

to bring up 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 an effective

constitutional protection of personal and family private life, attributes to its holder a

bundle of powers that consists mostly of the legal power to impose

third parties the performance or omission of certain behaviors whose concrete

regulation must establish the Law, the one that according to art. 18.4 C.E. should limit

the use of information technology, either developing the fundamental right to the protection of

data (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 right

fundamental as related as that of intimacy is, lies, then, in its different function, what

which entails, therefore, that their object and content also differ." (the

underlining is ours).

Secondly, this file is not intended to resolve a conflict between the freedom

of information and the right to the protection of personal data, but rather

try to find a balance between the two. Ensuring that the first one is deployed

without emptying content to the second.

In its allegations to the resolution proposal, elDiario.es states:

“The Resolution Proposal argues that it is not about resolving the conflict between these two fundamental rights, but to find a balance between the two, which It is surprising given the null recognition that in this specific case is given to the right to information, in the sense that this legal concept explains the facts just as they happened. Therefore, we do not consider that the Motion for a Resolution finds no "balance" between both rights, neither in its argumentation nor on everything in his proposal for a sanction, clearly disproportionate.

Our bet is precisely for the weighting, and not for the incompatibility of both rights or supremacy of one over the other, such as, for the purposes practical, is derived from the text of the Resolution Proposal.”

Next, elDiario.es provides examples of constitutional jurisprudence that, in opinion of said means of communication, try to ponder the Fundamental Right to Freedom of Information with the rights to privacy and one's own image.

In the first place, it has already been highlighted that the right to data protection of personal character has its own and differentiated entity with respect to the right to privacy (STC 292/2000, of November 30).

Secondly, said jurisprudence, for the most part, highlights the assumptions in which that yield either the right to privacy or the right to one's own image in front of the Fundamental Right to Freedom of Information, which prevails.

However, it is worth noting an idea reflected in said jurisprudence: (the underlining is ours)

""in those cases in which, despite an intrusion into privacy, such interference is revealed as necessary to achieve a constitutionally legitimate, proportionate to achieve it and is carried out using the means necessary to ensure a minimum affectation of the scope guaranteed by this law, cannot be considered illegitimate" STC 156/2001, of July 2, FJ 4"

Saving the distances, since it is a sentence related to the right to

privacy, the objective of guaranteeing the minimum affectation is one of the elements

essentials that backbone the principle of data minimization and is one of the keys

of the case being analysed. In this sense, it is worth considering whether the decision

to publish the voice of the victim without distorting was adopted trying to guarantee the

minimum possible affectation to said woman.

Although it is not disputed that the information published by elDiario.es was true or that

the case was reported by the media, as will be explained in the different foundations of

right of this resolution, disagrees with the rest of the conclusions drawn up by

elDiario.es, which have been reproduced in the preceding ninth section 4).

Said means of communication provided, together with the information, the voice of the victim without

distort. Said voice is a piece of information that allowed people who knew her and

were unaware that she had been the victim of a multiple rape, they could come to

identify it.

To the voice, sufficient by itself to identify the victim, the data must be added

staff of the town where the victim resided, which was published by the media

communication.

As previously stated, when elDiario.es published on YouTube the

video with the voice of the victim without distorting, also included a text that

began with the following sentence: (emphasis added).

"(...)"

In this sense, it is necessary to consider that, together with the journalistic perspective, based on the Fundamental Right to Freedom of Information, coexists the dimension related to the protection of personal data. The latter provides an essential scope of protection for the victim, especially in the present case, in the one whose voice has spread narrating how the multiple rape occurred.

Although it is not possible to eliminate the serious crime of a sexual nature suffered, nor its physical or psychological sequelae, it is possible to provide all possible protection in accordance with the legal system trying to prevent it from being identified. thus contributing to create an environment that is as conducive as possible so that little by little he can recover his life.

Faced with a situation of vulnerability, in which the victim of the rape finds himself multiple, as a consequence of the crime, it is necessary that all spheres of existing protection deploy their effects with the greatest intensity.

On the other hand, as regards the allegation that "The video has been disseminated by multitude of media with the same treatment, or even providing data truly capable of obtaining the identification of the victim.", this Agency affirms that, in the hypothetical case that this were the case and this Agency had not sanctioned any of the conducts, there is no room for equality in illegality (SSTC 40/1989, 21/1992, 115/1995, 144/1999, 25/2022, among others).

Continuing with the analysis of the allegations to the initiation agreement and the proposal of resolution of elDiario.es, throughout the said means of communication affirms on several occasions that the treatment was legitimate in accordance with the provisions of article 6.1 e) and f). By way of example, in the allegations to the proposal of resolution stands out:

"For its part, Article 6 of the GDPR indicates that the treatment will be lawful when it is meet certain conditions. And it establishes in its sections e) and f):

The treatment will only be lawful if at least one of the following is fulfilled conditions:

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

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

In the case at hand, the requirements contained in sections e) and f) of article 6 of the GDPR, in such a way that the treatment carried out is lawful; (…)"

In the present case, it would not be possible to invoke as a legitimate basis for the treatment the fulfillment of a mission carried out in the public interest (article 6.1 e) of the GDPR), given that article 8.2 of the LOPDGDD provides:

"2. The processing of personal data can only be considered based on the performance of a mission carried out in the public interest or in the exercise of powers conferred to the person in charge, in the terms provided in article 6.1 e) of the Regulation (EU) 2016/679, when derived from a competence attributed by a standard with force of law."

In this case, said attribution has not occurred through a rule with a range of law.

On the other hand, regarding the concurrence of the legitimate interest alleged by elDiario.es
(article 6.1 f) of the RGPD), this Agency advocates for data processing that even
based on said legal basis, is fully respectful of the principles
contemplated in article 5 of the GDPR, especially the principle of minimization
of data.
When using said legitimizing basis of the treatment, the communication medium should
having contributed the weighting carried out, between their interest in disseminating the news together with
the voice of the victim and that of the latter, in which their data was not disseminated. although not
contains said weighting.
Likewise, it is necessary to highlight that Opinion 06/2014 of the Working Group
of Article 29, on the concept of legitimate interest of the data controller
of data under Article 7 of Directive 95/46/EC, when examining the data base
of the legitimate interest of article 7.1.f) of Directive 95/46/EC, transferable
fully to the current article 6.1.f) of the GDPR, indicates the following

"(...), using an adequate legal basis does not exempt the person responsible for the
data processing of its obligations under article 6 (current article 5 of the
GDPR) relating to impartiality, legality, necessity and proportionality, as well
as well as the quality of the data. For example, even data processing
based on the reason of legitimate interest (...) would not allow the collection
excessive data for a specific purpose." (in our case, it would not allow a
excessive data processing).

Likewise, Opinion 06/2014 of the Article 29 Working Group states:

“(…). The availability of alternative methods to achieve the objectives

pursued by the data controller, with less negative impact on the

concerned, should certainly be a relevant consideration in this context.”

In the case analyzed, said alternative methods would consist of the distortion of the

voice of the victim or in the transcript of his statement, which included the account of the

multiple violation. The minimization of data, through the use of any of said

alternative methods, would make it possible to make the exercise of freedom of expression compatible

information with the right to the protection of personal data.

Let us focus our attention on a fundamental issue when carrying out the

risk analysis prior to the publication of the news.

The news has been decided to be published together with the recording of the victim's voice without

distort. Such treatment has two characteristic features:

a) On the one hand, its durability over time: once the news is published,

remains on the network, making it possible to access its content (and, in this case, the voice

of the victim) both through newspaper archives and through search engines.

search, as many times as desired and without time limitation.

b) On the other, its amplifying effect: as it is a means of communication that facilitates

information through the internet, making knowledge of that information accessible

information exponentially and ubiquitously.

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

Vyriausioji 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.

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 that allows you to consult the Internet, twenty-four hours a day and

for unlimited time. Consequently, the risk that the victim runs of being recognized

has been increased exponentially.

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.

In conclusion, it is necessary for the media to carry out a

risk analysis prior to publication. So you can detect the

need to ensure respect for the principle of data minimization (for example,

distorting the voice or substituting the audio with the victim's voice for a

statement transcript). In this way, the exercise of the

freedom of information with the right to the protection of personal data of

the victim.

