

□ Procedure No.: PS/00050/2020

## RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

### BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) on 11/5/2019 filed

claim before the Spanish Data Protection Agency against B.B.B. with NIF

\*\*\*NIF.1 (hereinafter, the claimed one).

The claimant states that on 10/12/2019 at 9:02 p.m., from the account of the

social network \*\*\*ACCOUNT.1, belonging to B.B.B. (claimed) XXXXXXXXX in the city

autonomous community of \*\*\*LOCALIDAD.1, published two messages accompanied by a photograph

that showed an invoice issued by the premises of his property, restaurant

\*\*\*RESTAURANTE.1, which also included name and surname, NIF number

and bank current account number.

Provides impression of the tweet in which the claimed under the title B.B.B. in

response to C.C.C., PP \*\*\*LOCALIDAD.1 and \*\*\*CUENTA.2, titled “without a doubt of

celebrations in \*\*\*RESTAURANTE.1 at the expense of the public treasury to the PP nobody

improvement, your invoices will be made public, at €45 per covered, because that

celebrations nobody like the PP” and the INVOICE document is seen, with the data

CLIENT “Ministry of the Presidency-General Directorate” “in description UNED dinner 14

diners”, “unit price 45 euros” and a complete bank account appears in the

bottom left, and at the top the data of \*\*\*RESTAURANTE.1, address

and NIF.

The tweet is recorded in the Inspection access diligence of 12/2/2019.

The date of the invoice, 05/02/2019, and the NIF associated with the claimant, with the

Property name. Under the invoice it shows 10/12/2019, 12:02. consist

response comments addressed to the respondent. There is no reference to participation of the claimant in the text messages related to said tweet.

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

documents provided by the claimant, dated 12/11/2019, the

claim to the respondent, and information was requested, specifically the causes that

gave rise to the claim, the decision adopted, the measures to be taken to

prevent similar incidents from occurring and any other issues you consider.

The defendant, dated 01/21/2020, states that "there was no will to

disseminate the personal data of the complainant, as it is not noted that in the image

hanging you could see the same, because the same day another message was broadcast

on several minor contracts awarded to the one that did not present this incidence".

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It states that the presentation of the claimant's data responds to a debate

administrative policy raised in \*\*\*LOCALIDAD.1 in relation to "the hiring

minor by the Autonomous City" and, "especially to the payments made in favor of the

owner of the establishment of \*\*\*\*RESTAURANTE.1", claimant. It states that

the claimant is a prominent supporter of the Popular Party, and his premises are a place

of meeting and leisure of the militants and political positions of said formation.

Provides a copy of a tweet dated 06/15/2019 from the former president, Mr. D.D.D., who

as stated, "the same day of the Constitution of the Autonomous Government

formed by the tripartite PSOE,

## COALITION FOR

\*\*\*LOCALIDAD.1 that displaced him from power, used the social network Twitter” with the content: “from \*\*\*RESTAURANT.1 of \*\*\*TOWN.1 big hug to all the PP voters for winning the elections even though there are unscrupulous traitors who twist democracy”.

## CITIZENS,

Also, in the digital newspaper “\*\*\*DIARIO.1”, \*\*\*DATE.1 is published, a Report on the economic-political relationship of the claimant and the previous government local, in which, among other things, the relationship between “\*\*\*RESTAURANTE.1” and the components of the Popular Party. In the news it relates the claimant's daughter, an artist who participated in a television event, to identifies, with his father, not with name and surnames, and mentions the tavern as a place close to the PP headquarters and where events sponsored or promoted by people of this political tendency.

Represents that the information disclosed about the owner of “\*\*\*RESTAURANTE.1” responds to a justified public and political interest, and furthermore, “It has been extracted from public access sources such as yellow pages, which relates hotel business with its owner, as well as in the profile of the contractor of the city of \*\*\* LOCATION.1 where contracts have been published on several occasions minors granted or in official bulletins of \*\*\* LOCATION.1, stating the data of name and surnames and NIF as beneficiary of subsidies.”

The exposed data is of a business nature, and appears in a document mercantile, and “of public, social and political interest”. Refers to article 2.3 of the RD 1720/2007 of 12/21 approving the regulations for the development of the Law Organic 15/1999 of 13/12 of Personal Data Protection, which indicates that “the data relating to individual entrepreneurs, when they refer to them

in their capacity as merchants, shipping industrialists, will also be understood to be excluded of the personal data protection application regime.”

