 File No.: PS/00199/2022

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 SOCIEDAD ESPAÑOLA DE RADIODIFUSIÓN, S.L., with NIF B28016970 (hereinafter, the claimed party or the BE). 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 where it was still available.

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

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

of previous investigative actions to clarify the facts in

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

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

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

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

following extremes:

During the investigation actions, publications were found where it was possible to

hear the victim's voice without distortion. Regarding the claimed party, the

following post:

***URL.1

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

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



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

content.

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

this entity reporting:

- That that same day the voice of the victim "included in the report" was distorted.

excerpt from the news, as well as in the full program of "Hoy por Hoy"." In addition,

“has stored an unaltered copy of the program to ensure its preservation,

in order to safeguard the evidence that may be necessary in the course of the

police, judicial or administrative investigation that could be investigated.”

- That, additionally, it has informed the platforms with which the

SER is related to the change made as a consequence of the requirement of the

AEPD, requesting that they proceed to update the contents as soon as possible

possible.

- That you consider that there has not been a violation of the GDPR with the publication

of the audio object of the request, "but has made use of the constitutional right

to information in a case of general interest, in which, in addition, he has tried to

safeguard at all times the rights and interests of the Affected."

It was found that the podcast had the victim's voice distorted, resembling

masculine.

FOURTH: On May 5, 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 6, 2022.

FIFTH: With the registration date of May 10, 2022, the party

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

allegations.

On May 11, 2022, the file was forwarded to the defendant, granting the

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

SIXTH: With the registration date of May 18, 2022, the claimed party

submitted a document in which it requested the sending of the documents annexed to the

applications submitted by D. A.A.A. with date ***DATE.1 and ***DATE.2, be the

texts of the claims themselves, whether they are documents for probative purposes

accompanied by the claimant, as well as an extension of the term to present

allegations.

On May 23, 2022, the defendant was sent a letter in which:



- The complete proof of entry registration number was attached.

O00007128e2100015794 regarding the claim filed by D. A.A.A. he

***DATE.1,

- It was indicated that the rest of the documentation attached to the aforementioned claims

that the submission of the file forwarded on May 11, 2022 was not accompanied, it is

refers to links from other media that are not from the SER, which

not only does he not need them to exercise his right to defense, but it would imply having

access to documentation corresponding to other files in which it does not have the

condition of interested

- A new term was granted to present allegations.

SEVENTH: The claimed party submitted a pleadings brief on June 2, 2022,

in which, in summary, he stated:

1.- Nullity by operation of law due to the absolute lack of the procedure due to the absence of

active legitimation of the claimant, since he "has never tried to

justify with what active legitimacy he acts, since he is not the owner of the rights and

interests that are said to be affected, nor has it proven to act on their behalf.

representation.", for which reason it considers null acts of full right both the admission

to process the claim and the subsequent agreement to start the file

penalizer from which it derives.

Criticizes the lack of motivation regarding the legitimacy of the claimant in the resolution

of admission of the claim of *** DATE.3, as well as that the agreement to start the

procedure speak plainly of “complaining party” and “respondent party”.

It indicates that "the procedure that has been initiated is a consequence of what has been

called a claim, which is a specific procedure regulated in the

European data protection regulation. This is not a generic complaint.

that as recognized in article 62 5 of Law 39/2015 on administrative procedure

of the Public Administrations does not attribute by itself the condition of

concerned to the complainant, but has been attributed nothing less than the status of

party to the claimant, opening a disciplinary file in which,

paradoxically, the victim has not been given a hearing, who is the one who in his case

would have the right to do so, in accordance with article 63.3 of the LOPDGDD (…)”

It considers that "the admission of the claim as it has been formulated implies

a helplessness that is irremediable and that is not saved by the possibility of alleging,

that, without prejudice to the right of the AEPD to act ex officio once it becomes aware of certain

facts, if he considers them worthy of it, the truth is that the admission of the

claim made by someone who lacks legitimacy produces irreversible effects

in the processing of the disciplinary procedure for the defendant, unless the

file is archived and declared null and void all the proceedings:

1) Conditions the purpose of the file

a specific claim, on whose facts said file will deal.

, since it starts from the existence of

2) It interferes with the statute of limitations for possible infractions,

interrupting the established deadlines, when the

legal conditions for it.

3) Attributes the status of interested party to those who should not have it, with

power to file appeals at the end of the file, or argue before the

presented by the sanctioned party, in accordance with the provisions of articles

112 and 118 of Law 39/2015."

2.- You have not infringed article 5.1.c) of the GDPR, since you understand that

the treatment that you have carried out is adequate, pertinent and limited to its purpose

informative, which was none other than to move public opinion and denounce the incisive

interrogation to which the victim had been subjected by the prosecutor.

He criticizes the balancing judgment between the fundamental right to freedom of

information and the fundamental right to the protection of personal data

who makes the initiation agreement because:

- The right to information holds a prevailing position when the

requirements of general interest and due veracity. He criticizes that the initial agreement

consider that the general interest has to concur both in the person involved

as in the matter to which the matter refers, despite the fact that the jurisprudence,

indicated by the claimed party, has clearly established that these are requirements

alternative, non-cumulative, citing in this regard the STS of the Plenary of the Chamber of

of October 15, 2015.

- (...) since the trial was held and the resulting information was published, no

there is no record that the victim was dissatisfied with the treatment

of the news about your case or that you believe you have been exposed to a

unwanted media coverage." Adding that the victim's parents went to

a television program to talk about the case, blurring their faces but without

distort their voice, which implies a degree of voluntary public exposure that

must be taken into account with respect to own acts.

- Although it is not denied that the voice constitutes personal data in accordance with the provisions of

article 4 of the GDPR, considers that the possibilities of identifying

a person through the voice, limited to the closest family and affective environment,

already aware of the situation.

- "The recording came from an official source, by signal enabled to the media by the

Communication Office of the TSJ of ***CCAA.1 on the Webex platform (...), without

by said press office, any warning will be made regarding

personal data in accordance with the Communication Protocol of Justice, by not

considered that there was reason to have to do so."

3.- Incorrect classification of the alleged infraction, since it considers that the classification

as a very serious offense by application of article 72.1.a) of the LOPDGDD results

absolutely generic and violates the principle of typicity in relation to that of

specialty.



It understands that, "for dialectical purposes, if there is any infraction, what we discard,

it would be merely serious, in accordance with article 73 letter d)" of the LOPDGDD:

"d) The lack of adoption of those technical and organizational measures that result

appropriate to effectively apply the principles of data protection from

the design, as well as the non-integration of the necessary guarantees in the treatment, in

the terms required by article 25 of Regulation (EU) 2016/679."

To this end, apart from transcribing the aforementioned article 25 of the GDPR, the part

claimed that "it would not in any case be an absolute or generic breach of the

rules or principles of personal data processing, but in dialectical terms,

a partial and specific non-compliance, in relation to the precise technical measures

to avoid the processing of an aspect of the personal data of the victim, whose

correction -technical as well- is precisely what, as a provisional measure, is

requested (…)"

It indicates that the consequence of the different classification is that the maximum sanction

applicable, in accordance with article 83.4.a) of the GDPR, is 50% lower than the

provided for very serious offenses that are included in article 83.5.a) of the

GDPR.

4.- Criticism of aggravating factors and omission of mitigating factors of the initiation agreement.

It criticizes that the initiation agreement applies article 83.2.a) of the GDPR as an aggravating circumstance,

because "neither the mere reproduction of the victim's voice, devoid of any other

collateral damage, made it recognizable by a third party, nor has it been shown

dissatisfied with the informative treatment of the case, at any time." Add

that "distortion-free audio remained accessible for a short time and, furthermore,

It cannot be ignored that it was an accessory element to the text of the information, therefore

that only a minimal part of the readers of the news on the website reproduced

also the fragment of the recording".

It considers that it did not act negligently, "since the discrepancy lies in the

consideration of fundamental rights in conflict in the process of transmission of

the information, in whose terms you may or may not agree, a very

other than acting unconsciously or negligently, which was not the case.

case." To this end, it insists on the specific newsworthiness of the audio content

to denounce the inadequate treatment given to the victim by the prosecutor and puts

revealed that practically all of the main media in the

country also carried out their informative treatment with the support of the recording of

the view with the voice of the participants in the trial.

He criticizes that the initial agreement, when referring to the aggravating circumstance of article 83.2.g) of the GDPR,

once again alludes to "the certain possibility of recognizing the victim of a crime as the

reporting the news", as well as referring again to the fact that the data is very

sensitive, both issues that he considers were already formulated in the first of the

aggravating factors.