SAW

Regarding the alleged violation of the principle of equality, it can be stated that said

violation has not occurred.

In relation to said principle, the defendant affirms in the pleadings

to the initiation agreement:

"For this reason, it seems to us clearly unfair, and that it violates the principle of equality, for

how much the company, even complying with the data protection guidelines, is seen

obliged to defend itself against a possible sanction, at least disproportionate,

understanding that the fairest measure is to render this agreement null and void.

initiation of disciplinary proceedings and the present sanction proposal."

As has been stated in the previous legal grounds, it is not shared

that elDiario.es has acted in compliance with the protection guidelines

of data.

In this same sense, the initiation agreement indicated:

"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 mediated case, makes the victim clearly identifiable." (underlining is

our).

Carrying out such excessive treatment constitutes a violation of article 5.1 c) of the

GDPR, typified in article 83.5 a) of the GDPR.

The proposed resolution elDiario.es alleges:

"We argue in the pleadings the violation of the principle of equality,

for which we provide extensive argumentation based on numerous jurisprudence, to

to which the aforementioned Resolution Proposal only responds by alluding to the Agreement of the

initiation of this procedure, which pointed to an "excessive use" of freedom of

information, without going into assessing our considerations."

In said section of the allegations to the resolution proposal, it is again insisted

in which the legitimating basis established in article 6.1 letters e) and f) concurs, that the

The right to information is a fundamental right linked to the principle of publicity

of justice, that the Constitutional Court makes no distinction between the press

written and audiovisual media and that the judicial body did not limit the dissemination of what

occurred in the Chamber through a resolution.

As can be seen, most of these questions have already been answered in

the legal grounds of this resolution.

In addition, this Agency does not seek any type of discrimination against

audiovisual media with respect to the written press.

It is clear that both types of media must respect the law and

comply with the regulations on the protection of personal data, if

Well, the treatments they carry out and the decisions they make regarding the

purposes and means of such processing, as well as the correct application of the

principles of the GDPR, will be adapted to the way in which they disseminate the

journalistic information.

A response has already been given to the allegations in the conclusions relating to the alleged

violation of the principle of equality, reproduced in the antecedent ninth section

5), throughout the different legal grounds of this resolution. This Agency

reiterates once again that the data controller was elDiario.es, not the Court

Superior Court of Justice of ***CCAA.1.

In this sense, it is necessary to highlight that the GDPR has brought about a trans-

fundamental in the way of understanding the right to personal data protection.

sound. One of the most relevant innovations resides in proactive responsibility,

contemplated in article 5.2 of said Regulation, which provides:

"2. The controller will be responsible for compliance with the provisions

in paragraph 1 and able to demonstrate it ("proactive responsibility")."

Proactive liability implies that the data controller is responsible

of the data processing that it carries out. Not only must it comply with the established principles

degrees in article 5.1, but must be able to prove it. That responsibility-

implicitly implies the need to adopt decisions -determination of the ends and

means of the treatment that is going to be carried out-, as well as to be accountable for the de-

decisions adopted.

In this sense, recital 74 of the GDPR provides the following: (underlining is

our).

"The responsibility of the data controller must be established for any

any processing of personal data carried out by himself or on his behalf. In pair-

particular, the person responsible must be obliged to apply timely and effective measures and has

to be able to demonstrate the compliance of the processing activities with this

Regulation, including the effectiveness of the measures. These measures should take into account

the nature, scope, context and purposes of the treatment as well as the risk

for the rights and freedoms of natural persons."

Consequently, it was up to elDiario.es to carry out the weighting provided for in the

Article 6.1 f) of the GDPR, the risk analysis prior to the publication of the news, as well as

how to guarantee respect for the principle of data minimization (article 5.1 c) of the

GDPR).

VII

As far as the alleged violation of the principle of classification is concerned, the writ of

allegations to the initiation agreement states:

"(...) we understand that the proposed sanction would be inadmissible, since it would violate

the principle of criminality because the sanction could never be classified as very serious,

but as light, (...)"

The allegations to the proposed resolution include:

"(...) we consider that the proposed sanction would be clearly inappropriate, for

How much would it violate the principle of criminality because the sanction could never be qualified

as very serious, but maximally as light:"

The principles of the disciplinary procedure, regulated in Chapter III of Title

Preliminary Law 40/2015, of October 1, on the Legal Regime of the Public Sector

(hereinafter, LRJSP) are the following: Principle of legality (article 25),

non-retroactivity (article 26), criminality (article 27), responsibility (article 28) and

proportionality (article 29).

Article 27 of the LRJSP, when referring to the principle of classification, states that "Only

Violations of the legal system constitute administrative infractions

foreseen as such infractions by a Law".

The offense is perfectly typified:

On the one hand, article 83.5 section a) of the GDPR provides:

"5. Violations of the following provisions will be penalized, 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;”

On the other hand, article 72.1.a) of the LOPDGDD regulates as a very serious infringement

the effects of the prescription "The processing of personal data in violation of the

principles and guarantees established in article 5 of Regulation (EU) 2016/679.” No

there being no other infraction that could be applied to the facts, neither serious nor minor.

In relation to this last statement, elDiario.es alleges:

“The sanctioning body that applies article 72.1.a) of the LOPDGDD admits, that

includes a type of offense considered very serious, "there being no other

infraction that could be applied to the facts, neither serious nor minor”. Maybe it's because it's not

there is no reflection of the performance of this party in the types enumerated in said law, nor in

in a mild way, nor in a serious way, much less in a "very serious" way.

As provided in article 27 of the Law on the Legal Regime of the Public Sector:

"Only violations of the legal system constitute administrative infractions

provided as such infractions by a Law”.

It is not possible, therefore, to assign the character of "very serious" to conduct by the

simple fact of not finding a legal provision that can understand the

performance of the subject as a "serious" or "minor" offense.

In relation to said allegation, we reiterate what has already been indicated in the proposal for

resolution:

In the first place, we must mean that the claimed party confuses and mixes up what

regarding the classification of offences, their seriousness and their classification

for the purposes of prescription, so we are going to examine this issue.

In this regard, it should be noted that breaches of data protection

They are typified in sections 4, 5 and 6 of article 83 of the GDPR. It is a typification

by referral, fully admitted by our Constitutional Court. In this

In this sense, article 71 of the LOPDGDD also makes a reference to them when

point out that "The acts and conducts referred to in the

sections 4, 5 and 6 of article 83 of Regulation (EU) 2016/679, as well as those that

are contrary to this organic law".

In this sense, the Opinion of the Council of State of October 26, 2017, regarding

to the Draft Organic Law for the Protection of Personal Data,

provides that "The European Regulation does typify, even though it does so in a sense

generic, conduct constituting an infringement: in effect, sections 4, 5 and 6 of

its article 83 transcribed above contains a catalog of infractions for violation

of the precepts of the European standard that are indicated in such sections. Article 72

of the Preliminary Draft assumes, not in vain, the existence of said catalogue, when it has

that "infractions are acts and behaviors that imply a violation of the

content of sections 4, 5 and 6 of the European Regulation and of this law

organic"."

C / Jorge Juan, 6

The offenses established in articles 72, 73 and 74 of the LOPDGDD are only for effects of the prescription, as stated in the beginning of each and every one of these precepts. This need arose in our State as it does not exist in the GDPR any reference to the statute of limitations relating to offences, given that this institute legal is not specific to all EU Member States.

Thus, the preamble to the aforementioned organic law states that it "proceeds to describe typical behaviors; establishing the distinction between infractions very serious, serious and minor, taking into account the differentiation that the Regulation general data protection law establishes when setting the amount of the sanctions. The categorization of offenses is introduced for the sole purpose of determining the limitation periods, having the description of typical behaviors as the only object the enumeration of exemplary way of some of the punishable acts which must be understood to be included within the general types established in the European standard. The Organic Law regulates the cases of interruption of the prescription based on the constitutional requirement of knowledge of the facts that are imputed to the person" (emphasis added).

