 File No.: PS/00201/2022

RESOLUTION OF SANCTIONING PROCEDURE

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

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claiming party), dated ***DATE.1, filed a claim with the Spanish Data Protection Agency (hereinafter, AEPD). The claim is directed, among others, against EDITORIAL UNIT INFORMACIÓN GENERAL, S.L.U., with NIF B85157790 (hereinafter, the part claimed). The reasons on which the claim is based are the following:

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

***URL.1

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

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

THIRD: The General Subdirectorate of Data Inspection proceeded to carry out

of previous investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 58.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter GDPR), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of the LOPDGDD, being aware of the

following extremes:

During the investigation actions, publications were found, more than

those initially denounced by the complaining party, where the voice of the complainant could be heard

undistorted victim. Regarding the claimed part, the following were found:

publications:

***URL.1

***URL.2

On ***DATE.4, the defendant was notified of a precautionary withdrawal measure

urgent content or distorted voice of the intervener in such a way that

will be unidentifiable in the web addresses from which this was accessible

content.

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

this entity informing that, in the first case, the tweet had been deleted, and in the

Second, the video with the victim's statement had been removed from the news.

FOURTH: On May 9, 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 of the GDPR.

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

established in the LPACAP, on May 9, 2022.

FIFTH: With the registration date of May 13, 2022, the party

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

allegations.

On May 17, 2022, the file was forwarded to the defendant, granting the

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

SIXTH: The claimed party submitted a brief of allegations on May 31, 2022,

in which, in summary, he stated:

1.- Treatment of data consented to the existence of prior consent of the interested party

for the live broadcast of his statement.

It indicates that "by decision of the aforementioned Court (the Superior Court of Justice of

***COMMUNITY.1), the statement of the Interested Party was broadcast live by

Internet -specifically, through the YouTube platform, accessible without any type of

limitation for the general public-, without implementing any type of measure to

distort or alter your voice or that of any other participant in it. to major

abundance, the XXXX authorized the media so that, using the

same signal through which the intervention was being broadcast live

of the Interested Party -YouTube- also spread it through their own channels (...) Everything

this so that the media could follow said statement and

fulfill its work of informing the public."

It goes on to indicate that "XXXX informed the parties to the process of its willingness to proceed to said retransmission and requested your consent to that effect. In this sense, the XXXX obtained the consent of the interested parties through the respective procedural representations, being requested by the Interested Party, as only condition, that his name and surnames not be disclosed - therefore, without requiring that measures be adopted regarding her voice, such as its distortion.

In this way, the Interested Party was aware of the intention of XXXX and authorized previously the retransmission in real time of your statement, consenting to that way the processing of your personal data, with the sole limitation that it is not make their first and last names public, as they did."

For this reason, it considers that it has not breached the principle of data minimization, all time that the weighting of the rights and freedoms affected by the treatment "already had been carried out by the court, which had even sought the consent of the parties to determine the scope of said weighting."

It ends by indicating that the "processing was legitimized both by the consent of the Interested Party as for the legitimate interest, consisting of the exercise of freedom of information by UNIDAD EDITORIAL, having been the same recognized by the XXXX by expressly authorizing, in accordance with article 232.1 of the LOPJ, the dissemination of images related to the hearing held. not for that reason it could be considered that the diffusion of the voice of the Interested Party without distorting could suppose an infringement of the personal data protection regulations, by

be covered by article 6.1 of the GDPR."

2.- Live broadcast of the victim's statement by the Court

***COMMUNITY.1

Superior of Justice of

. Legitimate confidence in the performance of the

jurisdictional bodies.

It indicates that "he acted with legitimate confidence that the authorization he had

received by the said Court to retransmit and disseminate the declaration of

the Interested Party, without any additional condition or requirement to those already mentioned,

protected him to publish such a statement, and therefore that the processing of data

personal information that said publication entailed, under the same conditions in which

it had been broadcast by XXXX, it was fully in accordance with the law."

It considers that "if sanctioned for an alleged violation of the regulations of

protection of personal data as a result of having carried out a

treatment that was considered lawful by the XXXX would be violating the principle

of legitimate trust of EDITORIAL UNIT, when considering the AEPD contrary to

Right what a Court of Justice previously understood protected by the

aforementioned regulations. In other words, respectfully understand this part that

would be disproportionate and would violate the aforementioned principle to require it to go further

of what has been considered lawful and legitimate by a court, and

penalize him for not having done so."

To this end, it refers to the Ruling of the Supreme Court of February 22,

2016 (rec. 4048/2013) regarding the principle of legitimate expectations, for later

state that in this matter the requirements set forth for

determine the existence of a legitimate expectation.

3.- Request that a probationary period be opened consisting of:

- Request "Google Ireland Limited, as the owner of the YouTube platform, so that

Report on whether the statement of the Interested Party was broadcast live through

said platform, without any kind of limitation for the general public".

- Request "the Superior Court of Justice of ***COMMUNITY.1, to report if

The parties to the process were informed of the fact that they were going to proceed to the

live broadcast of said statement and the statements of those to the

regard."

SEVENTH: On June 9, 2022, it was agreed to open a practice phase of

proof. It was also agreed to include in the file, for evidence purposes, the

claim that gave rise to the disciplinary procedure and its attached documentation;

the documents obtained and generated during the phase of admission to processing of the

claim, the report of previous investigation actions and the allegations to the

initiation agreement of PS/00201/2022 presented by the claimed party.

The following test procedures were carried out:

to. Before Google Ireland Limited:

1. On June 10, 2022, he wrote to Google Spain, S.L. to send

report on:

- If ***DATE.1 was broadcast live, in real time, the judicial hearing of the

victim of (...) of ***LOCATION.1 that was taking place in the

Sixth Section of the Provincial Court of ***LOCALIDAD.2, through the

YouTube channel of the Superior Court of Justice of ***COMMUNITY.1.

- If ***DATE.1 was disseminated in the open, without any type of limitation for the

general public, the court hearing of the victim of (...) of ***LOCATION.1 that

was taking place in the Sixth Section of the Provincial Court of

***LOCATION.2, through the YouTube channel of the Superior Court of

Justice of ***COMMUNITY.1.

2. On June 14, 2022, Google Spain, S.L. sent a letter stating that the

The request must be addressed to Google Ireland Limited, although it can be sent by

electronic headquarters to Google Spain to send it to this entity.

It also requested that the URL of the Court's YouTube channel be identified.

Superior Court of Justice of ***COMMUNITY.1 as well as what specific procedure

court is that of (...) of ***LOCATION.1 followed before the Sixth Section of the

Provincial Court of *** LOCATION.2.

3. On June 21, 2022, he wrote to Google Ireland Limited, through

Google Spain, S.L., to send a report on the aforementioned aspects,

indicating that (i) the URL of the YouTube channel of the Superior Court of

Justice since it is not known what it is and (ii) that the judicial hearing of the victim of (...) of

*** LOCATION.1 that took place in the Sixth Section of the Provincial Court

of ***LOCATION.2 is the summary procedure ***PROCEDURE.1.

4. On June 30, 2022, Google Ireland Limited sent a letter stating that

“without a URL that accurately identifies the YouTube channel owned by you

operated by the Superior Court of Justice of ***COMMUNITY.1, and an identification

information about the video that is the object of your request, we cannot inform or certify any

detail related to its alleged dissemination.”

***COMMUNITY.1

b. Before the Superior Court of Justice of

:

1. On June 16, 2022, a letter was addressed to the Superior Court of Justice of

*** COMMUNITY.1 to submit a report, in relation to the judicial hearing that was

was taking place in the Sixth Section of the Provincial Court of

***LOCATION.2 (summary procedure no. ***PROCEDURE.1), on:

- If he informed the complainant of the process that his statement before the court was going to

be broadcast live and openly through the Court's YouTube channel

Superior Justice of ***COMMUNITY.1.

- Provide, where appropriate, if any, the statements of the victim in relation to

for said purpose.

2. On September 13, 2022, the Superior Court of Justice of ***COMUNIDAD.1

(hereinafter, XXXX) sent a letter in which it reported the following:

“As stated by the person in charge of the Communications Office, the

the victim of the identification of his image by the media;

his identity was prevented from being known and any eye contact was prevented

protecting the victim with a screen during the trial.

The media coverage was carried out in accordance with the Statute of the Victim and with

the Communication Protocol of the General Council of the Judiciary to guarantee

the right to information, offering an institutional signal for the media without

In no case could the image of the victim be captured.

The institutional signal was offered under the usual conditions, serving for the

access to the view and to facilitate the construction by the media of the stories

informative.

As the report from the Communication Office points out, in this case, moreover,

none of the parties requested the president of the trial court to adopt

any advertising restrictions in addition to those already adopted or any other measure regarding

of the victim.

Regarding the specific questions that are formulated in the letter of the Aepd directed

to the Superior Court of Justice of ***COMMUNITY.1 (XXXX):

1. “Report on whether the complainant was informed of the process that her statement

before the court was to be broadcast live and openly through the YouTube channel

Tube of the Superior Court of Justice of ***COMMUNITY.1”:

The TSJ of ***COMUNIDAD.1 does not have a You Tube channel.

The Communication Office did not offer the media the institutional signal to

that the trial be broadcast but so that, in substitution of the presence within

the Chamber, could have access to the development of the view.

Therefore, XXXX could not inform the complainant about the diffusion to which

the question refers.

2- "Provide, where appropriate, if any, the statements of the victim in

relation to said purpose”

As explained in the answer to the previous question, there is no record of

XXXX manifestations of the victim in this regard.”

Attached to said written report of the Communications Office of XXXX, dated 28

July 2022, which states:

"- Known at the time the indication, the Office transferred to the Court the

unquestionable media interest of the trial.

- The possibilities of coverage available for

guarantee the right to information.