It is missing that the following extenuating factors have not been taken into account:



- Article 83.2.c) of the GDPR: "any measure taken by the person responsible or

in charge of the treatment to alleviate the damages and losses suffered by the

interested".

- Article 83.2.f) of the GDPR: "the degree of cooperation with the control authority with

in order to remedy the infringement and mitigate the possible adverse effects of the

infringement".

He is motivated by the fact that the same day he received the request from the AEPD for the withdrawal of

the news or distortion of the victim's voice, "proceeded to distort the voice of the

published information and to communicate to that AEPD the execution of the requested measure,

that proactively communicated to all those online platforms with which the

chain shares content, so that they apply the same measure (since the SER does not

can do it) and therefore would be of maximum effectiveness. Similarly, in that

In writing, the serious discrepancy with the indicative qualification of the

facts as a violation of data protection regulations, given the necessary

consideration of the right to information exercised in its treatment."

For all these reasons, it considers that there is a lack of justification of the amount of the sanction

provisionally proposed in 50,000 euros that justifies its proportionality in

in relation to the concurrent circumstances, "in view of the different rights

fundamentals involved, the legal debate that their simultaneous protection implies, the

widespread nature of similar processing of these same data by many other

relevant media, and the collaborative, brilliant and diligent conduct

of this company in response to the request made."

EIGHTH: On September 30, 2022, a resolution proposal was formulated,

proposing that the Director of the Spanish Data Protection Agency

sanction SOCIEDAD ESPAÑOLA DE RADIODIFUSION, S.L., with NIF B28016970,

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

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

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

confirm the following provisional measures imposed on SOCIEDAD ESPAÑOLA

OF RADIODIFUSION, S.L.:

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

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

or exact replicas by the same or other users.

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

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

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

police or administrative or judicial process that may be investigated.

NINTH: Notification of the proposed resolution in accordance with the established norms

in the LPACAP, the claimed party submitted a pleadings brief on October 17,

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



1.- Reiteration of nullity by operation of law due to the absolute lack of the procedure for

the absence of legal standing of the claimant, due to the lack of legal standing

active of the claimant.

The defendant considers that the proposed resolution errs in stating what

following:

"In this regard, it should be noted that this disciplinary proceeding has been

initiated ex officio on May 5, 2022, in accordance with article 63 of the

LPACAP and article 68 of the LOPDGDD, not having been issued regardless

totally and absolutely from the legally established procedure.

A different question is whether the admission of the claim, an act by another and prior to the

procedure that is now being processed, is null and void and if such nullity

contaminates the agreement to start the disciplinary procedure, as the party intends

claimed, since it derives from the foregoing."

The claimed part understands that it is incorrect because:

1.- "The initiation agreement may well derive from the admission for processing of a

claim (...) well on the initiative of the AEPD. But if there is admission to

claim process can no longer speak of ex officio action, because it is

responding to a claim that has determined the birth of the process.”

2.- "It is not an alien and previous act because it is that admission that determines the initiation

of the file”.

The defendant reiterates that the "improper admission of the claim for processing

conditions everything that comes after: on the one hand, the facts on which the

file are those revealed by the claimant, who have simply subsequently

been examined by the Agency; on the other hand, they give rise to previous actions that

otherwise we do not know in your case when and in what terms they would have been carried out;

facilitates and accelerates the interruption of the prescription of any possible infringement, by

margin that this interruption takes place with the initiation of the file and gives rise,

finally, immediately and causally, to the adoption of provisional measures that

otherwise they would not have been adopted, since there was no ex officio action prior to

the claim.”

The defendant criticizes the fact that the proposed resolution indicates that "if there were

processed the claim as a mere complaint under article 62.5 of the

Law 39/2015, of October 1, on the Common Administrative Procedure of

Public Administrations, the investigative actions would have been the same;

Leaving aside the fact that it is a mere hypothesis or speculation, in

disciplinary procedure, to which the general principles of the

criminal law, is not an admissible response.”

The foregoing is based on the defendant party that "the margin of action of the agency

before the mere complaint and before the claim admitted for processing is radically

different, according to Law”:

- "Because the admission to processing implies, unless expressly decided by the file (...)
reasoned and once the previous proceedings have been completed, in your case, the agreement of
beginning of the disciplinary procedure."

- While in the case of a complaint, "if there is no patrimonial damage to a
Public Administration, not starting the procedure is discretionary for the
Administration, which does not have to motivate him."

Based on the foregoing, the defendant reiterates "both in the legal classification, not
denied, lack of standing, which should have led to the inadmissibility of
the claim for abusive, as in the consequence of nullity by operation of law, since
that the disciplinary procedure is absolutely flawed by that beginning so
highly illegal."

2.- It is reiterated that it has not infringed article 5.1.c) of the GDPR, given
that you understand that the treatment you have carried out is adequate, pertinent and limited
with its informative purpose, which was none other than to transfer public opinion and
denounce the incisive interrogation to which the victim had been subjected by the prosecutor.

He considers that "the proposed resolution completely omits the necessary judgment of
weighting, assuming a maximalist position with regard to the protection of rights
to data protection above any consideration."

The defendant understands that "in the same way that jurisprudence exempts the
information of the obligation of a "requirement of absolute precision in the expression
of difficult-to-obtain data" (STS 97/2013), since this would discourage the necessary
informative coverage of matters of general interest, it does not seem reasonable to require
rigorous data minimization and risk analysis prior to disclosure

each of the hundreds or thousands of news items that are disseminated daily with the

immediacy, urgency and breadth demanded by public opinion. If it were so, it

would restrict the channels of information unjustifiably in a State

democratic by law."

Considers that, despite the large volume of information prior to the publication

of the news that is the subject of this procedure, cannot be taken for granted, as

"that previously had been supplied

makes the motion for a resolution,

"information about the victim" that later assisted in the identification of the victim to

through his voice.

It indicates that "the victim was not identified, and what the resolution proposal

called "materialized risk" are still remote hypotheses that have not been

come to fruition."

He criticizes that in the proposed resolution it is argued that "it is not possible to appreciate the doctrine of

their own acts in the case of parents, but it is hardly debatable that these facts

are part of the context of the news, and that the right to privacy has

legally recognized not only a personal but also a family aspect, for which reason

It is not inconsequential that the victim's parents went on television."



It is reiterated that "The recording came from an official source, by signal enabled to the

media by the Communication Office of the TSJ of ***CCAA.1 on the Webex platform

(...), without any warning being made by said press office in

matter of personal data in accordance with the Justice Communication Protocol, to the

not consider that there was a reason to have to do so."

3.- It reiterates the incorrect classification of the alleged infraction, since it considers

that the classification as a very serious offense by application of article 72.1.a) of the

LOPDGDD is absolutely generic and violates the principle of classification in

relation to specialty.

He criticizes the arguments of the proposed resolution, "since it is argued that the

typification suggested by this part is as if it did not exist, since it is stated in the

Organic Law and not in the European Regulation. The proposal indicates that said article

73 refers exclusively to the prescriptive terms of each infraction, depending on

of its seriousness, but not to infringing types, so it only falls to resort to the

types of the regulation in its article 83."

It indicates that with the application of "article 73 (of the LOPDGDD) there are no

far from ignoring the types of article 83 of the Regulation. (...) deny the

virtuality of an organic law that defines offenses with reference to and respect for the

European Regulation is a power that the Instruction has arrogated, of

particularly arbitrary manner."

It indicates that "it is not a matter of the victim's own narrative being a piece of information that

could be known, but that in the worst case the measures were not applied

techniques necessary to rule out that eventuality. That is why the offense never

may be the most serious, since listening to the victim was important, but in the

worst case scenario, technical caution was not adopted in the treatment of data that

it was relevant and likely to be published."

4.- It refers to what is stated in the pleadings to the start-up agreement in

regarding his criticism of the aggravating circumstances invoked and the omission of certain

extenuating.

Criticizes that the proposed resolution does not take into account the mitigating factors invoked

by the claimed party:

- In the case of article 83.2.c) of the GDPR, because the measures adopted to alleviate

the alleged damages were not “spontaneous”.

- In the case of article 83.2.f) of the GDPR, because, although the action of the party

claimed derived from a requirement of the Agency, the degree of diligence in the

answer to it can be very different.

For all these reasons, it considers that there is a lack of justification of the amount of the sanction.

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 where it was still available.