That is, it results from the application and interpretation of the GDPR, and not from the LOPDGDD, the determination of the seriousness of an infringement based on a series of conditions set forth therein. While the exemplary classification of infractions for the purposes of the prescription of the LOPDGDD does not have virtuality in regarding the determination of the seriousness of the infringement for the purposes of the GDPR or regarding the imposition of the corresponding fines in its case.

This disciplinary procedure has been initiated against the claimed party, as

indicates the initiation agreement, "for the alleged infringement of article 5.1.c) of the GDPR,

typified in article 83.5.a) of the GDPR." The reference that performs such an act

administrative to article 72 of the LOPDGDD is only for the purposes of prescription

of the offence.

The penalized conduct is perfectly in line with the provisions of article 72.1.a)

of the LOPDGDD for the purposes of prescription, since one of the

principles contemplated in article 5, specifically in its letter c) (principle of

minimization of data) for the reasons that they expose throughout this resolution, since

that there has been excessive processing of personal data.

Secondly, it is highlighted that there is no other infringement of the GDPR or of the

of the LOPDGDD for the sole purpose of the prescription in which there is doubt that

this conduct also fits (in fact, in its allegations elDiario.es does not mention

none other).

In conclusion, it is obligatory to qualify the effects of the prescription as very

serious case examined in accordance with the provisions of article 72.1 a), to the

perfectly fit the conduct examined with the provisions of said article.

VIII

In relation to the alleged lack of proportionality, it is necessary to make

reference to the STS, of the Contentious-Administrative Chamber of June 2, 2003

(record of cassation: 3725/1999) in whose sixth law foundation stands out:

"Proportionality, specifically pertaining to the scope of the sanction,
constitutes one of the principles that govern sanctioning Administrative Law, and
represents an instrument of control of the exercise of the sanctioning power by the
Administration within, even, the margins that, in principle, the norm indicates
applicable for such exercise. It certainly supposes a concept that is difficult to determine
a priori, but that tends to adapt the sanction, by establishing its specific graduation
within the indicated possible margins, to the seriousness of the fact constituting the
infraction, both in its aspect of illegality and guilt,
pondering as a whole the objective and subjective circumstances that make up the
presupposition of punishable fact - and, in particular, as it results from article 131.3
LRJ and PAC (currently article 29.3 of Law 40/2015, of October 1), the
intentionality or reiteration, the nature of the damages caused and the
recidivism–(SSTS July 19, 1996, February 2, 1998 and December 20,
1999, among many others).
In the present case, it should be noted that article 83.5, section a) of the GDPR, which
under the heading "General conditions for the imposition of administrative fines"
provides the following:
"5. Violations of the following provisions will be penalized, 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;”
As can be seen, an administrative fine of 50,000 euros is far from the
expected upper limit.

On the one hand, the XX legal foundation of this resolution details and explains the aggravating circumstances, which have been deemed concurrent in this case.

On the other hand, as it has been exposed in the foundations of law III and V, the publication of the news along with the voice of the victim through the Internet has amplified the risk that people around them, understood in a broad sense, who were unaware of her status as a victim, could come to identify her as such, with the difficulty that this would entail in order for him to be able to rebuild his life.

In relation to the lack of intentionality in terms of its impact on the proportionality, the initiation agreement already indicated:

"(...) Although the Agency considers that there was no intention on the part of the media outlet, communication, the Agency concludes that it was negligent in failing to secure a procedure that guarantees the protection of personal data in some such sensitive circumstances, especially when on many occasions the voice in the news so that the person speaking is not recognized." (he underlining is ours).

The brief of allegations has continuous references to the diligent action by from elDiario.es.

In this sense, it must be remembered that jurisprudence repeatedly considers that from the culpable element it follows "...that the action or omission, classified as administratively sanctionable infraction, must be, in any case, attributable to its

author, due to intent or negligence, negligence or inexcusable ignorance” (STS of 16 and 22 April 1991). The same Court pointed out that "it is not enough... for the exculpation in the face of typically unlawful behavior, the invocation of the absence of guilt" but it is necessary to prove "that the diligence that was required by those who claim its non-existence” (STS, January 23, 1998).

Connected with the degree of diligence that the data controller is obliged to to deploy in compliance with the obligations imposed by the regulations of data protection, the Judgment of the National Court of 17 October 2007 (rec. 63/2006), which indicates, in relation to entities whose activity involves continuous processing of customer data, which: "(...) the Court Supreme Court has understood that there is imprudence whenever a legal duty of care, that is, when the offender does not behave with due diligence callable. 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.

When covering the news regarding a multiple rape trial, ElDiario.es decided to publish the information along with the undistorted voice of the victim. Despite that said publication implied the need to adopt decisions on the purposes and means of treatment, said means of communication denies being responsible for the treatment. It affirms that the only person responsible for the treatment is the Superior Court of ***CCAA.1 who, in his opinion, corresponded to carry out the weighting and minimizing the data as required by article 5 of the GDPR.

The proposed resolution insisted on the importance of carrying out a risk analysis prior to the publication of the information, together with the voice of the victim without distorting,

without there being evidence that said risk analysis has been carried out.

ElDiario.es affirms that his conduct has been diligent at all times. This Agency

considers that in the present case, it is not possible to appreciate in the performance of said media

communication the rigor and exquisite care referred to in the Judgment of the

National Court of October 17, 2007, to which reference has just been made.

On the other hand, trying to highlight his diligent performance, elDiario.es indicates in various

occasions in his allegations to the motion for a resolution that his diligent action

by immediately removing all audiovisual elements that included the voice of the

victim was recognized by the claimant himself. As an example, reproduce the

next paragraph:

“d) the diligent action of eldiario.es immediately removing all the elements

audiovisuals that included the voice of the victim as soon as this Agency claimed it.

This was recognized by the same claimant as it appears in the Filing Receipt in

Registry Office of *** DATE.5, directed to make a notice to Twitter, where

It is explicitly stated that "I note that there are media outlets that have eliminated that

information from their websites (I thank you for the agility, in an unfortunate matter for the

victim)"."

It should be recalled that the second brief submitted by the claimant-whose text

reproduced in his statement of allegations- has a date of ***DATE.2.

The Agreement to adopt a provisional measure addressed to elDiario.es was signed on

***DATE.5.

For its part, the letter from elDiario.es indicating that the withdrawal of the

The video is dated April 4, 2022 and was entered in the AEPD Registry on April 5, 2022.

April 2022.

Therefore, the claimant ***DATE.2 appreciates the agility of this Agency and refers

to some media that have removed the information from their web pages.

Although elDiario.es is not cited among these media.

From all of the foregoing, it can be deduced that, in the case examined, it cannot be affirmed that the

performance of elDiario.es, by publishing the information together with the voice of the victim without

distort, have been diligent.

x

In the allegations to the resolution proposal of elDiario.es, reproduced in the

antecedent ninth section 6) it is affirmed that said means of communication has not

caused any harm. It is also stated that the victim consented to his

parents to give an interview on a television program. about the latter

In particular, this Agency considers that it is a presumption that lacks

completely basic, since they could have done the interview without having the

consent of his daughter.

Returning to the statement that no prejudice has been caused, it is

reproduces a paragraph of the foundation of law III of the resolution proposal, in

which indicates the following:

“And it is clear that the voice of any person, regardless of whether their features

are more or less marked can cause it to be identified as

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

meet her anyway. Let's imagine relatives, 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."

Likewise, on the basis of law XX of this resolution, when carrying out the

graduation of the fine, it is considered that a series of circumstances concur

aggravating factors, including that contemplated in article 83.2 a) of the GDPR, regarding the

nature, seriousness and duration of the infringement.

In this sense, the following is foreseen:

"

- 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 him."

This paragraph reflects the consequences for the victim for having proceeded to the

publication of his undistorted voice along with the news:

1. On the one hand, the loss of disposition and control of such personal data

transcendental as his voice is, giving diffusion to it during a

statement in which he recounts how the multiple rape occurred.

2. On the other, the certain risk that it may be recognized by third parties.

In this sense, it is necessary to highlight that the GDPR starts from a perspective

based on the risk approach.

