

□ Procedure No.: PS/00027/2020

## RESOLUTION OF PUNISHMENT 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 claimant) on 05/14/2019 filed  
claim before the Spanish Data Protection Agency. The claim is  
directed against the Independent Union of Banking Employees of Liberbank, with  
NIF G10467637 (hereinafter, SIBANK). The grounds on which the claim is based are:  
the complainant, chairman of the Liberbank branch works council

\*\*\*COMMUNITY.1 and Secretary of Organization and Administration FESMC-UGT

\*\*\*COMUNIDAD.1, affirms that the meeting held on 10/01/2018 between the committee of  
Liberbank company and the General Director of Labor of the Government of  
\*\*\*COMUNIDAD.1 was recorded fraudulently by a member of SIBANK, since  
that those attending it were unaware that it was taking place.

Subsequently, a video was disseminated through WhatsApp to the workers that  
includes an excerpt from the conversation between the UGT representative and the  
General Director of Labor. He states that they have filed a complaint with the Police.  
National and Court, although it does not provide evidence or numbers of the report and file.

Additional information requested from the claimant, dated 05/15/2019  
receives in this Agency written correction sent by the claimant providing  
the following documents on USB memory:

- Writing indicating various aspects of what happened in the union elections  
and differences between unions and requesting this Agency to formulate a  
formal complaint against the SIBANK union.

- Screen print of the broadcast by WhatsApp of the extract of the meeting.
- Recording to which the claimant alludes in his claim.
- Video of union representative (SIBANK), used in campaign

election, justifying the recording and its dissemination.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant of which this

Agency, the Subdirector General for Data Inspection proceeded to carry out

preliminary investigative actions to clarify the facts in

question.

☐ The extreme indicated in the claim of the recording and diffusion is verified

of a part of the meeting held by the works council with the

General Director of Labor of the Government of \*\*\*COMUNIDAD.1.

☐ The representative of the union claimed, in the video used in the campaign

electoral, manifests among others, the following aspects:

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It justifies the legality of the recording by pointing out that the person recording was participating in said recording.

- That he does not see it as punishable to spread positions or initiatives in trade union matters, they have nothing to do with the right to personal and family privacy.

- And he ends by pointing out that he has respected the principle of proportionality and that they have only understood that they should broadcast the recording

when verifying that the head of a union intended to influence

in the competent administrative bodies.

☐ Examined the recording provided by the claimant (excerpt from the meeting

broadcast by WhatsApp) only the UGT representative and the

General Director of Labor of the Government of \*\*\*COMUNIDAD.1. It is true that

The complete recording is not available, but an extract of it in which

the voice of any other meeting is not heard, but understanding "the recording"

denounced as the total of the meeting and given the controversy of what was

hears in it, it is presumable that the representative of the union claimed

participate at some point in it.

☐ Regarding the judicial process referred to in the claim, the written document

received on 05/15/2019 sent by the claimant, it follows that the process

court is due to a complaint filed by another union, against the

union claimed, for insults, facts other than those indicated in this

claim.

THIRD: On 02/28/2020, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the person claimed for the alleged

infringement of article 6.1.a) of the RGPD, typified in article 83.5.a) of the RGPD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

allegations on 06/12/2020 stating, in summary: that the meeting to which he

reference the start-up agreement or was produced by the works council but by a

part of him and the general secretary of UGT; That no consent is required for

record the audio conversation by the assistant to it; that only partially

cites the applicable regulations since in article 6 and no reference is made to the

legitimate interest and that we would be facing a form of legitimation of the treatment of the

data as an alternative to consent; that it would not be a legitimate interest of the

responsible but also of third parties in this case of the workers and that

file the procedure.

