

□ File No.: EXP202104745

RESOLUTION OF SANCTIONING PROCEDURE

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

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter the claimant) on 11/12/2021 filed
claim before the Spanish Data Protection Agency. The claim is
directed against Mrs. B.B.B. with NIF ***NIF.1 (hereinafter the claimed). The reasons in
on which the claim is based are the following: that someone has posted on the forum
***URL.1 an advertisement with which "he has been defaming my image (...). He has also put
the exact address of where I am residing on vacation in ***LOCATION.1".

Provide a screenshot of the ad in question, with title "****TITLE.1", in
the one that says "(...), woman's advertisement and (...). (...) It is in ***ADDRESS.1 (...)" He
ad is accompanied by a photo of the (...).

SECOND: On 11/19/2021, 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 functions assigned to the control authorities in the
article 57.1 and the powers granted in article 58.1 of the Regulation (EU)
2016/679 (General Data Protection Regulation, hereinafter GDPR), and
in accordance with the provisions of Title VII, Chapter I, Second Section, of the
LOPDGDD, having knowledge of the following extremes:

During these proceedings, the following have been investigated:

Investigated 1: B.B.B.

Investigated 2: C.C.C.

Investigated 3: D.D.D.

Required from the company MUBA ONLINE, S.L. (hereinafter, MUBA), owner of the website where the image and other personal data of the claimant were published, by the IP address from where the publication was made, dated 11/25/2021 is received in this Agency, written response informing of the requested IP and other data.

In this writing they report other similar ads published on their platform with the same user identifier with which the advertisement indicated in the claim. In the ads published by this user between the 5th and 8th of November 2021, a contact phone number is also published.

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

2/10

It is determined by consulting the website of “RIPE Network Coordination Centre”, entity in charge of coordinating IP ranges for the European area, that the assignment of the operators of the IPs provided by MUBA are ORANGE ESPAGNE, S.A.U. (hereinafter, ORANGE) for the ad's IP claimed, and TELEFÓNICA DE ESPAÑA, S.A.U. (hereinafter, TELEFÓNICA) for the Frequent IPs used by the same user.

Requested from ORANGE, the entity that operates the IP address from which it was published the claimed ad, the ownership of this IP at the time the ad was published, on 12/17/2021, this Agency receives a response brief reporting the data that appears as Investigated 1 in the Entities section investigated.

TELEFÓNICA requested the ownership of the other IP address that appears as frequent in the publication of the other announcements of this user, with date of 12/16/2021 this Agency receives a letter sent by this entity informing of that this IP address was assigned to the Investigated 2 that appears in the section Investigated Entities.

Requested to the entity DIGI SPAIN TELECOM, S.L.U., information of the owner of the telephone number that appears in the advertisements published by the same user days November 5 and 8, 2021, dated 01/25/2022 is received at this Agency letter sent by this entity informing that the owner of this telephone number

At the time these announcements are published, he is Investigated 3.

FOURTH: On 09/12/2022, the Director of the Spanish Protection Agency of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement for the alleged infringement of 6.1 of the GDPR, typified in article 83.5.a) of the aforementioned GDPR.

FIFTH: Once the start agreement has been notified, the claimant at the time of this resolution has not submitted a written statement of allegations, so the following applies indicated in article 64 of Law 39/2015, of October 1, on the Procedure Common Administrative Law of Public Administrations, which in its section f) establishes that in the event of not making allegations within the period established on the content of the initiation agreement, it may be considered a proposal for resolution when it contains a precise pronouncement about the responsibility accused, for which reason a Resolution is issued.

SIXTH: Of the actions carried out in this procedure, have been the following accredited:

PROVEN FACTS

FIRST: On 11/12/2012 there is a written entry in the AEPD of the affected party in which

states that they have published an announcement in the ***URL.1 forum with which they "has gone

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

3/10

defaming my image (...). They have also put the exact address of where I am

residing on vacation in ***LOCATION.1".

SECOND: The claimant has provided a screenshot of an advertisement with the

title "****TITLE.1", with the comment "(...), advertisement for a woman (...). (...) It is in

***ADDRESS.1 (...). The advertisement is accompanied by a photograph (...).

THIRD: On 11/25/2021 MUBA, owner of the website where the

personal data of the claimant, has reported similar announcements

published on its platform with the same user identifier with which

published the ad indicated in the complaint. In the advertisements published by this

user between 5 and 11/08/2021, a telephone number is also published

contact.

FOURTH: Consulted the website of the "RIPE Network Coordination Center", entity

in charge of coordinating IP ranges for the European area, the assignment to the

operators of the IPs provided by MUBA corresponds to ORANGE for the IP

of the claimed ad.

FIFTH: ORANGE, entity that has been assigned the IP address from which the

published the claimed advertisement, in a letter of 12/17/2021 it has reported that the ownership

of the same at the time of publication of the announcement, correspond to the claimed.