We must show that the management of regulatory compliance with the GDPR

includes conceiving and planning a treatment of personal data, which requires,

among other issues, to incorporate ab initio risk management in terms of

data protection within the organization by the data controller

treatment. Article 24.1 of the GDPR provides the following:

"1. Taking into account the nature, scope, context and purposes of the processing

as well as risks of varying probability and severity for the rights and

freedoms of natural persons, the data controller will apply measures

appropriate technical and organizational in order to ensure and be able to demonstrate that the

treatment is in accordance with this Regulation. These measures will be reviewed and

Will update when necessary"

In relation to this issue, recitals 74, 75 and 76 of the GDPR, which provide for the

following: (emphasis added).

"(74) 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."

(75) The risks to the rights and freedoms of natural persons, serious and variable probability, may be due to data processing that could cause physical, material or immaterial damages and losses, particularly in cases in which that the treatment may give rise to problems of discrimination, (...), damage to the reputation, loss of confidentiality of data subject to professional secrecy, unauthorized reversal of pseudonymization or any other financial or significant social; in cases in which the interested parties are deprived of their rights and freedoms or are prevented from exercising control over your personal data; In the cases in which the personal data processed reveal (...) data related to health or data about sexual life, (...); in cases in which personal data of vulnerable people, particularly children; or in cases where the treatment involves a large amount of personal data and affects a large number of interested."

"(76) The likelihood and severity of the risk to the rights and freedoms of the interested party must be determined with reference to the nature, scope, context and the purposes of data processing. The risk should be weighed on the basis of a objective evaluation by means of which it is determined if the operations of treatment of data pose a risk or if the risk is high."

In this sense, the Guide to Risk Management and Impact Assessment in Treatments of personal data of the AEPD indicates: "Risk management is made up of a set of actions ordered and systematized with the purpose of controlling the possible (probability) consequences (impacts) that an activity may have on a set of goods or elements (assets) that must be protected. … The GDPR demands the identification, evaluation and mitigation, carried out in an objective way, of the risk to the rights and freedoms of individuals in data processing

personal”,

Therefore, before carrying out the processing of personal data, it is

necessary to assess whether such processing may imply a risk to the rights and

freedoms of natural persons whose personal data will be processed. Hence the

the need to carry out a risk analysis prior to the publication of

the news, which allows you to detect said risk, analyze it and adopt the measures

timely.

From this perspective, what is important is not whether the risk of recognition of the

victim has materialized or not, but whether there is a risk that someone overhearing

her undistorted voice, identify her. That is, the focus is not placed on the certainty that

someone has identified her through her voice, but in the fact that, by publishing the

news together with the undistorted voice, a certain risk situation has been generated

that someone could come to identify her, which is a particularly serious fact

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

In the foundations of law III, IV and V have been indicated, both possible

consequences for the victim derived from said recognition reaching

occur, such as the wide diffusion that has been given to the personal data of your voice, to the

having been published on the internet, a circumstance that amplified the risk that

could be identified.

eleventh

When grading the fine in this resolution, it is considered that there are

a series of aggravating circumstances, including that contemplated in article 83.2

a) of the GDPR, regarding the nature, seriousness and duration of the infringement, which has been

previously reproduced, highlighting the consequences for the victim reflected

in the same.

In its pleadings to the resolution proposal, elDiario.es states:

"It must not be forgotten that, according to article 83.2 of the GDPR, they must also

considered to assess the decision to impose an administrative fine and its

amount, apart from the intention (or not) or negligence (or not) of the infringement:

c) any measure taken by the controller or processor to

alleviate the damages suffered by the interested parties

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

infringement and mitigate the potential adverse effects of the infringement

g) the categories of personal data affected by the infringement

This party clearly believes that these weightings have not been taken into account.

account in this case, inexplicably, when the diligence of eldiario.es

has been more than accredited in order to alleviate the damages, as well as its

cooperation with the supervisory authority, and when the voice of the victim is data

personal that, without being related to other data not provided by this means

(such as its location or the voice of its parents), cannot be considered as an element

sufficient for its identification by the readers of the medium."

On the one hand, as indicated above, elDiario.es did contribute, along with the

video, the location of the victim.

We will now examine the aforementioned circumstances:

Circumstance regulated in article 83.2 c) of the GDPR

Regarding the circumstance regulated in article 83.2 c) of the GDPR "any measure

taken by the person in charge or in charge of the treatment to alleviate the damages and per-

judgments suffered by the interested parties", the measure of withdrawal of the content did not derive from

a spontaneous action by the claimed party aimed at alleviating, in an effective manner,

the damage suffered by the victim, but rather an urgent and compulsory removal order.

of the AEPD, therefore it cannot be considered in the present case as a

extenuating.

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."

Circumstance regulated in article 83.2 f) of the GDPR

On the other, in order to assess the concurrence of the circumstance contemplated in the

Article 83.2 f) of the GDPR as mitigation, part of the

content of the Agreement for the adoption of provisional measure of ***DATE.5:

"Carried out by this Agency a provisional assessment of the facts in the framework of

the Previous Investigative Actions File no. ***FILE.1, addressed to

identify the person responsible for the publication, it is estimated that there are reasonable indications that the public exposure of personal data through the aforementioned addresses may constitute a violation of article 6.1 a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, regarding the protection of natural persons with regard to data processing personal data and the free movement of such data and repealing the Directive 95/46/CE (General Data Protection Regulation, hereinafter GDPR).

Taking into account the especially sensitive nature of the personal data disclosed and the intense affectation of the privacy of the person to whom they refer, this Agency you consider that continuing your treatment may put you at risk irreversible, impossible to repair.

It is, consequently, a case of urgency that cannot be postponed, in which, for the provisional protection of the interests involved, it is necessary and proportionate take provisional measures.

Therefore, it is necessary to urge the adoption of provisional measures to cease this processing of personal data, prevent the transfer to third parties and, ultimately, safeguard the fundamental right to the protection of personal data of the affected person.

According to the GDPR in its article 57, the AEPD, control authority in matters of data protection, has been attributed the power to control the application of the General Data Protection Regulation and make it apply. To do this, it bears the powers established in article 58 of said Regulation.

Additionally, Law 34/2002, of July 11, on services of the society of the information and electronic commerce establishes, in its article 11, the duty of collaboration of intermediary service providers when a body competent authority had ordered that the provision of a service of the information society or the withdrawal of certain contents.

For all of the foregoing, in use of the powers conferred by article 58 of the GDPR, and in accordance with the provisions of article 69 of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of rights (hereinafter LOPDGDD), AGREEMENT:

1.- Require EL DIARIO DE PRENSA DIGITAL, S.L. to proceed, with the as immediacy as possible, to remove or distort the voice of the intervening party in such a way that it cannot be directly or indirectly identified from the aforementioned contents, avoiding to the extent that the state of the technology allows, the re-upload or re-upload of copies or exact replicas by the same or other users.

2.- Require EL DIARIO DE PRENSA DIGITAL, S.L. so that the withdrawal or modification of the contents is carried out in such a way that it makes it impossible to access and disposition of the original by third parties, but guarantee its conservation, in order to safeguard the evidence that may be necessary in the course of police or administrative investigation or judicial process that could be educated

3.- Require EL DIARIO DE PRENSA DIGITAL, S.L. to inform this Spanish Data Protection Agency on the execution of the extent.

(…)

In accordance with the provisions of article 83 of the GDPR, the breach of the

resolutions of the supervisory authority in accordance with article 58, paragraph 2, of the GDPR,

will be sanctioned with administrative fines of a maximum of 20 million euros 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 one with the highest value."

As can be seen, the Agency, using the powers provided for in article

58 of the GDPR, requires ***COMPANY.2 to carry out a series of actions (in-

among them, to proceed to the immediate withdrawal of a series of contents or to the distortion

voice of the victim).

It is undeniable that the text of the Agreement conveys the idea of immediacy, of urgency

Inc.

The duty of collaboration of intermediation service providers is highlighted

when the AEPD had ordered the withdrawal of certain contents (article 11

of Law 34/2002, of July 11, on services of the information society and

electronic commerce).

Likewise, the media is warned of the consequences derived from the

non-compliance with the resolutions of the Agency under article 58.2 of the GDPR,

with the possibility of being penalized with a large administrative fine.