FIFTH: On 08/10/2020, the instructor of the procedure agreed to open

a period of practical tests, agreeing on the following:

- Consider reproduced for evidentiary purposes the claim filed by the claimant and his documentation, the documents obtained and generated by the Inspection services that are part of the file.
- Consider reproduced for evidentiary purposes, the allegations to the agreement of beginning PS/00027/2020 presented by the claimed party and the documentation that they accompany.
- Request the claimant a copy of all the documentation that is in his possession.

power relative to the sanctioning procedure that for any reason does not had been provided at the time of the complaint or, if deemed appropriate, any other manifestation in relation to the facts denounced; copy of the complaint before the Police and Court in relation to the facts claimed;

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information on the participants in the meeting held with the Director

Labor General of the Government of \*\*\* COMMUNITY.1.

SIXTH: On 01/05/2021, a Resolution Proposal was issued in the sense of that the claimant be filed for violation of article 6.1.a) of the RGPD, typified in article 83.5.a) of the aforementioned RGPD.

After the period established for this purpose, the respondent has not submitted

brief of allegations at the time of issuing this resolution.

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

#### PROVEN FACTS

FIRST. On 05/14/2019 it has entry in the Spanish Agency for the Protection of Written data of the claim filed by the claimant against SIBANK, indicating that in the meeting held on 10/01/2018 between members of the works council of Liberbank and the General Director of Labor of the Government of \*\*\*COMMUNIDAD.1 was fraudulently recorded by a member of SIBANK and subsequently has broadcast a video to workers via WhatsApp that includes an excerpt of the conversation between the UGT representative and the General Director of Worked.

SECOND. A copy of the claimant's DNI number \*\*\*NIF.1 has been provided.

THIRD. The claim in writing dated 06/12/2020 that "On 11/19/2018 the union SIBANK, as part of the electoral campaign that is taking place in that moment, distributes among its affiliates a composition in the form of a video that is It sends by email and to whatsapp lists of affiliates and supporters. In

This document contains (transcript attached):

- a) Electoral message and vote request.
- b) Recording in audio format of a passage of the conversation that takes place in on the 25th of the General Directorate of Labor of the Government of September 2018, and attended by union delegates from the unions APECASYC, CSIF, STC, SIBANK and UGT, members of the Works Council of LIBERBANK branches in

In addition to the Secretary General of

UGT in Liberbank that does not meet the status of member of the Works Council

c) Verbatim transcript of the video distributed by SIBANK”.

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FOURTH. It consists provided by both the claimant and the claimed, recording of the electoral video in which an audio extract of the conversation held during the meeting, indicating the following:

“2018 Trade Union Elections

Do you really think that all trade unionists are the same?

Listen to the Secretary General of UGT trying to convince the Director General of Labor of the Government of \*\*\*COMUNIDAD.1 that instead of sanctioning LIBERBANK should be sanctioned for working outside of working hours:

- Secretary General of UGT, B.B.B.:

“And another thing...in the complaints, that is being considered because there is criteria for one side and for another Until now the sanctions have always gone to the company. Is there any way that in the end the sanction of catching you has repercussions on the worker?”

- General Director of Labor

“No, the sanction is to the company”.

- Secretary General of UGT, B.B.B.:

"Always?"

- General Director of Labor

"Always. What happens to the worker at a certain moment is that as it is obligation of the company, the worker is not imputed. For example, in matters of unemployment benefits, a person, a worker who is on a file of employment regulation and is working in another company during the hours of the file, if you can be sanctioned by withdrawing your unemployment benefit, not from here but from the SEPE but when it is a worker who is in the company and is the company that is changing your schedule, you are not going to sanction the worker because it would be to take away the unemployment benefit, it would be extinction"

- Another worker present in the conversation (SIBANK union delegate and author of the recording):

"But sanctioning the worker, who is the party that is most pressured..."

- General Director of Labor:

"Unless you are looking for a specific worker, then it is very different

You know what I mean? Or in general to all workers?

- Secretary General of UGT, B.B.B.:

"No, let's see is that the other day it was commented because here, the issue is that in terms of someone affects him personally, the rest will stop working".