- The Court forwarded to the Communications Office the conditions for declaration of

the victim (protected by a screen, avoiding any visual contact with the

defendants), guaranteeing the Communication Office that in the advertising of the signal

institution, in no case would any image be offered, while, as there had been

been customary and in compliance with the obligations also included in the aforementioned

Communication Protocol, its identity would not be offered.

- From the beginning of the hearing, in which none of the parties proposed to the Court

no measure greater than the one previously referred to with respect to the victim, offered

institutional signal to the media.

- The institutional signal was offered under the usual conditions. The view could not

broadcast, served as access to view, guaranteeing the right to information.

That is, for the construction of informative stories.

The procedure regarding the trial of interest for this report was identical to that

has been using, in which, in accordance with the provisions agreed by the

courts, full, partial or none of a public hearing is offered, guaranteeing

that no image or identity of the victims is offered and understanding that the media

communication are aware of the provisions contained in the Victim Statute, in which

written are directly questioned, to contribute, without diminishing the right of

information, to their protection. The Communication Office maintains,

accordance with the provisions of each Court, which in the case at hand

expressly protected the victim from the identification of his image by the

media and to which none of the parties - reviewed the recording by the

president of the same - requested no other measure."

EIGHTH: On October 3, 2022, a resolution proposal was formulated,

proposing that the Director of the Spanish Data Protection Agency

penalize UNIDAD EDITORIAL INFORMACIÓN GENERAL, S.L.U., with NIF

B85157790, for a violation of article 5.1.c) of the GDPR, typified in article

83.5 of the GDPR, with a fine of €50,000 (fifty thousand euros).

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

confirm the following provisional measures imposed on UNIDAD EDITORIAL

GENERAL INFORMATION, S.L.U.:

- Withdrawal or distortion of the victim's voice from their web addresses, avoiding, in the

to the extent that the state of technology allows it, the re-uploading or re-uploading of copies

or exact replicas by the same or other users.

- Withdrawal or modification of the contents in such a way that it makes it impossible to access them and

disposition of the original by third parties, but guarantees its preservation, for the purposes of

guard the evidence that may be necessary in the course of the investigation

police or administrative or judicial process that may be investigated.

NINTH: With the registration date of October 11, 2022, the party

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

On October 13, 2022, the defendant was notified of the granting of a new term

to present claims.

TENTH: The claimed party submitted a pleadings brief on October 24,

2022, in which, in summary, he stated the following:

1.- Absence of restrictions for the diffusion of the voice of the interested party. Performance

in accordance with the provisions of the Communication Protocol of the General Council of the

Power of attorney.

The defendant states that "generally and by constitutional mandate, in

Spain legal proceedings are public, which includes the possibility of

that the media have access to them, with the purpose that they

can make use of their fundamental right to freedom of information and give

fulfillment of its mission of constituting vehicles for the formation of opinion

public." For this purpose, it refers to article 232 of Organic Law 6/1985, of July 1,

of the Judiciary, article 120.1 of the Spanish Constitution, article 6 of the

Agreement of September 15, 2005 of the Plenary of the General Council of Power

Court (hereinafter, CGPJ) approving Regulation 1/2005, of the

accessory aspects of judicial proceedings, and article 680 of the Royal Decree

of September 14, 1882 by which the Criminal Procedure Law is approved

(hereinafter, LECr)

It makes special mention of the Justice Communication Protocol, approved in the

year 2020 by the CGPJ, which declares that "according to constitutional doctrine, the rule is

free access of the audiovisual media to the courtrooms. In cases where

that, according to the exceptions provided for in the law, the right to

information from these media, the Communication Offices will request the resolution

motivated by that agreement and will pass it on to journalists."

Subsequently, the defendant indicates that the restrictions on the aforementioned principle

are regulated in articles 681 and 682 of the LECr as well as in the

Articles 22 and 25 of Law 4/2015, of April 27, on the Statute of the victim of crime.

The defendant refers that, in the case at hand, the Court "carried out
an assessment of the interests at stake to determine the need to establish
limitations to the publicity of the declaration of the interested party, considering sufficient
the protection of the identification of the victim's image by the media
communication through the installation of a screen that prevented the capture of
such image and without any of the parties requesting the adoption of any
additional advertising restriction".

Regarding the reference made by XXXX and its Communication Office regarding
that the institutional signal was offered to the media not for the trial to be
retransmitted, but so that they could have access to the development of the view to
guarantee the right to information, the defendant points out that in no
moment such limitation was communicated to him. Adding, then, that, for the
On the contrary, "it did rely on the decision of the Court to assess said conditions,
that at no time did it refer, because it was not so requested by the
parts, to the need for distortion of the victim's voice, adapting other
measures, which the XXXX considered sufficient, aimed at preserving their privacy and
that your identity is not accessible by third parties, as well as with what is established in
the Protocol, which expressly refers to the relevance of the audiovisual support as
element that contributes to significantly enrich the content of the message that is
leads to the formation of a free public opinion."

Based on the foregoing, the defendant points out that it fails to "understand the reason

by which the AEPD considers that its action has constituted an infringement of the GDPR, since ***PERIÓDICO.1 adjusted its procedure to the restrictions of publicity imposed by the XXXX and the limits of the right to freedom of information, as well as the provisions contained in the regulations adopted by the CGPJ for the development of freedom of information."

It then adds that the published information brought together all the factors established to carry out the balance between the right to freedom of information and the right to the protection of personal data: (i) veracity, (ii) proportionality, defined as "that expressions are not used unequivocally insulting or vexatious" or "pejorative terms, and (iii) public relevance of the facts, because it referred to a highly relevant criminal proceeding and affected a person private but linked to a very notorious case.

He criticizes that the resolution proposal considers that the treatment it carries out is different from that carried out by the court because it is characterized by the means of communication due to its durability over time, its amplifying effect and because involves making information available to a large number of people. AND criticizes it because "those characteristics are what give the media of their essential importance in a democratic society and allow them to fulfill their constitutional mission of being a vehicle for the formation of public opinion."

Nor does it understand that the balancing of conflicting interests carried out by the court cannot replace the one that must be carried out by the means of communication (i) by virtue of a constitutional principle, (ii) in accordance with the

established in the legal system and in the Protocol and (iii) in the exercise of a

fundamental right."

It also indicates that "this party wonders why, if the AEPD

considers that such a procedure gives rise to unlawful processing of personal data, does not give

transfer of such circumstances to the CGPJ, as the competent body to ensure the

compliance with the regulations on the protection of personal data by the

judicial bodies."

In this regard, it criticizes that the proposed resolution "limits itself to indicating that this

weighting carried out must not be valued by it (by the AEPD),

given that the treatment is different from that analyzed in this file, indicating

However, in both cases it is a question of carrying out a weighting of the

fundamental rights in conflict and that, in any case, the action of the body

jurisdiction and the communication of data to my principal, as a consequence of the

fact of facilitating the signal of the act of sight, is subjected to a rigorous

Protocol, adopted by the CGPJ, which is precisely the control authority in

matter of protection of personal data of the body that gave the signal."

He criticizes the resolution proposal when its Foundation of Law V indicates what

following: "it must be considered that the treatment carried out by the party

claimed within the framework of freedom of information has been excessive, as there is no

informative public interest prevailing in the diffusion of the voice of the victim - without

provide any added value to the information by keeping the real voice of the victim (without

distort, for example) -, under whose pretext it seems that those

data; voice that, added to the fact that it is a very mediatic case, makes

clearly identifiable to the victim." And he criticizes it because:

- "The proportionality in this treatment has already been analyzed and assessed by the body

jurisdictional".

- "The addition of images to the written news cannot be qualified in any case

excessive or lacking in added value, given that it has expressly indicated the High

Court that said information "significantly enriches the content of the message that

It is aimed at the formation of a free public opinion".

- "There is no record (...) that the victim was identified as a consequence of

from the fact that his voice was not distorted."

Finally, it also criticizes the resolution proposal when its "Foundation of

Law II" states that "in the case examined, the claimed party has withdrawn

immediately from his digital diary the recording of the hearing in which the word was disseminated

of the victim at the request of the AEPD, leaving the written notice of such

statement, so the information is still available and is still

supplying with all its breadth. This shows that to supply

This specific information was not necessary, under the terms of art. 5.1.c) of the GDPR,

disseminate the voice of the victim.", since it has only complied with a

Agency's agreement to adopt a precautionary measure, which cannot be

considered as an acknowledgment that the information was considered excessive.

2.- No concurrence of guilt. Confidence in the performance of the

exemption from liability.

XXXX

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The defendant party points out that the requirement of guilt in the procedure

administrative sanction is regulated in article 28.1 of Law 40/2015, of 1

October, of the Legal Regime of the Public Sector (hereinafter, RJSP), which

It is also collected by various sentences.

It goes on to indicate that the actions of the judicial body generated “the conviction

of the legality of its action, by reasonably presuming that the action of XXXX

was adjusted to Law and was based on a consideration of the rights and freedoms

in conflict that made further assessment unnecessary.”

For this reason, it considers that "even though the AEPD has ruled out concurrence in

this case of the application of the principle of legitimate expectations, which would exonerate

guilt", there is "an error of law or prohibition in the conduct of my

principal that must exonerate the concurrence of responsibility”, supporting his

claim in the Judgment of the National Court of April 27, 2006 (appeal

526/2004).

3.- Application to the present case of the principle of proportionality and circumstances

concurrent liability modifications.

On the one hand, the defendant considers that the aggravating circumstances appreciated by the

Agency would not apply:

- Regarding the aggravating circumstance of the nature, seriousness and duration of the infraction,

regulated in article 83.2.a) of the RGGPD, indicates the claimed party that does not attend

this circumstance because:

(i) The court had already weighed the interests in

game.