This last circumstance is extremely important, since it cannot be considered that

cooperation occurs, when acting in accordance with the provisions of an Agreement of

adoption of a provisional measure, non-compliance with which would imply the imposition of a sanction. Just as it would not be possible to understand that said circumstance occurs if acted in compliance with a court order.

Consequently, taking into account the circumstances of this case (dissemination of journalistic information in a case of multiple rape together with the undistorted voice of the victim), that the responding party had received a Settlement adoption of a provisional measure, which ordered him to carry out, on an indefinite basis, mediate, a series of actions, as well as the content of said Agreement, which contains tempered the possibility of being penalized if the provisions therein were not complied with, The Agency considers that the circumstance regulated in article 83.2 cannot be applied f) of the GDPR as mitigation.

Circumstance regulated in article 83.2 g) of the GDPR

Likewise, elDiario.es alleges that this Agency has not taken into account the provisions of the Article 83.2 g) of the GDPR. In which the following is provided:

"2. 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:

(…)

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

This Agency does not share this statement. In relation to said precept the agreement Initially it stated the following:

"- 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

for the affected, since what happened is linked to her sexual life."

As previously noted, Diario.es decided to publish the information

along with the undistorted voice of the victim. This circumstance put her at risk.

certain to be able to be identified. Especially serious circumstance if one takes into account

realize that it was a multiple rape and that in the recording to which

broadcast, she is heard recounting in the first person how the rape occurred.

Concurrence of aggravating circumstances

In the pleadings to the initiation agreement, the defendant party analyzes the

concurrence of aggravating circumstances:

"(...) regarding the loss of control over the personal data of the victim of

a violent crime against sexual freedom, it is strictly necessary to refer to the

preceding allegation regarding the publicity of the act of the Oral Trial and the

exclusive competence of the Chamber of Justice to carry out the limitation of rights

that it deems appropriate when there is a conflict between the rights

of the victim in this case and the right to information, as we have already explained above.

supra in greater detail, and that it is opportune to reproduce regarding the consideration of

negligence that is carried out of the conduct with respect to the publication of the file of

video, which we remember, is ceded to EL DIARIO DE PRENSA DIGITAL S.L by the

EFE Agency."

The status of controller of elDiario.es has already been highlighted in the

foundation of law IV.

Regarding the transfer of the video by Agencia EFE, it should be noted that it is a

data processing that is not subject to examination in this disciplinary file.

Likewise, reference is made again to the content of the Judgment of the Court of

Justice of the European Union in the Fashion ID case, C-40/17, ECLI:EU:2018:1039,

relating to previous or subsequent operations in the processing chain.

Likewise, the brief of allegations to the initiation agreement stands out:

(...) in this case to determine the occurrence of an aggravating circumstance, which

“in such sensitive circumstances, especially when on many occasions

distorts the voice in the news so that the person is not recognized

talking." It corresponded to the Chamber of Justice, which seems obvious did not consider it, (...)

As has been highlighted in the fundamentals of law IV and V, elDiario.es was the

responsible for the treatment and, in application of the principle of proactive responsibility,

should have carried out a risk assessment and analysis prior to the

publication of the news together with the voice of the victim. Such actions would have

allowed to detect the need to guarantee respect for the principle of minimization

before carrying out the treatment.

twelfth

In relation to the alleged violation of effective judicial protection due to lack of

motivation in relation to the inadmissibility of evidence:

1. Article 76.2 of the Administrative Procedure Law.

In the allegations reproduced, ElDiario.es states:

“It should be added that, according to article 76.2 of the Administrative Procedure Law,

When the test consists of issuing a report from an administrative body,

public body or entity governed by public law, it shall be understood that it has a

mandatory".

Article 77 of the LPACAP regulates the means and trial period:

Section 6 of said article provides:

“6. When the test consists of the issuance of a report by a body

administration, public body or public law entity, it will be understood that

it is prescriptive."

Although in sections 2 and 3 of said article they provide the following:

"2. When the Administration does not consider the facts alleged by the

interested or the nature of the procedure requires it, the instructor of the same will agree

the opening of a trial period for a period not exceeding thirty days and not less than

ten, so that as many as it deems pertinent can be practiced. Also, when you

deems necessary, the instructor, at the request of the interested parties, may decide the

opening of an extraordinary trial period for a period not exceeding ten days.

3. The instructor of the procedure may only reject the tests proposed by the

interested when they are manifestly inappropriate or unnecessary, through

reasoned resolution.”

As can be seen, article 77.6 of the LPACAP begins by indicating "When

the test consists of issuing a report from an administrative body…”. Of

said wording, as well as the content of article 77 of the LPACAP, it is inferred the

following time order:

YO.

II.

III.

The claimed party requests the practice of a test consisting of the issuance

of a report.

The instructor accepts or rejects the practice of the proposed test.

If said test is accepted and consists of issuing a report from a

administrative body, public body or Public Law Entity,

it will be understood that said report is of a mandatory nature.

This last provision (mandatory nature of the report) must be related to

the content of article 22.1 d) of the LPACAP, which provides the following:

"Article 22. Suspension of the maximum term to resolve"

1. The course of the maximum legal term to resolve a procedure and notify the

resolution may be suspended in the following cases:

(…)

d) When mandatory reports are requested from a body of the same or different

Administration, for the time between the request, which must be communicated to

interested parties, and the receipt of the report, which must also be communicated to

the same. This period of suspension may not exceed in any case three

months. If the report is not received within the indicated period, the process will continue.

procedure.

(…)”

Consequently, the consideration of said report as mandatory allows

suspend the maximum term to resolve the procedure.

Therefore, said article cannot be interpreted as claimed by the defendant in

the sense that if the claimed party requests as evidence a report of

a public administrative body or public law entity, said report is

mandatory, for the simple fact of having been requested as a means of proof.

Following the interpretation of elDiario.es, it would suffice to request the broadcast as proof

of a report from a public administrative body or public law entity,

even if the content of said report was neither relevant nor pertinent, so that

said request had to be accepted, given that the report is mandatory.

This interpretation is not consistent with the possibility contemplated in article 77.3

of the LPACAP to reject the tests proposed by the interested parties when they are

manifestly inappropriate and unnecessary.

Therefore, it is up to the procedure instructor to accept or reject the evidence.

proposed by the claimed party.

In this case, the evidence requested has been assessed and it has been estimated that there is no

accept their practice, as they are manifestly unnecessary tests, as

will be explained below

*** COURT.1

2. Evidence consisting of issuing an official letter to the Press Office of the

In its allegations to the proposed resolution, elDiario.es states:

“Regarding the Provincial Court of ***LOCALIDAD.2, it must be remembered that

we are talking about the actual data controller

referred to, in accordance with articles 236 bis, 236 ter and 236 quater of the LOPJ, is the

court in the exercise of its activity. But it is that, in addition, it turns out

It is essential to know the degree of data minimization existing prior to its

diffusion through the EFE Agency, as well as accrediting the relationship of the publicity of the

trial with the fundamental right to information.

It is the present Spanish Agency for Data Protection who must weigh (and not

conflict) the right to privacy with the right to information,

for which, obviously, he needs to know all the antecedents related to the

protection (inadequate or not) of both rights and their exercise."

As stated in the legal basis IV, the AEPD considers that

elDiario.es is responsible for the treatment, not the Superior Court of Justice of

***CCAA.1 or the Provincial Court of ***LOCALITY.2.

Based on proactive responsibility, it was up to elDiario.es to carry out an analysis

of risks prior to the publication of the news. In this way, he would have been able to detect

that if he posted the information along with the victim's undistorted voice, it would be

created a certain risk that it could be identified by people who

They were unaware of their status as a victim. It would also have appreciated that, in order, both

to prevent said risk from materializing and to comply with the principle of

data minimization, some kind of action had to be taken. For example:

Include a transcript of the victim's statement (made by

the publication of his voice is unnecessary).

 Distorting the voice of the victim, in order to prevent those who accessed the

news could identify her.

The person responsible for carrying out said risk analysis and deciding on the

adoption of any of these measures was elDiario.es, a communication medium that

published the information, not the Provincial Court of ***LOCALIDAD.2.