- General Director of Labor:

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"That is not like that"

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

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II

The facts denounced are specified in the audio recording and its dissemination to through WhatsApp by a member of the claimed, without knowledge or authorization of the attendees, from an extract of the conversation held between the representative of the UGT union and the General Director of Labor of \*\*\*COMUNIDAD.1 reaching be known by third parties, all of them employees of the entity.

The RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of legality, loyalty and transparency, noted:

"1. The personal data will be:

a)

processed in a lawful, loyal and transparent manner in relation to the interested party ("lawfulness, fairness and transparency")

(...)

f) treated in such a way as to ensure adequate security of the personal data, including protection against unauthorized processing or against its loss, destruction or accidental damage, through the application



of appropriate technical or organizational measures ("integrity and confidentiality").

(...)"

In turn, in article 6, Legality of the treatment, of the RGPD establishes that:

"1. The treatment will only be lawful if at least one of the following is met conditions:

a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;

(...)"

Article 4 of the GDPR, Definitions, in section 11, states that:

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

Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU) 2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

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2. When the data processing is intended to be based on consent of the affected party for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.
3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship”.

### III

In the present case, the claim that motivates the opening of the procedure deals with the audio recording and dissemination of an extract of the conversation maintained between the UGT representative and the General Director of Labor in the meeting of 10/01/2018 with members of the Liberbank works council, recorded by a member of SIBANK and that the attendees were unaware that was carrying out and which has subsequently been disseminated through the social network WhatsApp during the union election campaign.

The art. 4 section 1) of the GDPR defines “personal data” with great

1) "personal data": any information about a natural person amplitude:  
identified or identifiable ("the interested party"); shall be considered an identifiable natural person any person whose identity can be determined, directly or indirectly, in by an identifier, such as a name, phone number, identification, location data, an online identifier, or one or more elements own physical, physiological, genetic, mental, economic, cultural or social of said person;

For its part, article 4 of the RGPD defines in its section 2) the treatment of

data as “any operation or set of operations performed on data

personal information or sets of personal data, whether by procedures

automated or not, such as the collection, registration, organization, structuring,

conservation, adaptation or modification, extraction, consultation, communication by

transmission, dissemination or any other form of authorization of access, collation or

destruction”.

interconnection,

limitation,

suppression

either

In response to the case at hand, the recording of a private meeting

necessarily entails capturing and recording the voice of the members of the

same. Thus, and as the Agency has repeatedly considered

Spanish Data Protection, the voice of a person, is a personal data, since

allows you to identify a specific person. Therefore, recording the sound of voice

in an electronic or non-electronic medium constitutes a data storage

personal and, therefore, a treatment of the same.

The General Data Protection Regulation (RGPD) requires in the treatment

of data compliance with a series of basic principles, and non-compliance with

any of them inexcusably supposes an infraction of the norm.

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In accordance with the legality of the treatment, to treat any data of a

personal it is necessary that there is a legal basis that legitimizes it and this can be in some cases, the consent, which is necessary for the execution of a contract, a legal obligation, to protect vital interests, for a mission carried out in the interest public or for the satisfaction of legitimate interests, provided that on said interests do not override the interests or fundamental rights and freedoms of the interested party that require the protection of personal data.

First of all, it should be noted that in accordance with the provisions by the Supreme Court in numerous judgments, among others the recent one of 05/31/2019, the recording of a conversation between several people is considered and carried out by one of them does not violate the right to privacy or the secrecy of the communications, nor does it violate said rights the recordings of telephone conversations held with third parties, since the secrecy of communications refers essentially to the protection of citizens against to the State.

However, a different matter is that the recording made of a meeting privately by whoever attends it can subsequently make it known to third parties, broadcast or publish it without the consent or authorization of those attending the itself and if the treatment carried out can be considered legitimate.

It is evident that in the claimed case the processing of personal data personal has been made without the consent of the claimant. Thus, there would be no basis legal that legitimized the treatment of the personal data of the claimant for the purpose pursued based on consent, which in the present case is not given since the claimant opposes it.