(ii) It is not possible to affirm that the victim has suffered any harm or harm

as a consequence of the diffusion of the act of the oral trial.

- Regarding the aggravating circumstance of intentionality or negligence in the offence, regulated

in article 83.2.b) of the GDPR, the defendant states that "the concurrence of

such circumstances in the conduct of a defendant in a disciplinary proceeding

can never be considered aggravating, but rather a sine qua non condition for

to be able to appreciate the concurrence of responsibility in said defendant.”

Furthermore, it considers that it has not acted negligently, since

"has carried out its activities fully subject to the advertising restrictions

adopted by the XXXX after the weighting carried out by said court."

- Regarding the aggravating circumstance related to the categories of personal data affected by the

infringement, regulated in article 83.2.g) of the GDPR, indicates the claimed party that

is applicable because:

(i) “XXXX himself was aware of both the “undoubted media interest of the

trial" as well as the nature of the crime on which it dealt and adopted, prior

weighting of the interests at stake, the advertising restrictions that it considered

necessary to protect the interested party while guaranteeing the right

fundamental to freedom of information.

(ii) "constitutional jurisprudence does not make any exception to the principle

of publicity of the legal proceedings related to crimes against

sexual integrity; Furthermore, said jurisprudence has indicated that the information on

events of a criminal nature is of general interest and has public relevance.”

On the other hand, the defendant considers that in the present case there is a

number of extenuating circumstances that should be taken into account:

- The nature, seriousness and duration of the infringement, regulated in article 83.2.a)

of the GDPR, therefore:

(i) The treatment "was framed within the fundamental right to freedom of

information by a written means of communication, complying with all

requirements established by constitutional jurisprudence in relation to the

weighing between said right and the protection of personal data of the

interested, as well as with the advertising restrictions adopted by the XXXX for

guarantee said protection and the guidelines of the Protocol."

(ii) Only one person was affected by the treatment.

(iii) The publication of the news in question has not caused any damage to the

interested.

- The intentionality or negligence in the infraction, regulated in article 83.2.b) of the

GDPR, because, as previously indicated, the guilty element does not exist.

- The adoption of measures to alleviate the effects of the presumed infringement (article

83.2.c) of the GDPR) and the degree of cooperation with the control authority in order to

remedy the infringement and mitigate its possible adverse effects (article 83.2.f)

of the GDPR), since it immediately responded to "the request sent by the Agency".

4.- Opposition to the confirmation of the proposed provisional measure consisting of

"- 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."

Such opposition is motivated by:

- "the relevance that the Constitutional Court itself gives to the incorporation of audiovisual information to written information, given that the High Court understands that it "significantly enriches" the written information, thus contributing to the formation of a free and informed public opinion".

- The publications made were made "with full respect of the criteria of weighting carried out to preserve the privacy and data protection of the victim".

- "There is no proven evidence of the existence of impairment to the rights of the interested party."

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

PROVEN FACTS

FIRST: On ***DATE.1, the claimant filed a claim with the AEPD denouncing that various media, including the part claimed, published on their websites the audio of the statement before the judge of a victim of a multiple rape, to illustrate the news regarding the celebration of the trial in a case that was highly publicized, providing links to the news published on the websites of the media claimed, being the one related to the part claimed:

***URL.1

On ***DATE.2, a new letter sent by the claimant was received

stating that he had been able to verify that there were means that had eliminated this information, although it accompanied publications made by some media communication on Twitter in which it was still available, including a tweet from the claimed part.

SECOND: The General Sub-directorate of Data Inspection, in the exercise of its investigative activities, found publications of the responding party where could hear the victim's voice without distortion in the following directions:

***URL.1

***URL.2

THIRD: Within the framework of the previous investigation actions, with the date of ***DATE.3, the defendant was notified of an urgent precautionary measure to withdraw content or distorted voice of the intervener in such a way that it would be unidentifiable in the web addresses from which this content was accessible, in concrete of:

***URL.1

***URL.2

FOURTH: On ***DATE.3, the AEPD received a letter sent by the claimed party informing that, in the first case, the tweet had been removed, and in the second, the video with the victim's statement had been removed from the news.

SIXTH: It is proven in the report of previous actions of investigation of

date January 24, 2022 that it was verified that the tweet had been deleted and that in

the link ***URL.2 had been removed from the video with the victim's statement.

SEVENTH: Work in the file report of the President of the XXXX and the Office of

Communication of XXXX, both dated July 28, 2022. They indicate:

- The conditions of the victim's statement in the trial consisted of protecting the

image of the victim through a screen, avoiding any visual contact with

the accused.

- The institutional signal was offered to the media, in which in no

case, an image of the victim was offered, at the same time that they were not offered the

identity of it.

- None of the procedural parties proposed to the Tribunal any additional measure

referred to the victim.

- The court hearing could not be broadcast, it served as access to the hearing, guaranteeing

the right to information from the media. The institutional signal is

offered to the media for the purpose of substituting their presence within

the Room, being able to have access to the development of the view.

Furthermore, the mentioned report of the President of the XXXX indicates that:

- This court does not have a YouTube channel.

- Therefore, he could not inform the victim that his statement was going to be disseminated in

open and live through his YouTube channel.

- Therefore, there are no statements by the victim in this regard.

FUNDAMENTALS OF LAW

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

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

competent to initiate and resolve this procedure the Director of the Agency

Spanish Data Protection.

Likewise, article 63.2 of the LOPDGDD determines that: "Procedures

processed by the Spanish Data Protection Agency will be governed by the provisions

in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations dictated in its development and, insofar as they do not contradict them, with character

subsidiary, by the general rules on administrative procedures."

II

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

data processing that has been carried out is consented to by the prior consent of

the interested party for the live broadcast of their statement. For this purpose, it indicates

that "by decision of the aforementioned Court, the statement of the Interested Party was broadcast

live on the Internet -specifically, through the YouTube platform, accessible without

any type of limitation for the general public-, without implementing any type of

measure to distort or alter your voice or that of any other participant in it.

Furthermore, the XXXX authorized the media so that,

using the same signal through which the

intervention of the Interested Party -YouTube- also spread it through their own

channels (...) All this so that the media could follow said

declaration and comply with its work of informing the public."

In this regard, it should be noted that, as indicated by the XXXX in its report dated 28

July 2022, this court does not have a YouTube channel.

What XXXX did do was offer the media the signal

institutional, in substitution of the presence within the Room, with the purpose that

could have access to the development of sight to guarantee the right to

information, but in no case, for the trial to be broadcast, despite

that the claimed party indicates in its brief of allegations to the proposal of

resolution, that "at no time was this type of limitation communicated by

part of the XXXX, nor said restriction comes to be configured as a kind of

“usual condition” of access to the audiovisual signal of the trial.”

In other words, contrary to what the defendant asserts, there was no

retransmission without any type of limitation for the general public. As neither

there was authorization from XXXX for the media to broadcast the

Statement of the victim before the court. So neither did the XXXX report

to the parties to the process of their willingness to proceed with the retransmission under the terms

indicated by the claimed party, that is, directly and without any kind of limitation to

the general public through the YouTube platform.

In short, there was no consent from the victim for the dissemination of his statement

with his voice undistorted by the media, so the

treatment carried out by the claimed party cannot be found covered by

Article 6.1.a) of the GDPR, as it states.

II

The claimed party revolves the bulk of the allegations made in its writ of

allegations to the motion for a resolution regarding:

- The general principle of publicity of judicial proceedings and the law

fundamental to the freedom of information of the mass media.

- The limitation to the principle of publicity of legal proceedings that may make the courts. To this end, in the present case, the body jurisdiction has carried out a weighting of the interests at stake when it comes to establish limitations on the publicity of the victim's statement during the oral trial, among which was not the distortion of the victim's voice.

- The defendant considers that the weighting carried out by the body jurisdiction is sufficient for the purposes that the media can publish the victim's statement without distorting her voice.

At no time during this disciplinary proceeding has the exercise of the Fundamental Right to Freedom of Information by the media, nor the importance of these within a Social State and Democratic of Right to be vehicles of the formation of a free public opinion.

Nor has the general principle of publicity of the judicial proceedings enshrined in article 120.1 of the Spanish Constitution or that said principle is limited, in exceptional circumstances, by the organs jurisdictional.

It is not even about, as has been stated since the agreement to start this procedure, and will be developed in the Fundamentals of Law XII and XIII of the this resolution, to give precedence to one fundamental right over another.

But to find a balance between the Fundamental Right to Freedom of Information and the Fundamental Right to Personal Data Protection for achieve the achievement of the first without undermining the second.

And to find such a balance, it is necessary to carry out a weighting between both

Fundamental rights.

The defendant party points out that the weighting carried out by the body

jurisdiction when establishing the limitations on the publicity of the statement

of the victim during the oral trial is sufficient for the purposes of the media

communication can publish such content without distorting the voice of the victim.

And it is at this moment that we must disagree with the reasoning of the party

claimed.

As already indicated in the motion for a resolution, first of all we need to clarify

what is the data processing that is being analyzed in this procedure. TO

For these purposes, the GDPR defines in its article 4.2 the processing of personal data:

“any operation or set of operations carried out on personal data or

sets of personal data, whether by automated procedures or not, such as

the collection, registration, organization, structuring, conservation, adaptation or

modification, extraction, consultation, use, communication by transmission, diffusion or

any other form of authorization of access, comparison or interconnection, limitation,

suppression or destruction”. (underlining is ours).

It is the diffusion of the voice of the victim that has been carried out by the claimed party that is

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

Treatments, such as that carried out by the Court.

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 the Guidelines 0***PROCEDURE.1 of the Committee European Data Protection Committee on the concepts of data controller and mandated in the GDPR, the concept has five main components: “the natural or legal person, public authority, service or other body”, “determines”, “alone or together with others”, “the purposes and means” and “of the treatment”.