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

investigative activities, found a publication of the Respondent where

could hear the victim's voice undistorted at the following address:

***URL.1

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

***DATE.4, the party claimed was notified of an urgent precautionary measure to withdraw

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

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

concrete of:

***URL.1

FOURTH: On ***DATE.4, the AEPD received a letter sent by this

reporting entity:

- That that same day he had proceeded to distort the voice of the victim "included in the

excerpt from the news, as well as in the full program of "Hoy por Hoy"." In addition,

“has stored an unaltered copy of the program to ensure its preservation,

in order to safeguard the evidence that may be necessary in the course of the

police, judicial or administrative investigation that could be investigated.”

- That, additionally, it had informed the platforms with which the

SER is related to the change made as a consequence of the requirement of the

AEPD, requesting them to proceed to update the contents as soon as possible

possible.

- That you consider that there has not been a violation of the GDPR with the publication

of the audio object of the request, "but has made use of the constitutional right

to information in a case of general interest, in which, in addition, he has tried to

safeguard at all times the rights and interests of the Affected."

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

dated January 24, 2022 that it was verified that the link ***URL.1 has

distorted the victim's voice, sounding male.

FUNDAMENTALS OF LAW

Yo

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

control and as established in articles 47 and 48.1 of 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

Previously, the claimed party alleges nullity by operation of law for lack of

of the procedure due to the lack of legitimacy of the claimant, since

that he, as indicated in his allegations to the initiation agreement, "at no time

has tried to justify with what legitimacy it acts, since it is not the owner of the

rights and interests that are said to be affected, nor has it accredited acting on its behalf.

representation."

The defendant party continues to indicate in its allegations to the initiation agreement that "the procedure that has been started is a consequence of what has been called claim, which is a specific procedure regulated in the European Regulation of data protection. This is not a generic complaint, which, as recognized by the article 62 5 of Law 39/2015 of common administrative procedure of the Public Administrations does not attribute by itself the condition of interested party to the denouncer, but nothing less than the status of party to the claimant, opening a disciplinary file in which, paradoxically, there is no has given a hearing to the victim, who is the one who in his case would have the right to do so, in accordance with article 63.3 of the LOPDGDD (…)"

In this regard, it should be noted that this disciplinary proceeding has been initiated ex officio on May 5, 2022, in accordance with article 63 of the LPACAP and article 68 of the LOPDGDD, not having been issued regardless totally and absolutely from the legally established procedure.

However, the foregoing has been criticized by the defendant in its writ of allegations to the proposed resolution, indicating that "the initiation agreement may derive either from the admission of a claim for processing (...) or from the claim itself



AEPD initiative. But if there is admission to the claim process, you can no longer speak of acting ex officio."

In view of the foregoing, it can be deduced that the defendant confuses what the

agreement to start a disciplinary procedure with the actions prior to such

start agreement:

- It cannot be ignored that the aforementioned articles 63.1 of the LPACAP and 68 of the

LOPDGDD point out that the agreement to initiate all procedures

sanctions is always adopted ex officio.

- A different matter is the channel through which the AEPD becomes aware of an alleged

violation of data protection regulations, because it can not only be

through a claim, but also by any other means, including the complaint

as regulated in article 62 of the LPACAP, which gives rise to the fact that the

AEPD acts, prior to the adoption of the agreement to start the procedure

disciplinary action, "by own initiative", which is defined in article 59 of the

LPACAP as "the action derived from direct or indirect knowledge of the

circumstances, behaviors or facts that are the object of the procedure by the body that has

attributed the competence of initiation."

In fact, prior investigation actions are not only carried out when

a claim has been admitted for processing, except whenever they are necessary for a

better determination of the facts and circumstances, as indicated in article 67 of the

the LOPDGDD: "Before the adoption of the agreement to start the procedure, and once

Once the claim has been admitted for processing, if any, the Spanish Agency for the Protection of

Data may carry out prior investigation actions (...)" (underlining is

our).

In short, the admission for processing of the claim, as indicated in the

resolution proposal, is an alien act and prior to the disciplinary procedure, if

Although the claimed party does not share this idea in its allegations to the proposal of

resolution.

And he does not share it because, he understands, that the "admission for processing of the claim

conditions everything that comes after: on the one hand, the facts on which the

file are those revealed by the claimant, who have simply subsequently

been examined by the Agency; on the other hand, they give rise to previous actions that

otherwise we do not know in your case when and in what terms they would have been carried out;

facilitates and accelerates the interruption of the prescription of any possible infringement, by

margin that this interruption takes place with the initiation of the file and gives rise,

finally, immediately and causally, to the adoption of provisional measures that

otherwise they would not have been adopted, since there was no ex officio action prior to

the claim."

As already stated in the proposed resolution, if the AEPD had processed the

briefs presented by D. A.A.A. as complaints under article 62.5 of the

LPACAP, would also have carried out the previous investigation actions that

has been carried out under article 67 of the LOPDGDD, after which it was verified



that the complained party had published the victim's voice without distortion, adopting

the corresponding provisional measures.

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

resolution because it considers that "the margin of action of the agency before the mere

complaint and before the claim admitted for processing is radically different, according to Law":

- "Admission for processing implies, unless expressly decided by the file (...)

reasoned and once the previous proceedings have been completed, in your case, the agreement of

beginning of the disciplinary procedure."

- While in the case of a complaint, "if there is no patrimonial damage to a Public Administration, not starting the procedure is discretionary for the Administration, which does not have to motivate him."

We cannot share the arguments of the claimed party since, as Article 47 of the LOPDGDD states, "It corresponds to the Spanish Agency for Data Protection supervise the application of this organic law and the Regulation (EU) 2016/679 and, in particular, exercise the functions established in article 57 and the powers provided for in article 58 of the same regulation, in this law organic and in its development provisions." In other words, if the AEPD has knowledge of an alleged infringement of the regulations on the protection of data, you cannot stop acting, which is why if you receive a complaint you must carry out the corresponding preliminary investigation actions to determine if the facts and circumstances denounced justify the processing of a procedure sanction, and even, if appropriate, may adopt the provisional measures that deem appropriate.

In any case, it means that the Spanish Agency for Data Protection, as control authority, its mission is to "supervise the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons with regard to processing and to facilitate the free movement of personal data in the Union", in accordance with article 51 of the GDPR and develops more specifically article 57 of the same legal text, including the functions of the control authorities. It is specified, in this way, what is the good guaranteed by the control authorities.

In view of this, we can only banish that the "patrimonial damage to a Public Administration" alleged by the claimed party is in no case the property protected by the Spanish Data Protection Agency or what it determines,

where appropriate, the ex officio initiation of a disciplinary procedure.

In conclusion, it is not a mere hypothesis or speculation, as understood by the party claimed, that the proposed resolution states that "if the AEPD had processed the writings presented by D. A.A.A. as complaints under article 62.5 of the LPACAP, would also have carried out the previous investigative actions that has been carried out under article 67 of the LOPDGDD, after which it was verified that the respondent party had published the undistorted voice of the victim."



Since it is established that this disciplinary proceeding has been initiated ex officio on May 5, 2022, in accordance with article 63 of the LPACAP and article 68 of the LOPDGDD, and, therefore, it has not been issued disregarding totally and absolutely the legally established procedure, as well as the admission of the claim is an alien act and prior to the procedure that is now being processed, it remains to determine if such admission of the claim is null and void and if such nullity contaminates the agreement to start the procedure sanctioning, as claimed by the defendant.

To this end, the claimed party points out in its pleadings to the agreement of start that the admission of the claim is null and void because "it implies a defenselessness that is irremediable and that cannot be saved by the possibility of alleging" because conditions the purpose of the file, interferes with the prescription regime of the possible infringements and attributes the condition of interested party to those who should not have it.

While in the pleadings to the motion for resolution indicates the part

claimed that the disciplinary procedure is applicable to the general principles

of criminal law, in such a way that "it is a right to effective judicial protection

of Article 24 CE in its administrative aspect, which due to lack of due care and

legal precision in the processing of the file, has been violated, with effective

helplessness because my principal has been placed in a situation as part of

claimed, which would not have been the same as if it had been a mere denounced party."

It should be noted that the principles of the sanctioning power are found

regulated in Chapter III of the Preliminary Title of Law 40/2015, of October 1, on

Legal Regime of the Public Sector. While, on the other hand, the jurisprudence of

has repeatedly stated that "the inspiring principles of the criminal order are of

application, with certain nuances, to the sanctioning Administrative Law, given that

both are manifestations of the punitive order of the State" (Sentences of the

Supreme Court of September 29, and November 4 and 10, 1980; Judgment of

Constitutional Court 18/1981, among others. The underlining is ours), that is, that the

The assimilation of penalizing Administrative Law to Criminal Law is not absolute.

Thus, in relation to what constitutes effective material defenselessness for the purposes of

determine the nullity of an administrative act, the jurisprudence is clear in this regard.