However, in his allegations to the initial agreement, the respondent considers that the basis that legitimizes the processing of the claimant's data is found in the legitimate interest (5.1.f) of the RGPD).

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Regarding legitimate interest as a legal basis for data processing

of third parties, Recital 47 of the RGD says:

<<The legitimate interest of a data controller, including that of a responsible to which personal data may be communicated, or of a third party, may constitute a legal basis for the treatment, provided that the interests or the rights and freedoms of the interested party, taking into account the reasonable expectations of data subjects based on their relationship with the responsible. Such legitimate interest could occur, for example, when there is a relationship relevant and appropriate relationship between the data subject and the controller, such as in situations where which the interested party is a client or is at the service of the person in charge. In any case, the existence of a legitimate interest would require careful assessment, even if a data subject can reasonably foresee, at the time and in the context of the collection of personal data, which may be processed for this purpose. In particular, the interests and fundamental rights of the data subject could prevail over the interests of the data controller when proceeding to the processing of personal data in circumstances in which the interested party does not reasonably expect further treatment to take place. Since it corresponds the legislator to establish by law the legal basis for the processing of personal data by public authorities, this legal basis should not apply to treatment carried out by public authorities in the exercise of their functions. The processing of personal data strictly necessary for the prevention

of fraud also constitutes a legitimate interest of the data controller.

that it is Processing of personal data for direct marketing purposes

can be considered carried out for legitimate interest.>> (The underlining is from the AEPD)

Now, to determine if the treatment made by the respondent of the data of the

claimant through the aforementioned social network to members and sympathizers of the union is

or not adjusted to law requires weighing the interests at stake to conclude whether it should

prevail or not over the right to freedom of association the right of the claimant to his

privacy.

Therefore, in the examined case, the collision that can occur

between the right to freedom of association and the right to data protection in the

to the extent that personal data is used under the protection of that right

of the claimant and, ultimately, which of the two fundamental rights must deserve

increased protection.

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With regard to the right to freedom of association, it should be noted that

Indeed, it cannot be ignored that the union sections and the organs of

representation of the workers of a company or of a public administration,

have recognized a series of competencies for the exercise of their functions

representative unions and that are protected by the right to freedom

trade union recognized in article 28.1 of the Constitution, developed through the

Organic Law 11/1985.

In this sense, trade union activity includes the right to promote elections

and present candidates for the election of works councils and delegates of personnel, which implies the realization of an electoral campaign, the distribution of electoral propaganda directed at company employees and voters in the electoral process, etc.

The A.N. In a judgment of 01/28/2013, it states that: "Regarding the right to freedom of association, developed through Organic Law 11/1985, of August 2, Freedom of Association, the Constitutional Court has reiterated, that despite the fact that the tenor literal of art. 28.1 CE, could lead to consider the restriction of the content of the freedom of association to an exclusively organizational or associative aspect, however

This precept also integrates the functional aspect of law, that is, the right of trade unions to exercise those activities aimed at the defense, protection and promotion of the interests of workers, in short, to deploy the means of action necessary for them to fulfill the functions that they constitutionally correspond to them (for all, SSTC 105/1992, of July 1; 145/1999, of July 22; 308/2000, of December 18, and 213/2002, of December 11, november ).

(...)

Now, as the TC has pointed out, see STC 70/2003, of March 12 " no right, not even fundamental rights, is absolute or unlimited. Nail sometimes the very constitutional precept that enshrines it already explicitly establishes limits; on other occasions, these derive from the need to preserve other rights or assets constitutionally worthy of protection (TC SS 11/1981, of April 8 , 2/1982, of January 29, 91/1993, of March 15, 110/1994, of April 11, 52/1995, of February 23, 37/1998, of February 17".