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, 64.2 and 68.1 of the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve this procedure the Director of the Spanish Protection Agency of data.

Likewise, article 63.2 of the LOPDGDD determines that:

"The procedures processed by the Spanish Data Protection Agency will be governed by the provisions of Regulation (EU) 2016/679, in this organic law, for the regulatory provisions dictated in its development and, as soon as they are not contradict, on a subsidiary basis, by the general rules on the administrative procedures."

II

Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations, in its article 64 "Initiation agreement in the procedures of a sanctioning nature", provides:

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

4/10

"1. The initiation agreement will be communicated to the instructor of the procedure, with transfer of any actions that exist in this regard, and the interested parties will be notified, Understanding in any case as such the accused.

Likewise, the initiation will be communicated to the complainant when the rules regulators of the procedure so provide.

2. The initiation agreement must contain at least:

- a) Identification of the person or persons allegedly responsible.
- b) The facts that motivate the initiation of the procedure, its possible rating and sanctions that may correspond, without prejudice to what results from the instruction.
- c) Identification of the instructor and, where appropriate, Secretary of the procedure, with express indication of the recusal regime of the same.
- d) Competent body for the resolution of the procedure and norm that attributes such jurisdiction, indicating the possibility that the alleged responsible can voluntarily acknowledge his responsibility, with the effects provided for in article 85.
- e) Measures of a provisional nature that have been agreed by the body competent to initiate the disciplinary procedure, without prejudice to those that may be adopted during the same in accordance with article 56.
- f) Indication of the right to make allegations and to the hearing in the procedure and the deadlines for its exercise, as well as an indication that, in the event of not making allegations within the established term on the content of the initiation agreement, this may be considered a resolution proposal when it contains a precise pronouncement about the responsibility accused.

3. Exceptionally, when at the time of issuing the initiation agreement there are not enough elements for the initial qualification of the facts that motivate the initiation of the procedure, said qualification may be carried out in one phase through the preparation of a Statement of Objections, which must be notified to

the interested".

In application of the previous precept and taking into account that no

made allegations to the initiation agreement, it is appropriate to resolve the procedure initiated.

The physical image of a person, according to article 4.1 of the GDPR, is data

personnel and their protection, therefore, is the subject of said Regulation. In article 4.2

of the GDPR defines the concept of "processing" of personal data.

II

It is, therefore, pertinent to analyze whether the processing of personal data (image

of natural persons) carried out through the dissemination of the video object of the

This procedure is in accordance with the provisions of the GDPR.

Article 6.1 of the GDPR establishes the assumptions that allow considering

lawful processing of personal data:

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

5/10

"1. Processing will only be lawful if it meets at least one of the following

conditions:

a) the interested party gave his consent for the processing of his data

personal for one or more specific purposes;

b) the processing is necessary for the performance of a contract in which the

interested party or for the application at the request of this of measures

pre-contractual;

c) the processing is necessary for compliance with a legal obligation

applicable to the data controller;

d) the processing is necessary to protect vital interests of the data subject or of another natural person.

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

f) the processing is necessary for the satisfaction of legitimate interests pursued by the data controller or by a third party, provided that such interests are not overridden by the interests or the rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.

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

Likewise, Recital 40 of the aforementioned GDPR, when it provides that

"For processing to be lawful, personal data must be processed with the consent of the interested party or on some other legitimate basis established in accordance a Law, either in this Regulation or under other Union law or of the Member States referred to in this Regulation, including the the need to comply with the legal obligation applicable to the data controller or the need to execute a contract to which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract."

On the other hand, article 4 of the GDPR, Definitions, in its sections 1, 2 and 11, notes that:

“1) “personal data” means any information about an identified natural person or identifiable ("the data subject"); Any identifiable natural person shall be considered person whose identity can be determined, directly or indirectly, in particular

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

"2) "processing": any operation or set of operations carried out on personal data or sets of personal data, either by procedures automated or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use,

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

6/10

communication by transmission, diffusion or any other form of authorization of access, collation or interconnection, limitation, deletion or destruction;

"11) "consent of the interested party": any manifestation of free will, specific, informed and unequivocal for which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern him."

In relation to the facts claimed, it is considered that there is evidence of that the processing of the claimant's data, when disseminated through the forum ***URL.1 advertisement with which it is intended to discredit and denigrate its image and including address and photograph of the same, has been carried out without legitimizing cause what could imply the violation of article 6.1 of the GDPR.

IV.

The infringement attributed to the defendant is typified in the

Article 83.5 a) of the GDPR, which considers that the infringement of "the basic principles for processing, including the conditions for consent under the terms of the Articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the aforementioned Article 83 of the aforementioned Regulation, "with administrative fines of €20,000,000 as maximum or, in the case of a company, of an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the one with the highest amount".