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

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

Thus, Guidelines 0***PROCEDURE.1 on the concepts of person responsible for

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

the part that determines why the processing takes place (i.e. “for what purpose” or

"for what") and how this objective will be achieved (i.e. what means will be used

to make it)".

The court carries out a different treatment that is not the object of the

present disciplinary file. The consideration of the rights and freedoms that

it carries out seeks to protect the identity of the victim of a violent crime, without

violate the right to effective judicial protection of the defendants, within the

development of legal proceedings.

It must be insisted that the access to the institutional signal offered by the Court to the

means of communication is to replace their presence within the Chamber for the purposes of

that they can exercise their Fundamental Right to Freedom of Information. Hence

the weighting that the former has carried out for the processing of data in court

(processing other than that carried out subsequently by the communication medium) no

can in no way replace weighting and risk analysis

that prior to publication must be carried out by the claimed party, which are not

we know

And it is that the RGPD has supposed a transcendental change in the way of understanding the

right to the protection of personal data, being one of the novelties

most relevant proactive responsibility, contemplated in article 5.2 of said

Regulation:

"2. The controller will be responsible for compliance with the provisions

in paragraph 1 and able to demonstrate it ("proactive responsibility")."

Proactive liability implies that the data controller is

responsible for the data processing that it carries out. You not only have to meet the

principles enshrined in article 5.1, but must be able to prove it.

That responsibility implies the need to make decisions -determination

of the purposes and means of the treatment that is going to be carried out-, as well as to render

accounts for the decisions made.

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

"The responsibility of the data controller must be established for

any processing of personal data carried out by himself or on his behalf. In

In particular, the person responsible must be obliged to apply timely and effective measures

and must be able to demonstrate the compliance of the processing activities with the

this Regulation, including the effectiveness of the measures. These measures must have

into account the nature, scope, context and purposes of the processing as well as the

risk to the rights and freedoms of natural persons." (underlining is

our).

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

different and subsequent treatments carried out by different managers of the

treatment, each person in charge will be responsible for the decisions that they adopt in their field

regarding your treatment. Not being able to protect himself to exempt himself from

their responsibility neither in the weighting nor in what the person responsible for the

previous treatment, just as you will not be held responsible for the decisions

adopted by the data controller listed below in the

chain.

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

social network or if they clicked on the "like" button on Facebook. In its section 74 establishes that "On the other hand, and without prejudice to a possible civil liability provided for in national law in this regard, that natural or legal person cannot be held liable, within the meaning of that provision, for operations before or after the chain of treatment with respect to which it does not determine the ends nor the means.

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

And we cannot forget that:

- The treatment carried out by the claimed party, unlike that carried out by the court, is characterized by its durability over time, because once published the news, it remains on the network, being possible to access its content

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

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

temporary.

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

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

facilitates information through the Internet, makes 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 tarnybinés etikos komisija) exposes the amplifying effect of the internet

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

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

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

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

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

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

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

increased exponentially.

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

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

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

it's responsible.

It criticizes the claimed party in its pleadings to the proposed resolution

that

“it seems that the fact that the processing of the personal data of the interested party

was carried out by UNIDAD EDITORIAL within the framework of its right

constitutionally recognized freedom of information is a greater reproach

by the Agency, since it declares in the Proposal that said

Treatment must be differentiated from that carried out by XXXX, as long as it is

characterized by" the traits that we have just pointed out.

The defendant then indicated that "such argumentation seems to obviate that

These characteristics are what give the media their essential

importance in a democratic society and allow them to fulfill their mission

of being a vehicle for the formation of public opinion."

Once again we have to insist that at no time is it about making the

Fundamental Right to Protection of Personal Data on the Law

Fundamental to the Freedom of Information of the media, but of

find a balance between the two. For which it is necessary to carry out a weighting

between both fundamental rights. Weighting that cannot be the one carried out by the

court because it and the media pursue goals

different and their personal data processing have different characteristics, as

as we have just seen and also acknowledges the claimed party in its writ of

allegations to the resolution proposal when it indicates that the aforementioned

characteristics "are those that give the media their essential

importance".

It also indicates the party claimed in its pleadings to the proposal of

resolution that the published information "gathered all the factors established by the

jurisprudence to carry out the balance between the right to freedom of

information and the right to the protection of personal data, namely: (i) the veracity
of the information; (ii) proportionality, defined as "that expressions are not used
unequivocally insulting or vexatious" or "pejorative terms"; and (iii) the relevance
of the facts, in the sense that they are newsworthy and that it takes into
account, in turn, the matter or object of the same, the public or private condition to which
that pertains and the time elapsed (the "currentness" of the news)", since the
news to a highly relevant criminal proceeding and affected a private person
but linked to a very notorious case.

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

Among the judgments referred to in the aforementioned legal grounds,
We will highlight the Judgment of the Supreme Court, of its First Civil Chamber,
661/2016, of November 10 (rec. 3318/2014), which in relation to the recruitment and
disclosure in court of the image of a victim of gender violence provided that
"3rd) Regarding this matter, the jurisprudence has recognized the general interest and the
public relevance of information on criminal cases (judgment 547/2011, of 20

July), which are accentuated in cases of physical and psychological abuse (judgments 128/2011, of March 1, and 547/2011, of July 20), but it has also pointed out, regarding the identification of the persons involved in the trial, that the defendant and the victim are not on an equal footing, because in terms of that one does allow a complete identification, and not only by its initials, due to the nature and social significance of the crimes of mistreatment (judgment 547/2011, of July 20). (underlining is ours).

Victims of sexual assaults, such as gang rape, have to face the challenge of resuming his life once the trial is over, trying to overcome the physical and psychological sequelae derived from the traumatic experience they have suffered.

In this sense, your environment plays a decisive role. Unfortunately, even today produce situations in which they are stigmatized despite having been the victims, sometimes even being forced to change their place of residence.

For this reason, it is essential to treat with the greatest care any personal data that allows you to reveal your identity, prevent you from being recognized as a victim in your environment, understood in a broad sense. Here the medium plays a decisive role. communication, since the analysis of risks for the rights and freedoms that carried out prior to publication is the last guarantee that the company has. victim.

In short, the claimed party has not acted with the required diligence, that of a professional, since the media are responsible for the treatment of personal data that habitually distorts the voice with the purpose

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

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

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

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

subject matter of this file.

IV.

The defendant, in its pleadings to the proposed resolution, criticizes

to it when its Foundation of Law V states the following: "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."

And he criticizes it because:

- "The proportionality in this treatment has already been analyzed and assessed by the body

jurisdictional".

- "The addition of images to the written news cannot be qualified in any case

excessive or lacking in added value, given that it has expressly indicated the High

Court that said information "significantly enriches the content of the message that

It is aimed at the formation of a free public opinion".

- "There is no record (...) that the victim was identified as a consequence of

from the fact that his voice was not distorted."

Since in the previous legal basis we have already indicated that the

weighting carried out by the court is not applicable to data processing

personal information carried out by the media, now we must focus on the

two other aspects indicated by the defendant.

On the one hand, the defendant points out that "the addition of the images to the news

written cannot in any case be classified as excessive or lacking in added value,

given that the High Court has expressly indicated that such information "enriches

notably the content of the message that is directed to the formation of an opinion

free public".

It is true that the Judgment of the Constitutional Court 56/2004, of June 19, states,

in its Foundation of Law IV, that "it should be noted that the image enriches

notably the content of the message that is directed to the formation of an opinion

free public". Although, below, the aforementioned court indicates that

"It is evident, however, that the use of these means of capturing and disseminating

Visuals can affect others much more intensely than written reporting.

fundamental rights of third parties and constitutionally legal rights

protected relative to collective interests, with which the right to freedom of

information may conflict, which must be resolved in accordance with the

requirements of the principle of proportionality and weighting".

Therefore, it is not possible to share the thesis of the defendant regarding the fact that "the

addition of the images to the written news cannot in any case be classified as

excessive or lacking in added value" (emphasis added).

It has already been indicated throughout this proceeding that our courts provide

of prevalence to the Fundamental Right to Freedom of Information, although this does not

It is an absolute right, since the courts in the civil field have established limits to the same in relation to the Right to Honor, to Personal and Family Privacy and to Own Image, as we will see in detail in Fundamentals of Law XII, even when it comes to the dissemination of images.

Among the sentences to which both the initiation agreement and the proposed resolution in this regard, we will highlight the Judgment of the Court Constitutional 2*** PROCEDURE.1, of February 24 (recurso de amparo 1369-2017) that provides, in relation to the image of a person, "that the events criminals are newsworthy events, even independently of the nature of private subject of the person affected by the news. However, the limit is in the identification, direct or indirect, of the victim, since this information is not of interest public because it lacks relevance to the information that is allowed to be transmitted (SSTC 20/1992, of February 20; 219/1992, of December 3; 232/1993, of July; 52/2002, of February 25; 121/2002, of May 20, and 127/2003, of June). Thus, it is currently recognized by Law 4/2015, of April 27, on the statute of

victim of crime, in force since October 28, 2015, when it warns of the need "from the public powers [to offer] a response as broad as possible possible, not only legal but also social, to the victims, not only reparative of the damage within the framework of criminal proceedings, but also minimizes other effects traumatic in the moral that his condition can generate, all this independently of your procedural situation. Therefore, this Statute, in line with the regulations

European Union in the matter and with the demands that our society raises, intends,

starting from the recognition of the dignity of the victims, the defense of their assets

material and moral and, with it, those of the whole of society". In cases like

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,

because the graphic information became idle or superfluous because the photograph lacked the

victim of real interest for the transmission of information, in this case the

apparent accomplishment of a homicide and subsequent suicide" (emphasis added).