In addition, in relation to the trial "***CASE.1", the Provincial Court

of

***LOCATION.2 made a series of decisions taken in a very

concrete: a judicial proceeding that was being held in said Body

Judicial. In this sanctioning procedure, the actions are not being examined

adopted by the aforementioned Court in said framework. It is being analyzed if the

decisions adopted, subsequently, by Diario.es in the field of treatment,

for which he was responsible and that he decided to carry out, by publishing information together

with the voice of the victim without distorting, suppose a violation of the regulations in

matter of protection of personal data.

Let us examine one of the paragraphs contained in the allegation above

reproduced:

It is the present Spanish Agency for Data Protection who must weigh (and not

conflict) the right to privacy with the right to information,

for which, obviously, he needs to know all the antecedents related to the

protection (inadequate or not) of both rights and their exercise.

This file is analyzing a possible violation of the right to

protection of personal data, not the right to privacy.

The right to personal and family privacy protects the intimate and private sphere of

person, given its relationship with the right to dignity. The right of the

person to their privacy and to develop a life in the strictest privacy and reserve

of public knowledge. In the words of the TC: "this right confers on the person the

legal power to impose on third parties, be they public powers or simple

individuals the duty to refrain from all interference in the intimate sphere and the

prohibition of making use of what is so known and from this it follows that the right

fundamental to personal privacy grants at least one negative faculty or

exclusion, which imposes on third parties the duty to refrain from interference unless

are founded on a legal provision that has constitutional justification and that is

provided, or that there is an effective consent that authorizes it, since

It is up to each person to limit the scope of personal and family privacy that

reserved to the knowledge of others» (STC 196/2004, of November 15).

As can be seen, in relation to the right to privacy, it plays a role

The decisive factor is the person, who delimits the scope reserved for the knowledge of others.

In relation to the fundamental right to the protection of personal data,

The Constitutional Court Judgment 292/2000, of November 30, is key.

that ends up splitting the fundamental right to the protection of personal data

of the fundamental right to personal privacy, configuring it as a

independent right and with its own content.

According to said Judgment:

“(…) the content of the fundamental right to data protection consists of a

power of disposal and control over personal data that empowers the person

to decide which of these data to provide to a third party, be it the State or a

individual, or which this third party may collect, and which also allows the individual

know who owns that personal data and for what, being able to oppose that

possession or use.”

Said Judgment provides:

“The function of the fundamental right to privacy of art. 18.1 CE is to protect

against any invasion that may be carried out in that sphere of personal life and

familiar that the person wishes to exclude from the knowledge of others and from the intrusions of

third parties against their will (for all STC 144/1999, of July 22, F. 8). In

On the other hand, the fundamental right to data protection seeks to guarantee that

person a power of control over their personal data, over its use and destination, with

the purpose of preventing their illicit and harmful traffic for the dignity and right of the

affected. Finally, the right to privacy allows the exclusion of certain data of a person

of the knowledge of others, for this reason, and this Court has said so (SSTC

134/1999, of July 15, F. 5; 144/1999, f. 8; 98/2000, of April 10, F. 5; 115/2000,

of May 10, F. 4), that is, the power to protect your private life from a

unwanted advertising. The right to data protection guarantees individuals

a power of disposal over these data.(…). But that power of disposition over

the personal data itself is useless if the affected party does not know what data is the

that are owned by third parties, who owns them, and for what purpose.”

It also highlights:

"In this way, the object of protection of the fundamental right to the protection of

data is not reduced only to the intimate data of the person, but to any type of

personal data, whether intimate or not, whose knowledge or use by third parties may

affect their rights, whether fundamental or not, because their object is not only the

individual privacy, which for this is the protection that art. 18.1 CE grants, but

personal data. Therefore, it also reaches those data

public personal, that by the fact of being, of being accessible to the knowledge of

anyone, do not escape the power of disposition of the affected party because this is guaranteed by his

right to data protection. Also for this reason, the fact that the data is of a

does not mean that only those related to private or intimate life have protection

of the person, but the covered data are all those that identify or

allow the identification of the person, being able to serve for the preparation of their profile

ideological, racial, sexual, economic or of any other nature, or that serve to

any other utility that in certain circumstances constitutes a threat

for the individual.

But the fundamental right to data protection also has a second

peculiarity that distinguishes it from others, such as the right to personal privacy and

family of art. 18.1 EC. This peculiarity lies in its content, since

Unlike the latter, which confers on the person the legal power to impose on

third parties the duty to refrain from any interference in the intimate sphere of the person and

the prohibition of making use of what is so known (SSTC 73/1982, of December 2, F.

5; 110/1984, of November 26, F. 3; 89/1987, of June 3, F. 3; 231/1988, of 2 of

December, F. 3; 197/1991, of October 17, F. 3, and in general SSTC 134/1999,

of July 15, 144/1999, of July 22, and 115/2000, of May 10), the right to

data protection attributes to its owner a bundle of powers consisting of various

legal powers whose exercise imposes legal duties on third parties, which are not

contain in the fundamental right to privacy, and that serve the capital function

performs this fundamental right: to guarantee the person a power of

control over your personal data, which is only possible and effective by imposing

third parties the aforementioned duties to perform. Namely: the right to require the

prior consent for the collection and use of personal data, the right to

know and be informed about the destination and use of this data and the right to access,

rectify and cancel said data. In short, the power of disposition over the data

personal (STC 254/1993, F. 7).”

Therefore, the fundamental right to data protection is a different right from the

Right to privacy. It guarantees its owner a power of control over their data

personal, attributing to it a bundle of faculties consisting of various powers

legal, the exercise of which imposes legal duties on third parties.

This file tries to guarantee that the data processing carried out

elDiario.es, relying on the exercise of the Fundamental Right to Freedom of

Information and on the legal basis provided for in article 6.1 f) of the GDPR (interest

legitimate), is fully respectful of the principles contemplated in article 5

of the GDPR, especially with the principle of data minimization.

Based on all these clarifications, it is understood that although the Superior Court

of Justice of ***CCAA.1 confirmed that the signal applied was the institutional one and that

an order on limitations was not issued, as there was no restriction on public access,

but only a limitation of diffusion of the image, would not substantially affect

to the substance of the issue being analyzed in this proceeding. All of them

would be measures agreed by a different data controller, adopted in

a very specific framework (the judicial) and in relation to a treatment that is not

being examined in this disciplinary file.

in order to contribute the video

3. Proof consisting of issuing an official letter to

“***PROGRAM.1”.

of the interview of the victim's parents in the

In relation to the test related to issuing an official letter to ***COMPANY.1 so that

provide the complete video of the interview with the parents of the victim in the

“***PROGRAM.1” elDiario.es alleges:

"(...) we consider that (...) the exposure of the victim to which his

parents themselves, are clearly essential elements of this proceeding.”

As just indicated, the fundamental right to data protection is a

right different from the right to privacy, which guarantees its owner a power of

control over your personal data, attributing to you a bundle of consistent powers

in various legal powers, the exercise of which imposes legal duties on third parties.

The fact that the victim's parents have granted an interview in a media

of communication does not affect the fact that your daughter is the holder of the right to

protection of personal data and does not reduce the sphere of protection that said

fundamental right unfolds with respect to the victim.

It also highlights:

“Regarding the video of the ***COMPANY.1 television program,

We consider it impossible to assess the background of this case without questioning

relation all the data made public by this means, put in relation to the

voice of the victim disseminated by the Court of Justice of and the EFE Agency: it is the

present Spanish Data Protection Agency who must consider whether the simple

diffusion of the voice of the victim, without being related to the data provided by

their relatives (their voice and the location of the victim), would have been a piece of information

sufficient for its identification by the readers of eldiario.es.”

Said interview is a different treatment, which is not being examined in the

present disciplinary file.

Likewise, even when in said interview the voices of the

victim's parents, the fact that they have hidden their face, clearly shows their

desire not to be identified.

On the other hand, when a test is carried out, the aim is to solve

Doubts about the existence or non-existence of the relevant facts for the decision

of the conflict that is the subject of the process. In this case, the Agency has no doubt that said

interview ensued.

Nor does it question that throughout the same, the victim's parents revealed

data. Said data, provided in the framework of a treatment different from that examined

in this proceeding, are not decisive when it comes to determining whether Diario.es,

carry out the treatment for which he was responsible, infringed article 5.1 c) of the GDPR or

No.