For all, the Constitutional Court Judgment 25/2011, of March 14, or the

Ruling of the Constitutional Court 62/2009, of March 9, reminds us that the

defenselessness constitutes a material notion that is characterized by assuming a

deprivation or substantial reduction of the right to defense; a noticeable loss of

the principles of contradiction and equality of the parties that prevents or hinders

seriously give one of them the possibility of alleging and accrediting in the process their own

right, or dialectically replicate the opposite position on equal terms

with the other procedural parties.

In other words, "in order for defenselessness to be considered with constitutional relevance,
that places the interested party outside of any possibility of alleging and defending in the
process their rights, a merely formal violation is not enough, but it is
necessary that a material effect of defenselessness be derived from that formal infraction,
with real impairment of the right of defense and with the consequent real damage and

effective for the interests of the affected party" (STC 185/2003, of October 27 and STC
164/2005, of June 20).
This criterion is ratified in the Judgment of the National Court of its Chamber of
Administrative Litigation, Section 1, of June 25, 2009 (rec. 638/2008) to
determine that "this Chamber has reiterated on numerous occasions (SAN 3-8-2006,
Rec. 319/2004, for all), echoing the doctrine of the Constitutional Court,
In order for the procedural defect to lead to the nullity of the appealed act, it is necessary
that these are not mere procedural irregularities, but defects that
cause a situation of defenselessness of a material nature, not merely a formal one, this
is, that they have caused the appellant a real impairment of his right
defense, causing real and effective damage (SSTC 155/1988, of July 22,
212/1994, of July 13 and 78/1999, of April 26)".
In other words, for the interested party to see himself, in effect, in a situation of
defenselessness, it is necessary that the defenselessness be material and not merely formal
(Sentences of the Constitutional Court 90/1988, 181/1994, 314/1994, 15/1995,
126/1996, 86/1997 and 118/1997, among others), which implies that the aforementioned defect has

caused real and effective damage to the defendant in his possibilities of

defense (Sentences of the Constitutional Court 43/1989, 101/1990, 6/1992 and

105/1995, among others).

Or, in terms of the Supreme Court Judgment of February 1, 1992, "as it has

declared this Chamber ... not all the defects or infractions committed in the processing

of an administrative procedure have sufficient legal entity to cover a

annulment claim for formal cause, given that only very serious defects that

prevent the final act from reaching its end or that render the interested parties defenseless

may determine the voidability; constituting this a jurisprudential doctrine that

has been progressively reducing the vices that determine disability for

limit them to those that represent an effective, real and significant decrease in

guarantees" (STS of April 15, 1996, RA 3276)".

In the case examined, there has been no reduction in the exercise of the

right of defense of the claimed party, since it has been able to allege and prove throughout

of the disciplinary procedure what has been agreed upon by his right.

Furthermore, the motivation carried out by the party cannot be shared.

claimed regarding irremediable defenselessness because:

- In the first place, as we said before, if the AEPD had processed the

briefs presented by D. A.A.A. as complaints under article 62.5 of the

LPACAP, would also have carried out the previous investigation actions that

has been carried out under article 67 of the LOPDGDD, after which it was verified

that the respondent party had posted the undistorted voice of the victim.

- Secondly, the statute of limitations for offenses is not interrupted by the

admission to processing of a claim, but when the agreement to start the

disciplinary procedure, as indicated in article 75 of the LOPDGDD.

- Thirdly, the admission of a claim for processing does not confer the condition of

concerned to the claimant, since only the person who

comply with the provisions of article 4 of the LPACAP.

For these reasons, the admission of the claim, regardless of the procedure

sanctioning, does not suffer from nullity by operation of law that could contaminate the

agreement to start the disciplinary procedure.

II

The claimed party considers that it has not infringed article 5.1.c) of the

GDPR, since you understand that the treatment you have carried out is adequate,

pertinent and limited to its informative purpose, which was none other than to transfer to the

public opinion and denounce the incisive interrogation to which the victim had been

submitted by the prosecutor.

Currently, the claimed party maintains in its digital newspaper a podcast in format

audio of a radio program in which the presenter and a journalist

report on the interrogation to which the victim had been subjected by the

prosecutor, criticizing his actions. To the aforementioned information, are accompanied

fragments of the aforementioned interrogation in which the voice of the victim is distorted

while that of the prosecutor remains undistorted.

In view of the audio, it becomes clear that the victim's voice is not necessary to

manage to convey to the listener the prosecutor's lack of empathy, it is enough to hear the questions

that he does to the victim as well as the information added by the presenter and the

journalist, who are the ones who really lead the listener to empathize with the victim and

wonder about their revictimization.

To a greater extent we have to mean that it is indifferent that the purpose of the

means of communication by publishing the audio with the voice of the victim without distorting

was to denounce the actions of the prosecutor, because the truth is that with the dissemination of

the voice of that one is identified, 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.

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 risk analysis that must be carried out prior to the

publication, and which in the present case we are not aware of, is the last guarantee with which

account the victim.



Despite the foregoing, the claimed party considers in its writ of

allegations to the proposed resolution that "in the same way as the jurisprudence

exempts the information from the obligation of a "requirement of absolute precision in the expression of difficult-to-obtain data" (STS 97/2013), given that this would deter the necessary informative coverage of matters of general interest, it does not seem reasonable to require rigorous data minimization and risk analysis prior to the diffusion of each one of the hundreds or thousands of news items that are disseminated daily with the immediacy, urgency and breadth demanded by public opinion. If it were so, the channels of information would be restricted unjustifiably in a State democratic by law."

However, the aforementioned STS 97/2013, while not requiring "absolute precision in the expression of difficult-to-obtain data", requires "reasonable diligence on the part of of the informer to contrast the news according to professional guidelines adjusting to the circumstances of the case". Similarly, in terms of protection of data, the media are required to be especially diligent in the compliance with the regulations in this regard because they are entities that constant and abundant handle data of a personal nature (Sentence of the Hearing National of October 17, 2007).

GDPR compliance management includes conceiving and planning a processing of personal data, which requires, among other issues, to incorporate ab initio risk management in terms of data protection within the organization by the controller (article 24.1 of the GDPR). And this based on privacy by design and by default (article 25 of the GDPR) and to comply with the principles of processing (article 5 of the GDPR).

In this regard, as established in the Risk Management and Risk Assessment Guide impact on personal data processing by the AEPD, "Risk management is formed by a set of ordered and systematized actions with the purpose of control the possible (probability) consequences (impacts) that an activity

may have over a set of goods or elements (assets) that must be

protected. … The GDPR demands the identification, evaluation and mitigation, carried out

objectively, of the risk to the rights and freedoms of people in the

processing of personal data",

It constitutes one more obligation than those legally attributed to the person responsible for the

treatment, among many others that are legally imposed within

data protection or unrelated to it and that must comply with the same diligence.

On the other hand, the defendant party, in its allegations to the initial agreement, criticizes the

balance judgment between the Fundamental Right to Freedom of Information and the

Fundamental Right to the Protection of Personal Data carried out by the aforementioned

home agreement for various reasons:

- In the first place, the defendant exposes that the right to information holds

a prevailing position when the requirements of general interest are met and the

due veracity.



For this reason, the defendant continues to criticize that the initial agreement considers that

the general interest must concur both in the person who intervenes and in the

matter to which the matter refers, despite the fact that the jurisprudence indicates the part

claimed, it has clearly established that these are alternative requirements, not

cumulative, citing in this regard the STS of the Plenary of the Civil Chamber of 15

October 2015.

The aforementioned sentence, in its sixth law basis, states that

“Certainly, criminal events are newsworthy by their very nature, with

regardless of the condition of private subject of the person or persons affected

for the news (SSTC 178/1993, of May 31, FJ 4; 320/1994, of November 28,

FJ 5; 154/1999, of September 14, FJ 4). In general, it is in the public interest to

information both on the results of police investigations, the development

of the process and the content of the sentence, as on all those data, still not

directly linked to the exercise of the “ius puniendi” [penalizing power] of the

State, <<that allow a better understanding of your human profile or, more

simply, of its vital content>> of the person who participates in the act

criminal (STC 154/1999). Likewise, this Chamber, in its judgments no. 946/2008, of

October 24, and 547/2011, of July 20, has considered justified the publication of

identity data of those involved in criminal acts.” (underlining is ours),

If we go to the underlined sentences, we find that:

- In the case of STC 154/1999, of September 14, the data that had been

published were those of a person accused of a crime of sexual abuse,

regarding which, it was indicated "that, although they did not affect a person with

public projection as Professor Mr. J.R., yes they had reached public

notoriety and were the subject of a police investigation and prosecution

in criminal proceedings, with obvious social significance, given that they were accused of

said person criminal conduct such as the alleged rape and abuse

dishonest acts of mentally deficient students, enrolled in the School of

Special Education "San Francisco", in the city of Vigo, center where the

accused imparted the discipline of speech therapy.”