On the other hand, the claimed party points out that the processing it has carried out is not

excessive because "There is no record, in contrast to what is indicated in the proposed resolution, that the

victim has been identified as a consequence of the fact of not

distorted his voice.", adding that the present procedure has not been

initiated as a consequence of a claim made by the victim, which the latter did not

has addressed any claim to the media, as well as that the

The identity of the victim remains unknown, "it is not possible to discover that

through any type of Internet search, which shows that the risk

warned as potential by the Resolution Proposal has not concurred in this

case."

Regardless of the fact that the motion for a resolution has never indicated

that the victim has been identified as a consequence of not having distorted

her voice, but there was a certain risk that she would be identified, it should be noted that

it is irrelevant that the procedure was not initiated as a result of a

claim of the victim, as well as that the latter has not made any claim

before the media, because the truth is that, even in the absence of

claims, the party claimed has the obligation to respect the principles

relating to the processing of personal data referred to in article 5 of the GDPR,

among which is the principle of data minimization, and being able to

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

It is also irrelevant whether or not someone has identified the victim through his

voice, since there was a certain risk that someone would identify it, which is a

A particularly serious fact is an event such as the one that gives rise to the news. This is the

important is not whether the risk of the victim being recognized has materialized or

no, but if there is a risk that someone who listens to the voice of the victim without

distort, identify it.

V

The claimed party indicates in its brief of allegations to the initiation agreement that "acted

with legitimate confidence that the authorization he had received from the

expressed Court to retransmit and disseminate the statement of the Interested Party, without

any type of additional condition or requirement to those already mentioned, protected him to

publish such statement, and therefore the processing of personal data that said

publication included, under the same conditions in which it had been broadcast by

the XXXX, was fully adjusted to Law."

Adding then that "if penalized for an alleged violation of the

personal data protection regulations as a result of having carried out

a treatment that was considered lawful by the XXXX would be violating the

principle of legitimate trust of UNIDAD EDITORIAL, when considering the AEPD

contrary to Law what a Court of Justice previously understood protected

by said regulations. In other words, respectfully understand this part.

that it would be disproportionate and would go against the aforementioned principle to require him to go further

beyond what has been considered lawful and legitimate by a court, and

penalize him for not having done so."

Regardless of the fact that in Fundamentals of Law III we have already stated that

the treatment carried out by XXXX is different from that carried out by the claimed party and

that in no case was there authorization from the aforementioned court to

retransmit the statement of the victim, nor the consent of the latter, now

we must focus on whether or not the principle of

legitimate trust.

It is in article 3.1 of Law 40/2015, of October 1, on the Legal Regime of the

Public Sector where reference is made to the aforementioned principle, a precept that indicates

that "Public Administrations objectively serve the general interests and

act in accordance with the principles of effectiveness, hierarchy, decentralization,

decentralization and coordination, with full submission to the Constitution, the Law and

to the right.

They must respect the following principles in their actions and relationships:

(…)

e) Good faith, legitimate trust and institutional loyalty."

The principle of legitimate trust can be understood as the trust of the

citizens in the future performance of the Public Administrations according to their

past performances, considering the expectations they generate, although

always safeguarding the principle of legality, so that principle cannot be

be invoked to save situations contrary to the norm.

This is clear from the Supreme Court Judgment of February 9, 2004 (rec.

4130/2001): "The principle of protection of legitimate trust, related to the

more traditional in our legal system of legal certainty and good faith in

relations between the Administration and individuals, entails, according to the doctrine

of the Court of Justice of the European Community and the jurisprudence of this Chamber, the

that the public authority cannot adopt measures that are contrary to the

hope induced by the reasonable stability in the decisions of the former, and in

function of which individuals have made certain decisions. (…) In

same sense, it should be taken into account that "the principle of protection of the

legitimate trust of the citizen" in the actions of the Administration does not apply to

assumptions of any type of subjective psychological conviction in the individual, but

when said "confidence" is based on signs or external facts produced by the

Administration conclusive enough to induce him to trust the

"appearance of legality" that administrative action through specific acts

reveals (Cf. SSTS November 15, 1999, June 4, 2001 and April 15, 2002,

among other)." (underlining is ours).

While the Supreme Court Judgment of February 1, 1999 (rec.

5475/1995) indicates that "this principle cannot be invoked to create, maintain or

extend, in the field of public law, situations contrary to the law

legal, or when the preceding act results in a contradiction with the purpose or interest

protected by a legal norm that, by its nature, is not capable of covering

discretionary conduct by the Administration that implies the recognition of

some rights and/or obligations that arise from acts of the same. or said

In other words, the invoked doctrine of "proper acts" without the limitation that
just exposed could be introduced into the field of legal relations
public the principle of the autonomy of the will as an ordering method of
matters regulated by norms of an imperative nature, in which the
public interest safeguarded by the principle of legality; principle that would result
violated if an action by the Administration contrary to the
legal system for the mere fact that it has been so decided by the
Administration or because it responds to a precedent thereof.
One thing is the irrevocability of the acts declaring rights outside of
the review channels established in the Law (arts. 109 and 110 LPA of 1958, 102 and 103
of the Law on the Legal Regime of Public Administrations and Procedure
Common Administrative Law, Law 30/1992, modified by Law 4/1999), and another respect for the
legitimate trust generated by own action that must necessarily
be projected to the field of discretion or autonomy, not to the aspects
regulated or regulatory requirements against which, in Administrative Law, do not
what was resolved in act or in precedent that was contrary to those may prevail.
Or, said in other terms, it cannot be said that the trust that is
deposited in an act or precedent that is contrary to an imperative norm." (the underlined
is ours).
In addition, as we have advanced, that hope or confidence generated must be
"legitimate" and be based on previous external acts whose meaning is
undoubtedly contrary to what was subsequently agreed, without it being included in this
principle of legitimate trust a mere psychological conviction of the individual.
We have to mean that the principle of legitimate trust operates in practice between
a specific Public Administration and an individual, within the framework of the legal relationship
existing between them. This means that the action carried out by another Administration

Public outside and different from the acting party does not bind the latter -each one exercises its

own competences-, nor therefore, can generate legitimate confidence to the individual.

The AEPD has not carried out any action that has allowed the claimed party

conclude the suitability of its performance. You cannot provide any pronouncement or

performance of this Agency that led him to think that he could spread the voice of the

undistorted victim, simply because there is no action on that

sense.

In greater abundance, it is worth insisting on what has already been expressed previously about the

prevalence of the principle of legality, which prevents the invocation of legitimate expectations for

save situations contrary to the norm, especially when we talk about the powers

regulated by the AEPD regulated in article 58 of the GDPR, such as the power

sanctioning.

Therefore, the requirements set forth in the Supreme Court Judgment are not fulfilled.

of February 22, 2016 (rec. 4048/2013), invoked by the claimed party, to

determine the existence of a legitimate expectation:

1. "that is based on undeniable and external signs", which the defendant understands that

It is the decision of XXXX to broadcast the victim's statement live,

authorize the media to broadcast it, both live and after the fact,

and make available to those videos of the testimonial evidence that took place

during the trial, all without adopting or requiring the alteration or distortion of the voice of the

interveners.

Regardless of whether these undeniable and external signs, as has already been

indicated, they must be from the AEPD and, in this case, in addition, they do not exist, there are

remember that the court carries out a different treatment that is not the object of the

present disciplinary file. Which implies that what the media

communication, in this case the claimed party, do later with the

information derived from the provision of the institutional signal is not

responsibility of the XXXX, as indicated in the Legal Basis III.

2. "that the hopes generated in the administrator must be legitimate", which

the claimed party considers that they are linked to the exercise of their Right

Fundamental to Freedom of Information.

As already indicated throughout the disciplinary procedure and this resolution,

It is not about denying the exercise of the Fundamental Right to Freedom of Information

nor to give precedence to one fundamental right over another, having to choose which

has more weight in a specific assumption, but rather to find a balance

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

Information without distorting the Fundamental Right to Data Protection of

Personal character.

That is, the freedom of information of the mass media is not questioned.

communication but the weighting with the right to data protection based on 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.

In fact, in the case examined, the claimed party has immediately withdrawn
from his digital diary the recording of the hearing in which the voice of the victim was disseminated to
requirement of the AEPD, leaving the written notice of such statement, so
the information continues to be available and continues to be supplied in its full extent.
This shows that in order to provide this specific information it was not
necessary, under the terms of art. 5.1.c) of the GDPR, disseminate the voice of the victim.
The foregoing is criticized by the claimed party in its pleadings to the
motion for a resolution, indicating that all it has done is comply with
an agreement to adopt a precautionary measure from the Agency, which cannot be
considered as an acknowledgment that the information was considered excessive.
In this regard, it should be noted that at no time has it been interpreted that the
compliance with the requirement of the AEPD by the claimed party implies that it
acknowledge that posting the victim's undistorted voice was excessive.
Rather, once the aforementioned voice was distorted in the video on its digital page, the
Information continues to be available and continues to be supplied in full.
3. "that the final conduct of the Administration is contradictory to the acts
above, is surprising and incoherent. The defendant considers that if the
AEPD sanctions him, his performance would be clearly surprising, incoherent and
contradictory to the action of the court, which it considered legitimate and lawful
the retransmission and diffusion of the victim without the need to distort his voice.
Regardless of the fact that we have already indicated that the XXXX has not authorized the
retransmission and diffusion of the voice, it is necessary to insist that the final conduct

contradictory must be from the same body, which does not happen in the present case

since what the claimed party intends is to oppose the actions of the

court with that of the AEPD, not two contradictory actions of the

Agency.

SAW

Indicates the claimed party in its pleadings to the proposed resolution

that, although the Agency has ruled out the concurrence of the principle of

legitimate expectations, in the present case what there is is an absence of the principle of

guilt whenever there is an error of law or prohibition that must exonerate

such responsibility.