However, if elDiario.es was aware of said interview on ***DATE.6 and

considered that the data provided in it could facilitate the

identification of the victim by its readers, it should have taken into account

said circumstance when carrying out the risk analysis prior to the

publication, since the data of the voice, which was going to be published together with the information, was

would add to the information already available, increasing the risk that the victim

could be identified. A person responsible for the treatment of multiple character data

personnel, who acted diligently in accordance with proactive responsibility,

would have taken that circumstance into account.

To end with the reiteration of the request for the taking of evidence relating to the

interview of the parents in their allegations, elDiario.es attaches great importance

to data relating to the location of the victim, coming to consider it data that would have

been sufficient for his identification by the readers of said newspaper.

Likewise, it emphasizes on numerous occasions that it was facilitated by the parents of the

victim during interview: (emphasis added).

"(...) Parents have given their consent to issue their voice without distorting,

offering in said interview other relevant data for the purposes of data protection,

how is the town –

and victim of

crime against sexual freedom."

- in which his own daughter resides

***LOCATION.1

(...) the voice is not as decisive an element as a facial feature could be),

Rather, we are referring to the data provided by their parents in said interview, such as

is the locality, an extreme in no case would have been disseminated by eldiario.es

accompanying the undistorted voice of the victim or her parents."

"Therefore, it is not appropriate for this Agency to allege that we admit that the victim may be

recognized for her voice, a clearly insufficient element in the media

but we stress that such identification would be completely impossible for

the readers of eldiario.es nor the viewers of

without being required

more information such as, unfortunately, the specific location of the victim."

***CHANNEL.1

(...) and when the victim's voice is personal data that, without being linked

with other data not provided by this medium (such as its location or the voice of its

parents), cannot be considered as sufficient element for identification by

part of the readers of the media.

(...) it is the present Spanish Agency for Data Protection who must consider whether

the simple dissemination of the victim's voice, without being related to the data

provided by their relatives (their voice and the location of the victim),

would have been sufficient data for identification by the readers of

eldiario.es."

As we have previously indicated, the location of the victim was provided by

elDiario.es together with the video with the victim's voice without distorting.

4. Jurisprudence on the means of evidence proposed and the relevance of the evidence

requested.

Finally, it is necessary to refer to the jurisprudence on the means of

evidence proposed and the relevance of the evidence requested.

In this sense, the fourth legal basis of STC19/2001, of January 29,

stands out: (emphasis added).

(…). Specifically, in our constitutional doctrine we have emphasized the

connection of this specific constitutional right with the right to judicial protection

effective (art. 24.1 CE), whose scope includes issues related to evidence

(SSTC 89/1986, of July 1, F. 2; 50/1988, of March 22, F. 3; 110/1995, of 4

July, F. 4; 189/1996, of November 25, F. 3; and 221/1998, of November 24, F. 3), and with the right of defense (art. 24.2 CE), from which it is inseparable (SSTC 131/1995, of September 11, F. 2; 1/1996, of January 15, F. 2; and 26/2000, of 31 January , F. 2). It has been precisely this inseparable connection that has allowed affirm that the essential content of the right to use evidence pertinent is integrated by the legal power that is recognized to whoever intervenes as litigant in a process of provoking the procedural activity necessary to achieve the conviction of the judicial body on the existence or non-existence of the facts relevant to the decision of the conflict object of the process (for all, STC 37/2000, of February 14, F. 3)."

Therefore, it is necessary that through the practice of the test the conviction of this Agency on the existence or non-existence of relevant facts for the decision of the conflict, a circumstance that is not fulfilled in the present case. The requested tests relate to treatments that are not the subject of examination in this disciplinary procedure and its practice does not distort the fact that elDiario.es posted the undistorted voice of a gang rape victim. Treatment that it was excessive and violated the provisions of article 5.1 c) of the GDPR (principle of data minimization).

The STC 19/2001, of January 29, continues: (the underlining is ours).

"Advancing one more step in the exposition of the constitutional doctrine related to the right to evidence, it is worth remembering now that its inclusion in art. 24.2 EC has not to be understood as the constitutionalization of an absolute and automatic right to the proof in all the processes and in their different degrees (STC 33/2000, of 14 February, F. 2). In other words, this right does not authorize to demand the admission of all evidence that may be proposed by the parties in the process, but attributes only the right to receive and practice those that are pertinent,

Corresponding to the judicial bodies the examination of the legality and relevance of

the requested tests (for all, STC 96/2000, of April 10, F. 2, and the

resolutions mentioned there).

In this case, the practice of the requested tests has been assessed and it is considered that

they are not pertinent, for the reasons that have been previously exposed.

The STC STC 19/2001, of January 29 highlights: (the underlining is ours).

"(...), it also seems necessary to point out that this Court is only competent to

control said judicial decisions in the cases in which they had inadmissible

relevant evidence for the final resolution without any motivation or through a

interpretation and application of the law manifestly arbitrary or unreasonable, or

when the omission of the practice of the evidentiary proceedings previously admitted

is attributable to the judicial body and produces defenselessness (STC 96/2000, F. 2, and the

resolutions mentioned there). In any case, we must emphasize the fact

that for the issue to acquire constitutional relevance it is necessary that the

refusal or failure to take the test has resulted in an effective

material defenselessness for the appellant. In other words, that the test is

decisive in terms of defense because, if the omitted test had been performed or if

the admitted one had been practiced correctly, the final resolution of the process

could have been different (among the most recent, SSTC 26/2000, of January 31, F.

2; 37/2000, of February 14, F. 3; 96/2000, of April 10, F. 2; and 173/2000, of 26

June, F. 3), in the sense of being favorable to those who denounce the infringement of the right

fundamental."

This circumstance does not apply in the present case either, since the evidence

requested were not decisive, since their practice did not

would determine that the final resolution of the disciplinary file would have been different.

For the reasons set forth in the above legal grounds, the

all the allegations made by the claimed party, both to the initiation agreement

as to the motion for a resolution.

XIII

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 natural persons identified or

identifiable>>, an issue that is not controversial.”

Article 4.2 of the GDPR defines "processing" as: "any operation or set of

of operations carried out on personal data or sets of personal data,

whether by automated procedures or not, such as the collection, registration,

organization, structuring, conservation, adaptation or modification, extraction,

consultation, use, communication by transmission, diffusion or any other form of

authorization of access, collation or interconnection, limitation, deletion or destruction.”

The inclusion of a person's voice in journalistic publications, which identifies or

makes a person identifiable, implies a processing of personal data and, therefore,

Therefore, the person responsible for the treatment that carries out the same is obliged to comply with

the obligations for the data controller set forth in the GDPR and in

the LOPDGDD.

fourteenth

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");"

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.

fifteenth

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".

16th

That said, the Fundamental Right to Freedom of Information is not absolute. We can observe very clear limits established by the courts in the

civil sphere, in relation to the Right to Honor, to Personal and Family Privacy and to the Image itself.

Thus, we will cite, for all, the STC 27/2020, of February 24, 2020 (appeal of amparo 1369-2017) that provides, in relation to the image of a person, and starting from the incontrovertible fact that makes it identifiable, that "...the question discussed is reduced to pondering whether the non-consented reproduction of the image of a anonymous person, that is, someone who is not a public figure, but who acquires suddenly and involuntarily a role in the newsworthy event, in this case as victim of the failed attempted murder by his brother and the subsequent suicide of this, supposed an illegitimate interference in his fundamental right to his 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, 2011

(rec. 1747/2008), in which, regarding the data necessary to provide a

information and limits to the public interest states that "b) Trivial information is not

protects (ATC 75/2006), but the fact of providing unnecessary data in a case of

rape (full name, last name initials, street portal where

the victim lived) that have no community relevance, do not respect the reservation, only

seek to satisfy curiosity, produce disturbances or annoyances, and reveal

aspects of personal and private life unnecessarily, allowing neighbors,

close people and relatives full identification of the victim and knowledge

in great detail about an act that seriously violated his dignity (STC

185/2002) or about a disease that has no public interest and affects

direct to the irreducible field of intimacy and that reveals itself to the effect of a pure

joke or joke (STC 232/1993);".