- In the case of STS No. 946/2008, of October 24, the published data is

They referred to a person arrested for belonging to a drug trafficking network

dismantled: “In the case, the nature of the crime (drug trafficking) of

extraordinary importance and social transcendence (STC 158/2003, of 15

September ), and all the more if one takes into account the magnitude of the operation

of disarticulation of an international network or organization (they intervened

eight thousand ecstasy pills, five thousand doses of speed, a pistol and fifty

cartridges and stamps and stamps to falsify documentation, and a large quantity

of money in Spanish currency and currencies), justify not only the public interest

of the information, but even the one that expresses the data of

identity of the detainees, instead of the simple initial letters of their

Name and surname."

- Finally, STS No. 547/2011, of July 20, refers to the publication of

data of a person accused of a crime of injuries and ill-treatment, sentence that was

refers to the previous one: "As this Chamber already said in its judgment of October 24,



of 2008, RC no. º 651/2003, the nature of the crime (in this case it was

drug trafficking) of extraordinary importance and social transcendence justify

not only the special public interest of the information, but even that which is

express the identity data of the detainees, instead of the simple letters

initials of your first and last name."

That is to say, that the cases in which the jurisprudence has considered justified the

publication of data of people without public relevance when the newsworthy event does

is in the public interest, is when it concerns people who have been detained,

indicted or accused of a crime with social significance.

Without prejudice to its more detailed examination in the Fundament of Law IX of
this resolution, crime victims are not on the same level of equality as
people who have committed them, as stated in the V Law Foundation of the
startup agreement. Among the judgments referred to in the aforementioned
foundation of law, we will highlight the Judgment of the Supreme Court, of its Chamber
First of the Civil, 661/2016, of November 10 (rec. 3318/2014), which in relation
with the capture and dissemination in court of the image of a victim of violence against
gender provided that "3rd) Regarding this matter, the jurisprudence has recognized the
general interest and public relevance of information on criminal cases
(judgment 547/2011, of July 20), which are accentuated in cases of physical abuse and
psychological (judgments 128/2011, of March 1, and 547/2011, of July 20), but
He has also pointed out, regarding the identification of the people involved
at trial, that the defendant and the victim are not on an equal footing,
Well, as for him, a complete identification is possible, and not only by his initials,
due to the nature and social significance of the crimes of ill-treatment (judgment
547/2011, of July 20). (underlining is ours).
For these reasons, the interpretation made by the claimed party cannot be shared.
that the requirement of general interest is met in this case, and therefore
Therefore, that there is a prevalence of the Fundamental Right to Freedom of
Information on the Fundamental Right to the Protection of Personal Data of the
victim, since the prevalence is neither absolute nor general and requires, in any case,
a weighting that we are not aware that the communication medium has carried out.
- The claimant continues stating that "it has elapsed (...) since the
holding of the trial and the publication of the resulting information, there is no
evidence that the victim was dissatisfied with the treatment of the
news about your case or that you feel you have been exposed to coverage

unwanted media."

However, it must be remembered that, even without a manifestation of disagreement on the part of

of the victim, the claimed party has the obligation to respect the relative principles

to the processing of personal data contemplated in article 5 of the GDPR, among the

that the principle of data minimization is found, and be able to prove it in

based on the principle of proactive responsibility (article 5.2 of the GDPR). In

Consequently, the absence of disagreement does not imply that the Fundamental Right

Freedom of Information prevails over the Fundamental Right to Protection

of Personal Data.



- The claimed party indicates that the victim's parents attended a

television to talk about the case, blurring their faces but without distorting their

voice, which implies a degree of voluntary public exposure that must be taken into account.

account with respect to one's own acts.

Such thesis cannot be shared, since the will of such people is clear.

that they are not identified in any of the ways, because otherwise, their

image would not have been blurred.

Furthermore, the theory of proper acts applies only in relation to a subject that

shows his will through externalized acts, whose subsequent conduct must

Be consistent with previous acts. That is, that in application of the theory of acts

own, the actions of third parties are indifferent. In the Court's own words

Constitutional, the doctrine of own acts "means the link of the author of

a declaration of will, generally of a tacit nature [...] and the impossibility of

later adopt a contradictory behavior” (STC 73/1988, of April 21).

In the case examined, the action of the victim's parents (third parties) is

outside and independent of the actions of the victim herself and cannot be used

to apply the theory of own acts.

However, the foregoing is criticized by the defendant in its allegations to the

motion for a resolution because "it is little questionable that these facts form part of the

context of the news, and that the right to privacy has a legally recognized

aspect not only personal but also family, so it is not insignificant that

the parents of the victim went on television.”

In this regard, it should be noted that, unlike what happens with the right to

privacy, the Fundamental Right to the Protection of Personal Data does not

has such a family aspect, in such a way that the fact that the parents of the victim

went to a television program does not have to imply that the victim does not deserve

that your personal data be protected when treatments such as

prosecuted in this file and, therefore, that the law must prevail

Fundamental to Freedom of Information on the Fundamental Right to

Personal data protection.

- The defendant does not deny that the voice constitutes personal data in accordance with the

provided for in article 4 of the GDPR, although it considers that the possibilities are scarce

to identify a person through the voice, limited to the family and affective environment

closest, already aware of the situation, which is why the

Fundamental Right to Freedom of Information on the Fundamental Right to

Personal data protection.

Nor can this statement be shared, since the environment of a person

It can have very different fields (close family, distant family, educational,

social...), in such a way that it cannot be deduced that everyone who is in

conditions to recognize the voice, previously knew his status as a victim of

a multiple violation, circumstance, as previously stated, is

essential for the victim to remain unknown.



Furthermore, the voice can allow a segment to identify the victim.

greater than the population if combined with other data, including information

additional, depending on the context in question. In the case examined, there is

a greater ease of making the victim identifiable through his voice in response to

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

of a highly publicized judicial procedure, continuously followed by various

media that provide information about the victim, his

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

additional).

However, the claimed party considers in its pleadings to the proposal

resolution, which, despite the existence of a large volume of information prior to the

publication of the news object of this procedure, cannot be taken for granted

provided that "information about the victim" had previously been provided that

then help identify the victim through his voice."

In this regard, it is necessary to bring up Opinion 4/2007 on the concept of data

personnel of the Article 29 Working Group, which states that "In cases where

that, at first sight, the available identifiers do not allow us to single out a

particular person, that person may still be "identifiable" because that information combined with other data (whether the data controller has knowledge of them as otherwise) will allow that person to be distinguished from others". (he underlining is ours). That is, it is irrelevant if that additional information is prior or after the publication of the news, as well as if it has not been disseminated by the party claimed or unknown.

And it is that for a person to be identifiable it is not necessary that all the information that allows the interested party to be identified must be in the possession of a single person, as indicated in the CJEU Judgment of October 19, 2016, in the Case C-582/14, in the procedure between Patrick Breyer and the Bundesrepublik Deutschland: "for a piece of data to be classified as "personal data", in the sense of Article 2(a) of that Directive, it is not necessary that all the information that allows the interested party to be identified must be in the possession of a single person." (he underlining is ours).

In conclusion, the publication of the personal data of the victim's voice by itself and without distorting put her at a certain risk of being identified by people who were unaware of his status as a victim, despite the fact that the party claimed in his brief of allegations to the proposed resolution indicates that what it "describes" risk materialized" are still remote hypotheses that have not come to fruition".

Regardless of the fact that the proposed resolution has never referred to "risk materialized", but rather that "The risk materializes with the fact that a single person can identify the victim", which is very different, the important thing is not whether such a risk has materialized or not, but whether there is a risk that someone who overhears the victim's voice without distortion, identify it.

In other words, it makes no difference whether or not someone has identified the victim through his voice, because the truth is that there was a certain risk that someone would identify it, which

which is a particularly serious event in an event such as the one that gives rise to the news,



Therefore, in this case and with these circumstances, there cannot be a prevalence absolute of the Fundamental Right to Freedom of Information on the Right Fundamental to the Protection of Personal Data of the victim.

- The last allegation made by the defendant party to justify that in the present case, the Fundamental Right to Freedom of Information must prevail over the Fundamental Right to the Protection of Personal Data of the victim, is that "The recording came from an official source, by signal enabled to the media by the Office of Communication of the TSJ of ***CCAA.1 on the Webex platform (...), without part of said press office will issue any warning regarding personal data in accordance with the Communication Protocol of Justice, by not considered that there was reason to have to do so."