The defendant party continues arguing that the legal error of his actions

derives from that of the court, which generated "the conviction of the legality of his

performance, reasonably assuming that XXXX's performance was in line with

Law and was based on a consideration of the rights and freedoms in conflict

which made an additional assessment unnecessary.", supporting his claim in the

Judgment of the National Court of April 27, 2006 (appeal 526/2004):

"In the present case, as rightly indicated in the appealed decision, the

R.S.C.E. only delivered the 2001 LOE, including the names and surnames of the

complainant, to the General Directorate of Livestock of the Ministry of Agriculture because

the latter demanded it as a prerequisite for the official recognition of the latter for the

keeping of canine genealogical books as an organization or association of

breeders of purebred dogs, in accordance with the provisions of Royal Decree 558/2001 of May 25, an omission that previously had cost him the denial of such recognition. Obviously, we are in a case of error of law or of prohibition, which excludes guilt in the terms set forth above, that is, that the action or omission must necessarily be willful or culpable at any degree of negligence. Certainly, a reproach of guilt is necessary, be it title of fraud or fault, to the offending subject as a premise of his responsibility, but the error of law excludes such guilt, in line with what was stated in the judgment (interpretation) of the Constitutional Court 76/1990, which maintains the criterion that if a Law (in this case the General Tax Law) links the responsibility to a prior guilty conduct, it is evident that the error of law or the invincible error may produce the effects of exemption or attenuation that are proper to it in a system of subjective responsibility, but its lack of express contemplation in the norm does not constitutes a defect of unconstitutionality. As noted above, the illicit type of art. 44.4.b) of the LOPD requires that title of guilty imputation to the subject that He is declared responsible for the conduct in the same collection. and in the present allegedly prosecuted there is no such fault in the Royal Canine Society of Spain because this Company, by fulfilling that requirement of a body of the Administration Public, which is presumed to act in full compliance with the Law and the Law (Article 103.1 CE), delivered said L.O.E. of 2001 in the belief and confidence that This was legal, so such conduct cannot be imputed as guilt, to the constitute a clear case of legal error that cannot be overcome. From there, the perfect legality of the resolution that is appealed today determining the lack of responsibility (due to lack of voluntariness) of the R.S.C.E. in the facts object of the disciplinary file that is being prosecuted in this process." (the underlined is ours).

After reading said sentence, it is observed that the budgets of the same and of the

present case are totally different: In the case of the sentence cited there is an error

of law derived from compliance with a requirement made by a

administration under a standard, which is mandatory. In it

present case, the defendant has disseminated the statement in court of a victim

of a sexual crime without distorting the voice, alleging the communication medium that

has done so "reasonably presuming that the performance of XXXX was

adjusted to Law and was based on a consideration of the rights and freedoms in

conflict that made further assessment unnecessary."

For this reason, we cannot share the thesis that in the present case there is an error of

right because:

- The action of the claimed party does not derive from the obligation to comply with the norm.

any or any administrative requirement.

- As previously indicated in this resolution, the treatment

carried out by the court has a different purpose and characteristics than the

treatment carried out by the media, so the weighting that

that person performs cannot exempt the communication medium from the obligation to perform

both a consideration of the fundamental rights at stake, and an analysis of

risks, which, in the present case, are not known to us.

And we cannot forget that when the media publish

news, act as data controllers and, as such, must be

diligent in complying with data protection regulations,

applying, among others, the principle of data minimization enshrined in article

5.1.c) of the GDPR, not being able to rely on the weighting or on what the

responsible for the previous treatment.

In this regard, it should be remembered that jurisprudence repeatedly considers that

from the culpable element it can be deduced “...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). Assuming

examined, the respondent party has not proved that it used the slightest

diligence.

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, you can cite 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.

In the present case, the claimed party has not acted with the required diligence, in

In this case, that of a professional who carries out continuous processing of personal data.

personal, since the media are responsible for data processing

of a personal nature that habitually distort the voice in order to

that the person speaking is not recognized.

VII

It considers the claimed party in its brief of allegations to the proposal of

resolution that the aggravating factors considered by the Agency would not be applicable to the

present case, at the same time that it criticizes the fact that a

series of mitigating factors that, he understands, are present.

Regarding the aggravating circumstances:

- The claimed party considers that the circumstance of nature,

seriousness and duration of the infringement, regulated in article 83.2.a) of the GDPR

because: (i) the court had already weighed the interests

in Game; (ii) it is not possible to affirm that the victim has suffered any harm or harm

as a consequence of the diffusion of the act of the oral trial.

But we have already indicated throughout the resolution that the weighting

carried out by the court is for a treatment different from that carried out by the

claimed party, with a different purpose and characteristics, so the part

claimed cannot excuse its responsibility in the weighting it has carried out

a person in charge of a previous treatment.

On the other hand, the damage that has been caused to the victim with the publication of his statement without distorting the voice is the certain risk that someone who hears such voice, identify it.

Based on the foregoing, the circumstance regulated in article 83.2.a) of the GDPR as an aggravating circumstance, since the nature of the infringement of article 5.1.c) of the GDPR is of such seriousness that it has led to the loss of disposition and control over the personal data of the 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

- The defendant considers that the aggravating circumstance of the intentionality or negligence in the infraction, regulated in article 83.2.b) of the GDPR, because "the concurrence of such circumstances in the conduct of a involved in a disciplinary proceeding can never be considered aggravating factor, but rather a sine qua non condition to be able to appreciate the concurrence of responsibility in said defendant".

We cannot share the thesis of the defendant, since the circumstance of the intentionality or negligence in the offense is regulated as a circumstance to which when determining the amount of an administrative fine in article 83.2.b) of the GDPR, rule of direct and immediate application in our legal system.

In this regard, Directives 04/2022 of the European Committee for Data Protection on the calculation of administrative fines in accordance with the GDPR, in its version of 12 May 2022, submitted to public consultation, indicate that "the absence of intention does not necessarily equates to a decrease in severity. In fact the negligence serious constitutes an increase in perceived seriousness, and in other cases negligence could, at best, be considered neutral. On the other hand, in this regard,

It should be clear that even if the infringement is unintentional, it can

considered a serious infringement, depending on the other circumstances of the case of

cars.” (underlining is ours).

In the present case, the claimed party did not ensure a procedure that guaranteed

the protection of the personal data of the victim in such circumstances

sensitive, since we are referring to a woman of XX XXXX victim of a crime

violent and against sexual integrity, putting her at a certain risk of being identified

by people who were unaware of their status as victims, a risk that should have been

valued by the media and for which it is responsible.

That is, the claimed party did not act with the required diligence, that of a

professional, as stated in the previous legal basis, since the

media as responsible for the treatment of multiple data that

know within the exercise of their journalistic work, they must know and comply with the

regulations on data protection, applying, among them, the principle of

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

Despite the foregoing, the claimed party considers that it has not acted

negligently, since "it has carried out its actions fully subject to the

advertising restrictions adopted by the XXXX after the weighting carried out by

said court."

But we have already indicated repeatedly throughout this resolution that the

weighting carried out by the court is for a previous treatment and

different from that carried out by the media, so it cannot replace the

you have to do this.

- Neither does the defendant consider that in the present case the

aggravating circumstance relating to the categories of personal data affected by the infringement,

regulated in article 83.2.g) of the GDPR, because:

(i) “XXXX himself was aware of both the “undoubted media interest of the

trial" as well as the nature of the crime on which it dealt and adopted, prior

weighting of the interests at stake, the advertising restrictions that it considered

necessary to protect the interested party while guaranteeing the right

fundamental to freedom of information.

(ii) "constitutional jurisprudence does not make any exception to the principle

of publicity of the legal proceedings related to crimes against

sexual integrity; Furthermore, said jurisprudence has indicated that the information on

events of a criminal nature is of general interest and has public relevance.”

It appears that the Respondent is confusing what is involved in the exercise of

Fundamental Right of Freedom of Information with what the aggravating factor entails

cited, which refers to the processing of certain categories of personal data.

As has already been indicated throughout the resolution, at no time has there been any doubt

of the importance that in a Social and Democratic State of Law the exercise

of the Fundamental Right to Freedom of Information. Now, the media

communication, in the exercise of their informative work, sometimes process data

sensitive personal. And if by violating the data protection regulations

personal data of such a sensitive nature has been affected, it is when this

circumstance, as in the case that is the subject of this disciplinary proceeding.

Hence, both the start-up agreement and the proposed resolution refer to

that this aggravating circumstance is applied due to "The certain possibility of recognizing the victim of a

crime as reported in the news, very serious, violent and against sexual integrity

(multiple violation), supposes a serious damage for the affected, since what happened

it is linked to their sex life."

On the other hand, regarding the mitigating factors:

- The claimed party indicates that the nature, seriousness and

duration of the infringement, regulated in article 83.2.a) of the GDPR, because:

(i) The treatment "was framed within the fundamental right to freedom of

information by a written means of communication, complying with all

requirements established by constitutional jurisprudence in relation to the

weighing between said right and the protection of personal data of the

interested, as well as with the advertising restrictions adopted by the XXXX for

guarantee said protection and the guidelines of the Protocol."

(ii) Only one person was affected by the treatment.

(iii) The publication of the news in question has not caused any damage to the

interested.

Since in this Foundation of Law we have already referred to both the

consideration of the fundamental rights at stake as well as the harm that

caused the publication of the news in the interested party, since such issues were

raised by the claimed party when criticizing that the

circumstance regulated in article 83.2.a) of the GDPR as an aggravating circumstance, now we

We are going to focus on the allegation that only one person was affected by the

treatment.