Freedom of association, like the right to data protection, does not

constitute, evidently, an exception to this rule (SSTC 81/1983, of 10 of October, 94/1995, of June 19, 127/1995, of July 25), so it proceeds weigh the opposing interests and in attention to the concurrent circumstances, determine protection".

deserves

elderly

interest

that

It should be noted that the representatives of the union claimed, through WhatsApp and as part of the electoral campaign that was taking place in that moment, they distributed among their affiliates and sympathizers an extract of the conversation held at a meeting by some members of the works council and the claimant with the General Director of Labor of \*\*\*COMUNIDAD.1 facilitating information that could be relevant for the purposes of union activity.

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The moment in which the examined facts take place, electoral period trade union, justifies exchanging information between members and sympathizers of the different unions, for example, about how they have carried out the activities that have been entrusted to them by the different union leaders; to be informed of whether in the development of such activity the interests of the collective etc



As the TC has repeatedly pointed out, "... despite the fact that the literal tenor of the art. 28.1 CE, could lead to consider restricting the content of freedom trade union to an exclusively organizational or associative aspect, however in this precept also integrates the functional aspect of the law, that is, the right of trade unions to exercise those activities aimed at the defense, protection and promotion of the interests of the workers, in short, to deploy the means of necessary action so that they can fulfill the functions that constitutionally correspond".

The exercise of this right includes the trade union activity of maintaining informed to the members of the union in the corresponding work center of all issues that directly or indirectly affect or that may have impact on labor relations, since this transmission of news of interest union, that flow of information between the union and its affiliates, between the delegates trade unions and workers is the foundation of participation, allows the exercise of trade union action, promotes the development of democracy and pluralism trade union and, in short, constitutes an essential element of the fundamental right to syndical freedom.

It is the TC itself that points out "the flow of information between the union and the workers is the foundation of participation, allows the full exercise of a trade union action and promotes the development of trade union democracy and pluralism (SSTC 94/1995, of June 19, FJ 4; and 168/1996, of November 25, FJ 6).

In the present case, as evidenced by the proven facts, the support where process the claimant's personal data without their consent is the recording carried out by one of the attendees at the meeting with the General Director of Labor of the CCAA of \*\*\* COMMUNITY.<sup>1</sup> which was subsequently disseminated on the social network to members and sympathizers of the union during the period of union elections,

extracting the content of what was stated by the UGT representative and the Director General.

One of the elements to consider is that the scope of dissemination of the excerpt from the conversation has been limited to the scope of the company, the workplace, which is the sphere that authorizes article 8 of the Law on Freedom of Association to have the right to information on issues that affect workers arising from the activity union.

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Secondly, the time in which it takes place, union elections where the different unions raise proposals and make known their different projects obtaining the support of its affiliates and workers and, as in the particular case, giving information on the opinion of one of the workers' representatives on an issue (ERTES), which could be relevant in the workplace in which it is produces and in which the workers themselves could be affected.

On the other hand, as the AEPD itself considers "in the electoral period, prevail the right to trade union activity enshrined in article 2.1 of the Law Organization of Trade Union Freedom on the fundamental right to data protection.

Consequently, workers during the union election process cannot object to the processing of your personal data, provided that the use made by the Union is suitable for the purposes of the electoral process itself" (Res. 01871/2014, Proc.00624/2014).

In consideration of the foregoing, it is concluded that the defendant is not

responsible for an infringement of article 5.1.a), in relation to article 6.1.a) of the GDPR.

Therefore, in accordance with the applicable legislation,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE with the INDEPENDENT UNION OF EMPLOYEES OF BANCA-LIBERBANK, with NIF G10467637, for the infringement of article 6.1.a) of the RGPD, typified in article 83.5.a) of the RGPD.

SECOND: NOTIFY this resolution to the INDEPENDENT UNION OF EMPLOYEES OF BANKING-LIBERBANK, with NIF G10467637.

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

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure 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 reconsideration

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

month from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the

LPACAP, the firm resolution may be provisionally suspended in administrative proceedings

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

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

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

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

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

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

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

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

day following the notification of this resolution, it would end the

precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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