Beforehand, we must clarify what is the data processing that is being analyzed in this proceeding. 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 whether by automated procedures or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, utilization,

communication by transmission, diffusion or any other form of authorization of access, comparison or interconnection, limitation, deletion or destruction". (he

underlining is ours).

And it is the diffusion of the voice of the victim that the claimed party has carried out 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 Directives 07/2020 of the European Protection Committee

of Data on the concepts of data controller and manager in the

GDPR, the concept has five main components: "the natural person or

legal entity, public authority, service or other body", "determines", "alone or together with

others", "the purposes and means" and "of the treatment".

In addition, the concept of data controller is a broad concept, which deals with

to ensure effective and complete protection for the interested parties. It has determined so

the jurisprudence of the Court of Justice of the European Union. For all we will quote the

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 07/2020 on the concepts of data controller and in charge in the RGPD specify that "the person in charge of the treatment is the party that determines why the processing is taking place (i.e. “for what purpose” or “what for”) and how this objective will be achieved (that is, what means will be used to achieve it)”.

The court, which, as indicated, carries out a treatment that is not the subject of this sanctioning file, provides the media with communication the information available in its entirety, so that they, subsequently, they can exercise the Fundamental Right to Freedom of Information.

When the information reaches the media, the latter, as the person in charge of the treatment, in the exercise of its proactive responsibility, must prove that has complied, complies and will comply with the regulations on protection of data.

That the Communication Office of the TSJ of ***CCAA.1 not issue a warning any in terms of data protection in accordance with the Communication Protocol of Justice cannot assume that there is a prevalence of the Fundamental Right to

Personal, since the warning that the court can make is a mere

recommendation, not a mandate.

As indicated, it corresponds to the media, as the

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

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

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

not having received any warning in this regard.

It can be concluded that the warning does not prevent the publication of personal data,

In the same way that the absence of it does not legitimize to publish all the data

personal. Nor does it exempt you from the obligation to carry out a risk analysis

prior to the publication of the news.

In case of following the interpretation defended by the defendant, the treatment that

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

by the indications received from the judicial body, this not being the case.

This last line of argument of the claimed party is not consistent with the

Section 6 of the 2020 Justice Communication Protocol, regarding the protection

of personal data, which refers to the transmission, by the



Communication Offices, from the text of the judicial decision to the media

social comunication.

This section contains the text of a warning about the responsibility of the

means of communication in the dissemination of personal data contained in the text of the judicial resolution, which must be included in all shipments to media:

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

In any case, the provisions of the data protection regulations will apply. of a personal nature to the treatment that the recipients of this information carry out out of the personal data contained in the attached judicial resolution, which does not may be transferred or communicated for purposes contrary to the law.” (underlining is our).

In conclusion, in the case examined there must not be a prevalence of the Law Fundamental to Freedom of Information on the Fundamental Right of Protection of Personal Data of the victim. Which does not mean, as has interpreted the claimed party in its statement of allegations to the proposal of resolution, that "a maximalist position regarding the protection of personal data" be adopted personal above any consideration. Because, as stated by the Basis of Law VI of the initiation agreement and in the Basis of Law V of the motion for a resolution, what must exist is a balance between both rights to achieve the achievement of the Fundamental Right to Freedom of Information without

distort the Fundamental Right to Protection of Personal Data of the victim,

reconciliation between both rights that is not new, since the European legislator

mandates such conciliation in article 85 of the GDPR.

It should be remembered that this file has not been opened because it is considered that

the information should not be published, but because, in application of the principle of

data minimization regulated in article 5.1.c) of the GDPR, the

publication adopting the necessary precautions so that they are not affected

the rights of the victim, while reporting on the development of the process

court in question. For this purpose, the respondent party should have made a

weighting prior to the publication of the information, as well as a risk analysis

prior to such publication, which has not been carried out by the party

claimed, in accordance with what was stated in his statement of allegations to the proposal of

resolution. Such an analysis would have allowed him to identify which were the risks that were

derived from posting the undistorted voice of the victim, trying to avoid

that they existed or reducing them to the minimum expression, which in the end would have

supposed to have duly complied with article 5.1.c) of the GDPR.



IV.

The complaining party considers that the classification of the infringement as very serious for

application of article 72.1.a) of the LOPDGDD is absolutely generic and

violates the principle of typicity in relation to that of specialty, understanding that

"If there is any infraction, what we rule out would be merely serious, according to the

article 73 letter d)" of the LOPDGDD:

"d) The lack of adoption of those technical and organizational measures that result

appropriate to effectively apply the principles of data protection from

the design, as well as the non-integration of the necessary guarantees in the treatment, in

the terms required by article 25 of Regulation (EU) 2016/679."

In this regard, it should be noted that breaches of data protection

They are typified in sections 4, 5 and 6 of article 83 of the GDPR. It is a typification

by referral, fully admitted by our Constitutional Court. In this

In this sense, article 71 of the LOPDGDD also makes a reference to them when

point out that "The acts and conducts referred to in the

sections 4, 5 and 6 of article 83 of Regulation (EU) 2016/679, as well as those that

are contrary to this organic law".

In this sense, the Opinion of the Council of State of October 26, 2017, regarding

to the Draft Organic Law for the Protection of Personal Data,

provides that "The European Regulation does typify, even though it does so in a sense

generic, conduct constituting an infringement: in effect, sections 4, 5 and 6 of

its article 83 transcribed above contains a catalog of infractions for violation

of the precepts of the European standard that are indicated in such sections. Article 72

of the Preliminary Draft assumes, not in vain, the existence of said catalogue, when it has

that "infractions are acts and behaviors that imply a violation of the

content of sections 4, 5 and 6 of the European Regulation and of this law

organic"."

The offenses established in articles 72, 73 and 74 of the LOPDGDD are only for

effects of the prescription, as stated in the beginning of each and every one of these

precepts. This need arose in our State as it does not exist in the GDPR

any reference to the statute of limitations relating to offences, given that this institute

legal is not specific to all EU Member States.

However, the claimed party in its pleadings to the proposal for

resolution criticizes such argumentation because, it understands, "that the typification suggested by

this part is as if it did not exist, as it is stated in the Organic Law and not in the

European Regulation. The proposal indicates that said article 73 refers

exclusively to the prescriptive terms of each infraction, depending on its

gravity, but not to offending types, so it only falls to resort to the types of the

regulation in its article 83."

Pointing out below that with the application of "article 73 (of the LOPDGDD) no

the types of article 83 of the Regulation are not being known, much less. (…)

deny the virtuality of an organic law that defines offenses with reference and



Respect for the European Regulation is a power to which the authority has been arrogated.

Instruction, in a particularly arbitrary manner."

We cannot share such a statement because, as already indicated in the proposal for

resolution, the GDPR is a directly applicable legal norm, which has been

developed by the LOPDGDD only in what the first allows. GDPR

typifies the offenses and the LOPDGDD qualifies them for the sole purpose of the

prescription.

Thus, the preamble to the aforementioned organic law states that it "proceeds to

describe typical behaviors; establishing the distinction between infractions very

serious, serious and minor, taking into account the differentiation that the Regulation

general data protection law establishes when setting the amount of the sanctions. The categorization of offenses is introduced for the sole purpose of determining the limitation periods, having the description of typical behaviors as the only object the enumeration of exemplary way of some of the punishable acts which must be understood to be included within the general types established in the European standard. The Organic Law regulates the cases of interruption of the prescription based on the constitutional requirement of knowledge of the facts that are imputed to the person". (underlining is ours).

That is, it results from the application and interpretation of the GDPR, and not from the LOPDGDD, the determination of the seriousness of an infringement based on a series of conditions set forth therein. While the exemplary classification of infractions for the purposes of the prescription of the LOPDGDD does not have virtuality in regarding the determination of the seriousness of the infringement for the purposes of the GDPR or regarding the imposition of the corresponding fines in its case.

This disciplinary procedure has been initiated against the claimed party, as indicates the initiation agreement, "for the alleged infringement of article 5.1.c) of the GDPR, typified in article 83.5.a) of the GDPR." The reference that performs such an act administrative to article 72 of the LOPDGDD is only for the purposes of prescription of the offence.

Furthermore, it should be noted that:

- In the present case, there is a violation of article 5.1.c) of the GDPR, since it does not The data to be published was minimized, a specific obligation collected accurately in the aforementioned precept, for which reason article 83.4 cannot be applied of the GDPR, which does not include the classification of the violated precept.