It is true that the number of victims is one. But article 83.2.a) of the GDPR

invoked by the claimed party includes more aspects than the number of injured parties

for the infringement: the nature, scope or purpose of the processing operation and the

level of damages that have been caused.

As we have already said, in the present case, it is considered that the

nature of the offense is very serious since it entails a loss of

provision and control over your personal voice data to a person who has been

victim of a violent crime and against sexual integrity and that by disseminating said information

there was a certain risk that it could be recognized by third parties.

Such aspects are so important in themselves that, within what is the

circumstance of article 83.2.a) of the GDPR, must have more weight in the graduation

of the offense than the mere fact that the injured party is a person.

- The intentionality or negligence in the infraction, regulated in article 83.2.b) of the

GDPR, because, as previously indicated, the guilty element does not exist.

We have already referred to this aspect both in the previous Foundation of Law

such as when the defendant criticized the application of this circumstance as

aggravating, so we refer to what is stated there.

- The adoption of measures to alleviate the effects of the presumed infringement (article

83.2.c) of the GDPR) and the degree of cooperation with the control authority in order to

remedy the infringement and mitigate its possible adverse effects (article 83.2.f)

of the GDPR), since it immediately responded to "the request sent by the Agency".

The content withdrawal measure did not derive from a spontaneous action of the

claimed party aimed at alleviating, effectively, the damage suffered by the

victim, but rather an urgent and mandatory withdrawal order from the AEPD, so there is no

can be considered in the present case as a mitigation.

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."

Neither can the degree of cooperation with the AEPD be considered a mitigating factor.

time that the withdrawal orders issued by it are mandatory

in accordance with the provisions of article 69 of the LOPDGDD. The consideration of the

cooperation with the AEPD as mitigation, as claimed by the appellant, not

is linked to any of the cases in which there may be a collaboration or

cooperation or requirement by reason of a legal mandate, when the actions are

due and required by law, as in the case at hand, being indifferent to the

degree of diligence in responding to requests.

To this end, it is necessary to take into account the Guidelines of the Working Group of the

Article 29 on the application and setting of administrative fines for the purposes of

Regulation 2016/679, approved on October 3, 2017, which states that

“That said, it would not be appropriate to take into account in addition the cooperation that the law requires; for example, in any case the entity is required to allow the authority of control access to the facilities to carry out audits or inspections”.

In the same sense, Directives 04/2022 of the European Committee for the Protection of Data on the calculation of administrative fines in accordance with the GDPR, in its version of May 12, 2022, submitted to public consultation, indicate that "it must be consider that the ordinary duty of cooperation is obligatory and, therefore, must be considered neutral (and not a mitigating factor).”

Therefore, we can conclude that "cooperation" cannot be understood as that which is required or mandatory by law for the person responsible for the treatment, as in this case.

VIII

The claimed party, in its pleadings to the resolution proposal, opposes the confirmation of the proposed provisional measure consisting of:

“- 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.”

Motivating such opposition in:

- "the relevance that the Constitutional Court itself gives to the incorporation of audiovisual information to written information, given that the High Court understands that it "significantly enriches" the written information, thus contributing to the formation of a free and informed public opinion".

- The publications made were made "with full respect of the criteria of weighting carried out to preserve the privacy and data protection of the victim".

- "There is no proven evidence of the existence of impairment to the rights of the interested party."

It has already been indicated throughout this proceeding that our courts provide of prevalence to the Fundamental Right to Freedom of Information, although it is not a absolute right, since the courts in the civil field have established limits to the same in relation to the Right to Honor, to Personal and Family Privacy and to Own Image, as we will see in detail in Fundamentals of Law XII, even when it comes to the dissemination of images.

Also repeatedly throughout this resolution, and in a manner detailed in Fundamentals of Law III, we have indicated that the weighting carried out by the court can not replace in any way the that the media has to do.

Likewise, in Fundamentals of Law IV and VII of this resolution we have indicated that the impairment of the rights of the interested party that has taken place is the certain risk that someone hearing the victim's voice without distortion will identify it, which supposes the loss of disposition and control over the personal data of the voice to a person who has been the victim of a violent crime and crime against sexual integrity, and that when disseminating said personal data there is a certain risk that it can be recognized

by third parties, with the serious damages that this would cause.

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

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

IX

The voice of a person, according to article 4.1 of the GDPR, is personal data

make it identifiable, and its protection, therefore, is the subject of said GDPR:

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

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

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

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

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

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

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

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

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

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

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

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

personal character considered together with the voice.

For this reason, report 139/2017 of the Legal Office of this Agency states that "the

image as well as the voice of a person is personal data, as will be

any information that makes it possible to determine, directly or indirectly, your identity

(…)”

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

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

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

as

"any information concerning identified or identifiable natural persons",

This question is not controversial."

Article 4.2 of the GDPR defines "processing" as: "any operation or set of

of operations carried out on personal data or sets of personal data,

whether by automated procedures or not, such as the collection, registration,

organization, structuring, conservation, adaptation or modification, extraction,

consultation, use, communication by transmission, diffusion or any other form of

authorization of access, collation or interconnection, limitation, deletion or destruction.”

The inclusion of a person's voice in journalistic publications, which identifies or

makes a person identifiable, implies a processing of personal data and, therefore,

Therefore, the person responsible for the treatment that carries out the same is obliged to comply with

the obligations for the data controller set forth in the GDPR and in

the LOPDGDD.

X

This procedure begins because the claimed party published, on the websites

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

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

case that was very mediatic. The victim's voice could be seen clearly

recount in all crude details the multiple rape suffered. All this constitutes

processing of personal data of the victim.

People have the power of disposal over their personal data, including

his voice, as well as its diffusion, resulting, without a doubt, deserving of

protection of the person whose personal data is disclosed in violation of the law

legal.

Thus, STC 292/2000, of November 30, provides that "the content of the right

Fundamental to data protection consists of a power of disposal and control

on personal data that empowers the person to decide which of those data

provide to a third party, be it the State or an individual, or which can this third party

collect, and which also allows the individual to know who owns that personal data

and for what, being able to oppose that possession or use. These powers of disposition and

control over personal data, which constitute part of the content of the right

fundamental to data protection are legally specified in the power to

consent to the collection, obtaining and access to personal data, its subsequent

storage and treatment, as well as its use or possible uses, by a third party, be it the

state or an individual. And that right to consent to knowledge and treatment,

computerized or not, of personal data, requires as complements

essential, on the one hand, the ability to know at all times who has

these personal data and to what use you are submitting them, and, on the other hand, the power

oppose such possession and uses".

In this sense, and regardless of the legal basis legitimizing the

treatment, all controllers must respect the principles of

treatment included in article 5 of the GDPR. We will highlight article 5.1.c) of the

GDPR which establishes that:

"1. Personal data will be

c) adequate, pertinent and limited to what is necessary in relation to the purposes for which

that are processed ("data minimization");"

However, we are faced with a fundamental right that is not absolute,

since, if necessary, the Fundamental Right to Data Protection can

give in to the prevalence of other rights and freedoms also constitutionally

recognized and protected, such as, for example, the Fundamental Right to Freedom of

Information, weighing it on a case-by-case basis.

However, in the present case, as we will explain, it must be considered that the

treatment carried out by the claimed party within the framework of the freedom of

information has been excessive, as there is no prevailing public interest in information in

the dissemination of the voice of the victim - without adding any added value to the information

keeping the real voice of the victim (without distorting, for example)-, under whose pretext

it seems that those data have been disclosed; voice that, added to the fact that it is

a highly publicized case, makes the victim clearly identifiable. By pondering the

conflicting interests and, considering the concurrent circumstances of this case,

that is, the especially sensitive nature of personal data and the intense

affectation of the privacy of the victim, the interest of the owner deserves greater protection

of the right to the protection of your personal data and that they are not disclosed in front of the

claimed public interest in its dissemination.

eleventh

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".

twelfth

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

Thus, we will cite, for all, STC 2***PROCEDURE.1, of February 24 (appeal amparo 1369-2017) that it has, 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 (rec. 1747/2008), in which, regarding the data necessary to provide a information and limits to the public interest states that "b) Trivial information is not protects (ATC 75/2006), but the fact of providing unnecessary data in a case of rape (full name, last name initials, street portal where the victim lived) that have no community relevance, do not respect the reservation, only seek to satisfy curiosity, produce disturbances or annoyances, and reveal aspects of personal and private life unnecessarily, allowing neighbors, close people and relatives full identification of the victim and knowledge in great detail about an act that seriously violated his dignity (STC 185/2002) or about a disease that has no public interest and affects direct to the irreducible field of intimacy and that reveals itself to the effect of a pure joke or joke (STC 232/1993);".

Likewise, the STS, of its First Civil Chamber, 661/2016, of November 10 (rec. 3318/2014), in relation to the capture and dissemination in court of the image of a victim of gender violence provided that "1.) The interest of the disputed information or the right of the defendant television station to broadcast

images recorded during the act of the oral trial of the criminal case, since there is no record

no limitation in this regard agreed by the judicial body.

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

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

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

also included in the fundamental right of the television channel

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

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

image.

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

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

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

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

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

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

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

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

of July 20).

[…]

6th) In short, the defendant television channel should have acted with the prudence of the

diligent professional and avoid issuing images that represented the

recurring in close-up, either refraining from issuing the corresponding shots,

well using technical procedures to blur their features and prevent their

recognition (judgment 311/2013, of May 8). Similarly, it should also

avoid mentioning your first name, because this information, insufficient by itself to

constitute illegitimate interference, became relevant when pronounced on the screen

simultaneously with the image of the applicant and add the mention of her

town of residence, data all of them unnecessary for the essence of the content

information, as evidenced by the news about the same trial published in the

next day in other media. 7th) The identification of the plaintiff through his

image and personal data indicated and its direct link to an episode of

gender violence and other serious crimes, when disclosure was foreseeable

Simultaneous or subsequent data referring to how the victim and her aggressor met

and the way in which the criminal acts occurred, supposes that the loss of the

anonymity would violate both the plaintiff's right to her own image, by the

broadcast of their physical features, such as their personal and family intimacy, to the extent that

that some reserved data, belonging to his private life (who went to the Internet

to start a relationship or the intimate content of some of their talks), lacking

offensive entity in a situation of anonymity, they began to have it from the moment

in which any person who watched those news programs and who resided in the

location of the victim could know who they were referring to, so that the damage

psychological damage inherent to his condition as a victim of crimes was added to the moral damage

consisting of the disclosure of information about his private life that he had not consented to

make public." (underlining is ours).