The LOPDGDD in its article 71, Violations, states 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".

And in its article 72, it considers for the purposes of prescription, which are: "Infractions considered very serious:

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

(...)

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(...)

V

Data processing requires the existence of a legal basis that legitimizes it, as the consent of the interested party for the processing of personal data for one or more specific purposes.

In accordance with article 6.1 of the GDPR, in addition to consent,

There are other possible bases that legitimize the processing of data without the need for

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

7/10

have the authorization of its owner. in particular, when necessary for the execution of a contract in which the affected party is a party or for the application, upon request of this, of pre-contractual measures, or when necessary for the satisfaction of legitimate interests pursued by the controller or by a third party, provided that such interests do not prevail over the interests or rights and fundamental freedoms of the data subject that require the protection of such data. He treatment is also considered lawful when necessary for the fulfillment of a legal obligation applicable to the data controller, to protect interests of the data subject or of another natural person or for the fulfillment of a mission carried out in the public interest or in the exercise of public powers vested in the responsible for the treatment.

In the present case, the defendant is accused of violating article 6.1 of the GDPR when the illegality of the treatment carried out is evidenced, without stating accredited none of the legitimacy bases provided for in the aforementioned article for the treatment of the claimant's data.

Therefore, it is considered that the treatment carried out violates the principle of legality enshrined in article 6.1 of the GDPR, typified in article 83.5 a) of the GDPR.

In order to establish the administrative fine that should be imposed, the

observe the provisions contained in articles 83.1 and 83.2 of the GDPR, which

point out:

SAW

"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, as an addition to or substitute for the measures contemplated

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

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

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

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infraction;

c) any measure taken by the controller or processor

to alleviate the damages and losses suffered by the interested parties;

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

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

applied under articles 25 and 32;

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

treatment;

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

remedy the breach and mitigate the potential adverse effects of the breach;

C / Jorge Juan, 6

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

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

particularly if the person in charge or the person in charge notified the infringement and, in such a case, what extent;

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

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

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 the financial benefits obtained or the losses avoided, direct

or indirectly, through the infringement.

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

Article 76, "Sanctions and corrective measures", establishes that:

"2. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

a) The continuing nature of the offence.

b) Linking the activity of the offender with the performance of processing of personal data.

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 process by absorption after the commission

of the infringement, 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) The submission by the person in charge or in charge, with character

voluntary, alternative conflict resolution mechanisms, in those

cases in which there are controversies between those and any

interested."

data.

- In accordance with the precepts transcribed, for the purpose of setting the amount of the

sanction of a fine to be imposed in the present case for the offense typified in the

Article 83.5.a) and Article 6.1 of the GDPR for which the defendant is held responsible,

consider the following factors concurrent:

They are aggravating circumstances:

- The nature, seriousness and duration of the infringement, taking into account the

scope or purpose of the treatment operation carried out as well as the

damages infringed (article 83.2.a) RGPD).

- Intentionality or negligence in the infringement (article 83.2.b) RGPD).

- The category of personal data affected, by including data

on sexual orientation (article 83.2.g) RGPD).

Extenuating circumstances are:

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

- The absence of any link between the offender's activity and the performance of processing of personal data (article 76.2.b) of the LOPDGDD in relation to with article 83.2.k).

- It has been verified that the content object of the claim had been removed

(article
GDPR).
83.2.c)

In accordance with the above factors, it is deemed appropriate to impose on the defendant for violation of article 6.1 of the GDPR a penalty of 10,000 euros.

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 Mrs. B.B.B., with NIF ***NIF.1, for a violation of Article 6.1 of the GDPR, typified in Article 83.5 of the GDPR, a penalty of €10,000 (ten a thousand euros).

SECOND: NOTIFY this resolution to Ms. B.B.B..

THIRD: Warn the penalized person that they must make the imposed sanction effective

Once this resolution is enforceable, in accordance with the provisions of Article art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common of Public Administrations (hereinafter LPACAP), within the payment period voluntary established in art. 68 of the General Collection Regulations, approved

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

of December 17, by means of its income, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account

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

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

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

Once the notification has been received and once executed, if the execution date is between the 1st and 15th of each month, both inclusive, the deadline for making the voluntary payment will be until the 20th day of the following or immediately following business month, and if is between the 16th and the last day of each month, both inclusive, the term of the Payment will be until the 5th of the second following or immediate business month.

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

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, interested parties may optionally file an appeal for reversal

before the Director of the Spanish Data Protection Agency within a period of one

month 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

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

10/10

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, the firm resolution may be temporarily suspended in administrative proceedings

If the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

presenting it to

the agency

[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within a period of two months from the

day following the notification of this resolution, would terminate the

injunction suspension

Electronic record of

through the

Mar Spain Marti

Director of the Spanish Data Protection Agency

C / Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es