- Article 25 of the GDPR includes specific obligations of the data controller treatment in relation to privacy by design and by default, and must

consider for the purpose of adopting the necessary measures, the application

effective of all the treatment principles included in article 5 of the GDPR. To the

after all, Guidelines 4/2019 of the European Committee for Data Protection on

article 25 of the GDPR state that "In the application of article 25, it is necessary to take into account

Note that the main objective of the design is that the effective application of the

principles (of article 5 of the GDPR) and the protection of the rights of the interested parties

integrated into appropriate treatment measures." Notwithstanding the foregoing, in



this specific assumption and in attention to the proven facts, what happens is that

Article 5.1.c) of the GDPR has been infringed, due to the principle of specialty, which

imposes a specific obligation on the data controller to process the data

personal information "adequate, relevant and limited to what is necessary in relation to the purposes

for those who are treated."

However, the foregoing is not shared by the claimed party in its writ of

allegations to the proposed resolution, stating that "it is not that the

The victim's own narration was a fact that could not be known, but that in

In the worst case, the necessary technical measures were not applied to rule out

that eventuality. For this reason, the offense can never be the most serious, since

listening to the victim was important, but in the worst case, it was not adopted

a technical caution in the treatment of data that was indeed relevant and susceptible to

be published."

First of all, it should be noted that "the victim's own narrative" is not a piece of information.

of a personal nature in accordance with the definition established in article 4 of the

GDPR. The personal data that is the subject of this procedure

sanctioner is the voice of the victim, regardless of the content of his statement

before the court.

Once the foregoing is established, and in view of the statements made by the party

claimed, it is worth asking about what is important to listen to: the narrative

of the victim or his undistorted voice. And clearly, what is important to hear is

the content of the victim's statement, which is protected by the

Fundamental Right of Freedom of Information of the media.

A different matter is the undistorted voice of the victim, which, as has already been

indicated, it is not necessary to know the content of the narration and, therefore, to

that the medium manages to fulfill its informative purpose.

Article 5.1.c) of the GDPR does not limit the excess of data, but the need. That is to say,

personal data will be "adequate, relevant and limited to the need" for the

that were collected, in such a way that if the objective pursued can be achieved

without carrying out excessive data processing, this must be done in any case.

Similarly, recital 39 of the GDPR indicates that: "Personal data only

should be processed if the purpose of the processing cannot reasonably be achieved by

other media." Therefore, only the data that is "adequate,

relevant and not excessive in relation to the purpose for which they are obtained or processed".

As already indicated in the Legal Basis III of this resolution, if the party

claimed had carried out a risk analysis prior to the publication

from the information, would have concluded:

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

I could identify her.

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

informative.



In conclusion, the principle of data minimization regulated in the

Article 5.1.c) of the GDPR, which is an infringement of the regulations on

data protection in accordance with article 84.5.a) of the GDPR.

V

The defendant makes a series of criticisms of the aggravating factors to which he refers

both the initiation agreement and the proposed resolution:

- Article 83.2.a) of the GDPR: The defendant considers that such an aggravating circumstance is not

should have applied because "neither the mere reproduction of the victim's voice,

devoid of any other collateral damage, made it recognizable by third parties,

nor has it been dissatisfied with the informative treatment on the

case, at any time.", adding that "the undistorted audio remained

accessible for a short time and, furthermore, it cannot be ignored that it was a

accessory element to the text of the information, so that only a minimum part of the

Readers of the news on the website also reproduced the excerpt from the

recording".

Since in Fundamentals of Law III we have already referred to the fact that the voice does

makes the victim identifiable with respect to people who were unaware of such condition, as well

as if there was a real will not to be identified, we are going to refer

at this time to the considerations made by the defendant regarding the time

that the audio was available with the victim's voice without distorting as well as on

the number of people who have played such a recording.

Regarding the "short time" that, according to the claimed party, the audio with the voice was

of the victim without distorting it should be noted that, analyzing the case, we found

that the video was published on ***DATE.5, being aware of the removal of the

itself and the distortion of the voice in the digital newspaper of the party claimed the

***DATE.4, the day the order to remove the content was notified. Is

In other words, the video with the undistorted voice of the victim was available for a

month and a few days

Bearing in mind that time is a relative concept, in the present case it is not

You can share the allegation that the content was published for a short time, since

the video with the undistorted voice of the victim was published the same day that it took place

the newsworthy fact, being available until the AEPD notified the party

demanded the aforementioned requirement, which shows that the measure of

removal of the content did not derive from a spontaneous action of the claimed party.

On the other hand, regarding the allegation related to “that only a minimal part of the

Readers of the news on the website also reproduced the excerpt from the

recording" it must be indicated that the number of people who have

listened to the video of the victim's account in his undistorted voice. On the one hand,

because the purpose of the Fundamental Right to Personal Data Protection is

protect people without hesitation and without exception, even more so in this case, given that

what has occurred is the dissemination of a story from a victim of rape

multiple. On the other hand, because the processing carried out by the claimed party is

characterizes:

- Due to its durability over time, since once the news is published, it remains in the network, making it possible to access its content (and, in this case, the victim's voice) both through newspaper libraries and through search engines, so many times as desired and without time limitation.
- Due to its amplifying effect: as it is a means of communication that facilitates information through the internet, making knowledge of that information accessible information exponentially and ubiquitously.

In this sense, the STJUE of August 1, 2022 in case C-184/20 (OT and Vyriausioji tarnybinės etikos komisija) exposes the amplifying effect of the internet indicating that "102 On the other hand, it is clear that this treatment leads to those personal data are freely accessible on the Internet by the public as a whole general and, as a result, by a potentially unlimited number of people.

The information, including the voice of the victim, has been made available to a large number of people, allowing access to it through any type of electronic device, 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.

The question is that behind that voice that has been decided to publish, there is a person vulnerable, due to the experience suffered.

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

- Article 83.2.b) of the GDPR: Considers the party claimed that did not act with
negligence, "since the discrepancy lies in the weighting of rights
conflicting fundamentals in the information transmission process, in which
terms may or may not agree, a very different matter from acting
unconsciously or negligently, which was not the case."

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).

Connected with the degree of diligence that the data controller is obliged to
to deploy in compliance with the obligations imposed by the regulations of



data protection, the Judgment of the National Court of 17
October 2007 (rec. 63/2006), which indicates, in relation to entities whose activity
involves continuous processing of customer data, which: "(...) the Court
Supreme Court has understood that there is imprudence whenever a

legal duty of care, that is, when the offender does not behave with due diligence

callable. And in assessing the degree of diligence, special consideration must be given to the

professionalism or not of the subject, and there is no doubt that, in the case now examined,

when the activity of the appellant is constant and abundant handling of data from

personal character must be insisted on the rigor and exquisite care to adjust to the

legal provisions in this regard.

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

The media are responsible for the processing of personal data

personnel who habitually distort the voice in order not to be heard

recognize the person speaking. For this reason, the initiation agreement in its Fundamentals of

Law IX indicates that the claimed party "was negligent in not ensuring a

procedure that guarantees the protection of personal data in some

such sensitive circumstances.

It is useless to allege the specific newsworthiness of the audio content for

denounce the inadequate treatment given to the victim by the prosecutor, purpose

for which it was not necessary to broadcast the voice of the victim without distortion, as

as indicated in the Legal Basis III. Nor can it be taken into account

the allegation made by the defendant regarding the fact that practically all of the

main media outlets in the country will carry out their treatment

informative with support in the recording of the hearing with the voice of the interveners, since

there is no room for equality in illegality (SSTC 40/1989, 21/1992, 115/1995, 144/1999,

25/2022, among others). Because the truth is that a woman (...), victim of a crime

violent and against sexual integrity, it has been put at a certain risk of being

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

have been analyzed prior to the publication of the information by the

media and for which it is responsible.

- Article 83.2.g) of the GDPR: Criticizes the party claimed that the initial agreement returns

to refer at this moment to "the certain possibility of recognizing the victim of a crime

as the one reporting the news", as well as the fact that the data is very sensitive, since

understands that these issues have already been formulated in the first of the aggravating circumstances.

The statement made by the claimed party cannot be shared, because while

The first circumstance regulated by the GDPR as an aggravating circumstance refers to the

very serious nature of the offense assessed as a whole, the circumstance

regulated in article 83.2.g) of the GDPR as an aggravating circumstance, specifically addresses

that the category of personal data affected by the infringement is highly sensitive. Are

totally different issues.