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

personal data (some of which are not of an intimate nature) to provide the

information, considering them unnecessary at all points in attention to the

concurrent circumstances. Sometimes the courts refer to intimate data,

but sometimes it is personal data that is not intimate, such as, for

For example, the image of a natural person obtained from a photograph published in a

social network or name and surname.

XIII

In the specific case examined, as we have indicated, the claimed party

published, on the websites referred to in the facts, the audio of the statement before the

judge of a victim of multiple rape, to illustrate the news of a very

media.

Thus, it is not a question, as in other cases examined by jurisprudence, of endowing

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

weight in a specific case. If not, rather, to find a balance between

both to achieve the achievement of the purpose of the first without undermining the second.

The reconciliation of both rights is nothing new, since the legislator

European Union mandates such reconciliation in article 85 of the GDPR.

As we have seen previously, the Fundamental Right to Freedom of

Information is not unlimited, since the jurisprudential interpretation when confronting it

with other rights and freedoms does not allow the same in any case and with all breadth,

but, nevertheless, the prevalence that the courts usually endow it can be seen

limited by other fundamental rights that must also be respected. Thus

observes its limitation when the personal data provided was unnecessary for the

essence of the information content.

We must consider the special circumstances present in the supposed

examined. It is about a woman from (…) who has suffered a multiple rape. In the

published recording, she is heard recounting, with great emotional charge, the aggression

sexuality suffered in all crudeness, narrating (...).

In addition, we cannot lose sight of the victim status of the woman whose voice, with

all the nuances exposed, has spread.

Let us remember, for merely illustrative purposes, that Law 4/2015, of April 27,

of the Statute of the victim of crime, as well as the recent Organic Law 10/2022, of 6

of September, of integral guarantee of sexual freedom, foresee a special

need to protect victims of crimes against sexual freedom or

sexual indemnity. In addition, the aforementioned Statute of the victim of crime

it also provides special protection for victims of violent crimes. and in the

case examined both circumstances concur.

In this case, the situation of the victim must be considered (who is not in the

same level of equality as the defendants) and what the diffusion of their voice with

all its nuances, as well as the special protection that the

legal system that, without constraining the supply of information, must be done

compatible with the principle of data minimization, applicable to the form, the

medium in which the information is supplied and disseminated due to the immediate affectation of the data

personnel and the identification of the victim.

Precisely because the obvious informative public interest in the news is not denied,

Given the general interest in criminal cases, in this specific case, it is not a question of

to diminish the Fundamental Right to Freedom of Information due to the prevalence

of the Fundamental Right to the Protection of Personal Data, but of

make them fully compatible so that both are absolutely

guaranteed. That is, the freedom of information of the media is not questioned.

of communication but the weighting with the right to data protection based on

to the proportionality and need to publish the specific personal data of the voice. Such

situation could have been resolved with the use of technical procedures to

prevent voice recognition, such as, for example, distortion of the voice of

the victim or the transcript of the report of the multiple rape, security measures

both, applied depending on the case in an ordinary way by means of

communication.

At older we have to mean that the victim is an anonymous person and our

Constitutional Court, for all, STC 58/2018, of June 4, affirms that the

public authorities, public officials and public figures or those dedicated to

activities that carry public notoriety “voluntarily accept the risk of

that their subjective personality rights are affected by criticism, opinions

or adverse disclosures and, therefore, the right to information reaches, in relation to

with them, its maximum level of legitimizing effectiveness, insofar as their life and conduct

morality participate in the general interest with a greater intensity than that of those

private persons who, without a vocation for public projection, see themselves

circumstantially involved in matters of public importance, to which

Therefore, a higher level of privacy must be recognized, which prevents

granting general importance to facts or behaviors that would have it if they were referred to

to public figures".

The STJUE (Second Chamber) of February 14, 2019, in case C 345/17, Sergejs Buivids, mentions various criteria to ponder between the right to respect of privacy and the right to freedom of expression, among which are "the contribution to a debate of general interest, the notoriety of the affected person, the object of the report, the previous behavior of the interested party, the content, the form and the repercussions of the publication, the form and the circumstances in which it is obtained information and its veracity (see, in this regard, the judgment of the ECtHR of June 27, 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, CE:ECHR:2017:0627JUD000093113, section 165)".

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

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

For this reason, and as expressed by the Supreme Court in its (civil) Judgment 697/2019, of 19 December, the formation of a free public opinion does not require, nor does it justify, the affects the fundamental right to one's own image [in this case to the protection of

personal data] with that seriousness and in a way that does not save the necessary

connection with the identification of the person object of the information.

It is worth mentioning the breach of point 1 of the Digital Pact for the

protection of persons, signed by the entity involved, which establishes that "The

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

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

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

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

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

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

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

fourteenth

Every person responsible for the treatment has conferred obligations in terms of

data protection, in the terms prescribed in the GDPR and in the LOPDGDD,

being able to highlight, in terms of what interests us, proactive responsibility,

Article 5.2 of the GDPR, risk assessment and implementation of measures

of adequate security. Obligations that are even more relevant when, as in

In the case we are examining, this one is especially sensitive.

Such obligations do not decline because we are before a data controller

that it is a means of communication.

If we add the diffusion of the victim's voice (with all its nuances), which makes it

identifiable and can be recognized by third parties, with the factual account that makes

in relation to the violation suffered, there is a very high and very likely risk that

may suffer damage to their rights and freedoms. This has happened in other cases

of dissemination of personal data of victims of rape crimes. And this, in addition to

that with the diffusion of the voice of the victim she is being sentenced again to

can be recognized by third parties, when it is not a proportional treatment or

necessary in relation to the information purposes pursued.

It is tremendously significant that, in the case examined, the part

claimed immediately has distorted the voice of the victim's statement in

the podcast at the request of the AEPD, without prejudice to which the information follows

being available and continues to be supplied with all its breadth. This puts

manifest that in order to provide this specific information it was not necessary, in the

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

fifteenth

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.”

16th

In order to determine the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the GDPR, precepts that state:

"Each control authority will guarantee that the imposition of administrative fines

under this Article for infringements of this Regulation

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

proportionate and dissuasive.”

"Administrative fines will be imposed, depending on the circumstances of each

individual case, in addition to or in lieu of the measures contemplated in

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

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

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

nature, scope or purpose of the processing operation in question as well as the number

number of interested parties affected and the level of damages they have suffered;

b) intentionality or negligence in the infringement;

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 an initial assessment, the graduation criteria are considered concurrent

following:

 Aggravating:

- Article 83.2.a) of the GDPR:

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

- Article 83.2.b) of the GDPR.

Intentional or negligent infringement: Although it is considered that there was no intentionality on the part of the communication medium, it is concluded that it was negligent by not ensuring a procedure that guarantees the protection of personal data in such sensitive circumstances, especially when on many occasions distorts the voice in the news so that the person is not recognized talking.

- Article 83.2.g) of the GDPR.

Categories of personal data affected by the infringement: The certain possibility of recognize the victim of a crime as the one reporting the news, very serious, violent and against sexual integrity (multiple rape), is seriously detrimental to the affected, since what happened is linked to their sexual life.

seventeenth

The text of the resolution establishes the offense committed and the

facts that have given rise to the violation of data protection regulations, of

which clearly infers what are the measures to adopt, notwithstanding that the

type of procedures, mechanisms or concrete instruments to implement them

corresponds to the sanctioned party, since it is the person responsible for the treatment who

He fully knows his organization and has to decide, based on the responsibility

proactive and risk-focused, how to comply with the GDPR and the LOPDGDD.

Therefore, in accordance with the applicable legislation and assessed the criteria of

graduation of sanctions whose existence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE UNIDAD EDITORIAL INFORMACION GENERAL S.L.U., with

NIF B85157790, for a violation of article 5.1.c) of the GDPR, typified in the

Article 83.5 of the GDPR, a fine of 50,000.00 euros (FIFTY THOUSAND euros).

SECOND: Confirm the following provisional measures imposed on UNIDAD

EDITORIAL GENERAL INFORMATION S.L.U.:

- Withdrawal or distortion of the victim's voice from their web addresses, avoiding, in the

to the extent that the state of technology allows it, the re-uploading or re-uploading of copies

or exact replicas by the same or other users.

- Withdrawal or modification of the contents in such a way that it makes it impossible to access them and

disposition of the original by third parties, but guarantees its preservation, for the purposes of

guard the evidence that may be necessary in the course of the investigation

police or administrative or judicial process that may be investigated.

THIRD: NOTIFY this resolution to EDITORIAL UNIT

GENERAL INFORMATION S.L.U.

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

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

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

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

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

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

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

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

restricted IBAN number: ES00 0000 0000 0000 0000 0000 (BIC/SWIFT Code:

XXXXXXXXXXXX), opened on behalf of the Spanish Agency for Data Protection in

the banking entity CAIXABANK, S.A. Otherwise, it will proceed to its

collection in executive period.

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

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

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

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

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

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

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

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

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

Interested parties may optionally file an appeal for reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from

count from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided for in article 46.1 of the

referred Law.

C / Jorge Juan, 6

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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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