Likewise, the STS, of its First Civil Chamber, Judgment 661/2016 of 10

November 2016 (rec. 3318/2014), in relation to the recruitment and disclosure in court

of the image of a victim of gender violence provided that "1.) The

interest of the questioned information nor the right of the defendant television channel

to broadcast images recorded during the act of the oral trial of the criminal case, since they did not

There is no limitation in this regard agreed by the judicial body.

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

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

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

also included in the fundamental right of the television channel

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

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

image.

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

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

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

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

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

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

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

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

of July 20).

[…]

6th) In short, the defendant television channel should have acted with the prudence of the

diligent professional and avoid issuing images that represented the

recurring in close-up, either refraining from issuing the corresponding shots,

well using technical procedures to blur their features and prevent their

recognition (judgment 311/2013, of May 8). Similarly, it should also

avoid mentioning your first name, because this information, insufficient by itself to

constitute illegitimate interference, became relevant when pronounced on the screen

simultaneously with the image of the applicant and add the mention of her

town of residence, data all of them unnecessary for the essence of the content

information, as evidenced by the news about the same trial published in the

next day in other media. 7th) The identification of the plaintiff through his

image and personal data indicated and its direct link to an episode of

gender violence and other serious crimes, when disclosure was foreseeable

Simultaneous or subsequent data referring to how the victim and her aggressor met

and the way in which the criminal acts occurred, supposes that the loss of the

anonymity would violate both the plaintiff's right to her own image, by the

broadcast of their physical features, such as their personal and family intimacy, to the extent that

that some reserved data, belonging to his private life (who went to the Internet

to start a relationship or the intimate content of some of their talks), lacking

offensive entity in a situation of anonymity, they began to have it from the moment

in which any person who watched those news programs and who resided in the

location of the victim could know who they were referring to, so that the damage

psychological damage inherent to his condition as a victim of crimes was added to the moral damage

consisting of the disclosure of information about his private life that he had not consented to

make public." (underlining is ours).

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

personal data (some of which are not of an intimate nature) to provide the

information, considering them unnecessary at all points in attention to the

concurrent circumstances. Sometimes the courts refer to intimate data,

but sometimes it is personal data that is not intimate, such as, for

For example, the image of a natural person obtained from a photograph published in a

social network or name and surname.

seventeenth

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 very young woman who has suffered a multiple rape. In

In the published recording, she is heard recounting, with great emotional charge, the

sexual assault suffered with all crudeness, (...).

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, as well as victims of violent crimes, circumstances both

that concur in the case examined.

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 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 for

privacy and the right to freedom of expression, among which are “the

contribution to a debate of general interest, the notoriety of the affected person, the

object of the report, the previous behavior of the interested party, the content, the form and

the repercussions of the publication, the way and the circumstances in which it was obtained

information and its veracity (see, in this regard, the judgment of the ECtHR of 27

June 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,

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

In such a way that for a matter to be considered of general interest,

public relevance, they will be not only for the person who intervenes, but also for the

matter to which it refers. Both requirements must concur, resulting, at greater

abundance of what was meant in the previous section, that in the case examined

the victim is not a public person; rather the contrary, it is of great interest that

is recognized by third parties, so it may entail a new penalty

to the already suffered The victim is an anonymous person and must remain so, in such a way that

so that their fundamental rights are fully guaranteed.

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

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

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

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

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

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

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

It is worth mentioning the breach of point 1 of the Digital Pact for the protection of persons, signed by the entities involved, which establishes that "The signatories of the Charter will refrain from identifying the victims in any way. of assaults, acts of violence or sexual content in their information or publish information from which, in general, your identity can be inferred in the case of people of no public relevance. All this without prejudice to the fact that the non-public persons may be involved in newsworthy events, in which case the informative coverage will be the necessary one to give adequate fulfillment to the right information, taking into account the peculiarities of each case".

XVIII

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

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

If we add the diffusion of the victim's voice (with all its nuances), which makes it identifiable and can be recognized by third parties, with the factual account that makes in relation to the violation suffered, there is a very high and very likely risk that

may suffer damage to their rights and freedoms. This has happened in other cases

of dissemination of personal data of victims of rape crimes. And this, in addition to

that with the diffusion of the voice of the victim she is being sentenced again to

can be recognized by third parties, when it is not a proportional treatment or

necessary in relation to the information purposes pursued.

XIX

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."

XX

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:

"1. 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."

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

individual case, in addition to or in lieu of the measures contemplated in

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

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

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

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

number of interested parties affected and the level of damages they have suffered;

b) intentionality or negligence in the infraction;

c) any measure taken by the person in charge or in charge of the treatment to

settle the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment, habi-

gives an account of the technical or organizational measures that have been applied by virtue of the

articles 25 and 32;

e) any previous infringement committed by the controller or processor;

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

infringement and mitigate the possible adverse effects of the infringement;

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

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

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

extent;

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

previously against the person in charge or the person in charge in relation to the

same matter, compliance with said measures;

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

certification approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case,

such as financial benefits obtained or losses avoided, directly or

indirectly, through the infringement."

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

"Sanctions and corrective measures", provides:

"2. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679

may also be taken into account:

a) The continuing nature of the offence.

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

personal information.

c) The benefits obtained as a consequence of the commission of the infraction.

d) The possibility that the conduct of the affected party could have led to the commission

of the offence.

e) The existence of a merger by absorption process subsequent to the commission of the

violation, which cannot be attributed to the absorbing entity.

f) The affectation of the rights of minors.

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

h) Submission by the person responsible or in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which

there are controversies between those and any interested party."

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

 Aggravating:

- Article 83.2.a) of the GDPR:

Nature, seriousness and duration of the infringement: It is considered that the nature of the

infraction is very serious since it entails a loss of disposition and control over

the personal data of your voice to a person who has been the victim of a violent crime and

against sexual integrity and that by disseminating said personal data there was a certain risk

that it could be recognized by third parties, with the serious damages that this

it would cause

- Article 83.2.b) of the GDPR.

Intentional or negligent infringement: Although it is considered that there was no

intentionality on the part of the communication medium, it is estimated that it was negligent in

not ensure a procedure that guarantees the protection of personal data

in such sensitive circumstances, especially when on many occasions

distorts the voice in the news so that the person is not recognized

talking.

- Article 83.2.g) of the GDPR.

Categories of personal data affected by the infringement: The certain possibility of

recognize the victim of a crime as the one reporting the news, very serious, violent

and against sexual integrity (multiple rape), is seriously detrimental to the

affected, since what happened is linked to their sexual life.

XXI

The text of the resolution establishes the offense committed and the

facts that have given rise to the violation of data protection regulations, of

which clearly infers what are the measures to adopt, notwithstanding that the

type of procedures, mechanisms or concrete instruments to implement them

corresponds to the sanctioned party, since it is the person responsible for the treatment who

He fully knows his organization and has to decide, based on the responsibility

proactive and risk approach, how to comply with the GDPR and the LOPDGDD.

Therefore, in accordance with the applicable legislation and assessed the criteria of

graduation of sanctions whose existence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE EL DIARIO DE PRENSA DIGITAL SL., with NIF B86509254,

for a breach of Article 5.1.c) of the GDPR, typified in Article 83.5 a) of the

GDPR, a fine of 50,000 euros (fifty thousand euros).

SECOND: Confirm the following provisional measures imposed on EL DIARIO

DIGITAL PRESS SL:

- 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 EL DIARIO DE PRENSA DIGITAL

SL.

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

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

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

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

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

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

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

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

restricted IBAN number: ES00-0000-0000-0000-0000-0000, open in the name of the

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

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

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

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

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

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

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

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

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

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

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

Interested parties may optionally file an appeal for reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from

count from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided for in article 46.1 of the

referred Law.

Finally, it is noted that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

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

If this is the case, the interested party must formally communicate this fact through

writing addressed to the Spanish Data Protection Agency, presenting it through

of the Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registries provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative proceedings within a period of two months from the day following the

Notification of this resolution would terminate the precautionary suspension.

Mar Spain Marti

Director of the Spanish Data Protection Agency

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