On the other hand, the claimed party points out that the same day it received the request

of the AEPD to withdraw the news or distort the voice of the victim, "proceeded to

distort the voice of the published information and to communicate to that AEPD the execution

of the requested measure, which he proactively communicated to all those platforms

online with which the chain shares content, so that they apply the same



measure (since the SER cannot do it) and therefore it would be of maximum effectiveness."

For this reason, it considers that the following mitigating factors must be taken into account:

- Article 83.2.c) of the GDPR: "any measure taken by the person responsible or

in charge of the treatment to alleviate the damages and losses suffered by the

interested".

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 mitigating factor, although the fact that

such action was not "spontaneous" is criticized by the claimed party in his brief

of allegations to the proposed resolution.

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 communication that the claimed party

have sent to the online platforms with which you share content so that

modify such content, since such conduct is typical of a person responsible for the

treatment that acts based on the principle of proactive responsibility, of

in accordance with article 5.2 and article 19 of the GDPR.

- Article 83.2.f) of the GDPR: "the degree of cooperation with the control authority with

in order to remedy the infringement and mitigate the possible adverse effects of the

infringement".

The degree of cooperation with the AEPD cannot be considered a mitigation of any

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 requirements, despite what is indicated by the

claimed party in its pleadings to the proposed resolution.

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.

In view of the foregoing, the provisionally proposed sanction was duly motivated,

because in the initial agreement, as well as in the resolution proposal, they were collected and duly made explicit the circumstances that have been taken into account for the quantification of the sanction.

SAW

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.

VII

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

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

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

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

with all the crudeness of details the multiple rape suffered. All this constitutes a

processing of personal data of the victim.

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

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

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

legal.

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

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

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

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

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

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

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

fundamental to data protection are legally specified in the power to

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

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

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

computerized or not, of personal data, requires as complements

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

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

oppose such possession and uses".

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

treatment, all controllers must respect the principles of

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

GDPR which establishes that:

"1. Personal data will be

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

that are processed ("data minimization");"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

claimed public interest in its dissemination.

VIII

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".

IX

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 27/2020, of February 24 (amparo appeal 1369-

2017) that it has, in relation to the image of a person, and based on the fact

uncontroversial that it makes it identifiable, that "…the debated question is reduced to

consider whether the non-consensual reproduction of the image of an anonymous person is

that is, of someone who is not a public figure, but who suddenly and

involuntarily a role in the newsworthy event, in this case as a victim of

failed attempted murder by his brother and his subsequent suicide,

implied an illegitimate interference in their fundamental right to their own image (art.

18.1 CE).

[…]

…that criminal events are newsworthy events, even with

regardless of the character of private subject of the person affected by the news. Without

However, the limit is in the individualization, direct or indirect, of the victim, since

This data is not of public interest because it lacks relevance for the information

that is allowed to be transmitted (SSTC 20/1992, of February 20; 219/1992, of

December; 232/1993, of July 12; 52/2002, of February 25; 121/2002, of 20

May, and 127/2003, of June 30). Thus, it is currently recognized by Law 4/2015, of 27

April, of the crime victim statute, in force since October 28, 2015,

when he warns of the need "from the public authorities [to offer] a

response as broad as possible, not only legal but also social, to the victims,

not only repairing the damage in the framework of a criminal proceeding, but also

minimizing other traumatic effects on the moral that his condition can

generate, all this regardless of their procedural situation. Therefore, the present

Statute, in line with European regulations on the matter and with the demands that

raises our society, claims, based on the recognition of the dignity of

victims, the defense of their material and moral assets and, with it, those of the group of

the society". In cases such as those raised in this appeal, this Court must

give relevance to the prevalence of the right to the image of the victim of the crime

against information freedoms, since graphic information became idle or

superfluous because the photograph of the victim lacks real interest for the transmission of

the information, in this case the apparent accomplishment of a homicide and subsequent

suicide" (emphasis added).

We will add the STS, from its First Civil Chamber, 272/2011 of April 11 (rec.

1747/2008), in which, regarding the data necessary to provide a

information and limits to the public interest states that "b) Trivial information is not

protects (ATC 75/2006), but the fact of providing unnecessary data in a case of

rape (full name, last name initials, street portal where

the victim lived) that have no community relevance, do not respect the reservation, only

seek to satisfy curiosity, produce disturbances or annoyances, and reveal

aspects of personal and private life unnecessarily, allowing neighbors,

close people and relatives full identification of the victim and knowledge

in great detail about an act that seriously violated his dignity (STC

185/2002) or about a disease that has no public interest and affects



direct to the irreducible field of intimacy and that reveals itself to the effect of a pure

joke or joke (STC 232/1993);".

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.

X

In the specific case examined, as we have indicated, the claimed party

published, on the website referred to in the facts, the audio of the statement before the judge

of a victim of a multiple rape, to illustrate the news of a very

media.

Thus, it is not a question, as in other cases examined by jurisprudence, of endowing

of prevalence to a fundamental right over another, having to choose which one has more

weight in a specific case. If not, rather, to find a balance between

both to achieve the achievement of the purpose of the first without undermining the second.

The reconciliation of both rights is nothing new, since the legislator

European Union mandates such reconciliation in article 85 of the GDPR.

As we have seen previously, the Fundamental Right to Freedom of

Information is not unlimited, since the jurisprudential interpretation when confronting it

with other rights and freedoms does not allow the same in any case and with all breadth,

but, nevertheless, the prevalence that the courts usually endow it can be seen

limited by other fundamental rights that must also be respected. Thus

observes its limitation when the personal data provided was unnecessary for the

essence of the information content.

We must consider the special circumstances present in the supposed

examined. It is about a woman (...) who has suffered a multiple rape. In the

published recording, she is heard recounting, with great emotional charge, the aggression

sexuality suffered with all crudeness, (...).

In addition, we cannot lose sight of the victim status of the woman whose voice, with

all the nuances exposed, has spread.

Let us remember, for merely illustrative purposes, that Law 4/2015, of April 27,

of the Statute of the victim of crime, as well as the recent Organic Law 10/2022, of 6

of September, of integral guarantee of sexual freedom, foresee a special

need to protect victims of crimes against sexual freedom or

sexual indemnity. 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".

eleventh

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 particularly sensitive.

Such obligations do not decline because we are before a data controller

that it is a means of communication.

If we add the diffusion of the victim's voice (with all its nuances), which makes it

identifiable and can be recognized by third parties, with the factual account that makes

in relation to the violation suffered, there is a very high and very likely risk that

may suffer damage to their rights and freedoms. This has happened in other cases

of dissemination of personal data of victims of rape crimes. And this, in addition to

that with the diffusion of the voice of the victim she is being sentenced again to

can be recognized by third parties, when it is not a proportional treatment or

necessary in relation to the information purposes pursued.



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.

twelfth

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.”

XIII

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 this case, the following graduation criteria are considered concurrent:

 Aggravating:

- Article 83.2.a) of the GDPR:

Nature, seriousness and duration of the infringement: It is considered that the nature of the

infraction is very serious since it entails a loss of disposition and control over

the personal data of your voice to a person who has been the victim of a violent crime and

against sexual integrity and that by disseminating said personal data there was a certain risk

that it could be recognized by third parties, with the serious damages that this

it would cause

- Article 83.2.b) of the GDPR.

Intentional or negligent infringement: Although it is considered that there was no

intentionality on the part of the 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.



fourteenth

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 SOCIEDAD ESPAÑOLA DE RADIODIFUSION, S.L., with NIF

B28016970, for a violation of article 5.1.c) of the GDPR, typified in article

83.5 of the GDPR, a fine of 50,000.00 euros (FIFTY THOUSAND euros).

SECOND: Confirm the following provisional measures imposed on COMPANY

ESPAÑOLA DE RADIODIFUSION, S.L.:

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

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

or exact replicas by the same or other users.

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

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

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

police or administrative or judicial process that may be investigated.

THIRD: NOTIFY this resolution to SOCIEDAD ESPAÑOLA DE

RADIODIFUSION, S.L.

FOURTH: Warn the sanctioned party that he must enforce the sanction imposed

Once this resolution is enforceable, in accordance with the provisions of Article

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common of Public Administrations (hereinafter LPACAP), within the payment 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 number ES00 0000 0000 0000 0000 0000, open in the name of the Agency

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

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

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

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

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



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

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

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

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

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

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

Interested parties may optionally file an appeal for reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from

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

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

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

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

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

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

referred Law.

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

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact through

writing addressed to the Spanish Data Protection Agency, presenting it through

of the Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registries provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative proceedings within a period of two months from the day following the

Notification of this resolution would terminate the precautionary suspension.

Mar Spain Marti

Director of the Spanish Data Protection Agency