THIRD: On 02/04/2020 the claim was admitted for processing.

FOURTH: On 03/30/2020, the Director of the AEPD agrees:

“INITIATE PUNISHMENT PROCEDURE of WARNING to B.B.B.,

with NIF \*\*\*NIF.1, for the alleged infringement of article 5.1.a) of the RGPD, in accordance with article 83.5.a) and 58.2.b) and d) of the aforementioned GDPR.”

No claims were received.

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#### PROVEN FACTS

1) The claimant files a claim against the defendant for having tweeted from "\*\*\*\*ACCOUNT.1" your personal data of NIF, name and surnames, related to the establishment it runs, "\*\*\*\*RESTAURANTE.1" and the bank account number of your ownership.

2) The personal data appears on an invoice that the claimed photograph and exposes in the tweet.

3) In the tweet, under the title B.B.B., in response to C.C.C., PP \*\*\*LOCALIDAD.1 and \*\*\*ACCOUNT.2, headline: “Without a doubt of celebrations in \*\*\*RESTAURANT.1 to expense of the public treasury to the PP nobody improves him, his will be made public bills, at €45 a cutlery, because that of celebrations nobody like the PP” and see the document, invoice, with the client data “Ministry of the Presidency-General Directorate” “in description: dinner UNED 14 people”, “price

unitary 45 euros” and can be seen in the lower left, the complete digits

from a bank account. At the top, the data

\*\*\*RESTAURANTE.1, address and NIF, with the name and surname of your headline.

4) In the inspection procedure of 12/2/2010, it is verified that the tweet exists,

Appreciate the date of the invoice, 05/2/2019, and under the photo of the invoice it appears

10/12/2019, 12:02. There are comments in response addressed to the respondent.

There is no reference to the claimant's participation in the aforementioned tweet.

5) In the tweet posted by the claimant, nothing is indicated about the payments obtained by

the claimant, contracts awarded, etc. Although the respondent indicates that with

the exhibition, meant the contracts awarded to the claimant,

Considering necessary the photograph in which the invoice appeared in which the

they had the aforementioned data on the food and the claimant, who is also

sympathizer of the PP, being his establishment a meeting place for militants

tes and political positions of said political formation.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of Regulation (EU) 2016/679 of the

European Parliament and of the Council, of 04/27/2016, regarding the protection of

natural persons with regard to the processing of personal data and the free

circulation of these data (hereinafter GDPR); recognizes each authority of

control, and according to the provisions of articles 47 and 48 of Organic Law 3/2018, of

5/12, of Protection of Personal Data and guarantee of digital rights (in what

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hereinafter LOPDGDD), the Director of the Spanish Data Protection Agency is competent to initiate and resolve this procedure.

The RGPD defines in its article 4:

## II

1) "personal data": any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person whose identity can be determined, directly or indirectly, in particular by

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

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

physical, physiological, genetic, psychic, economic, cultural or social of said person;"

2) "processing": any operation or set of operations carried out on

personal data or sets of personal data, whether by procedures

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

conservation, adaptation or modification, extraction, consultation, use,

communication by transmission, broadcast or any other form of enabling of

access, collation or interconnection, limitation, suppression or destruction;

4) "file": any structured set of personal data, accessible in accordance with

to certain criteria, whether centralized, decentralized or distributed

functional or geographical;

7) "responsible for the treatment" or "responsible": the natural or legal person,

public authority, service or other body which, alone or jointly with others, determines the

purposes and means of treatment; whether the law of the Union or of the Member States

determines the purposes and means of the treatment, the person in charge of the treatment or the

Specific criteria for their appointment may be established by Union Law.

or of the Member States;

Both on the date of issuance of the invoice, 5/2019, and the date of the exhibition, October of the same year, the RGPD is in force. The LOPDGDD establishes in its unique derogatory position: "Normative derogation":

1. Without prejudice to the provisions of the fourteenth additional provision and in the Fourth transitory provision, the Organic Law 15/1999, of 13 December, Protection of Personal Data.

2. Royal Decree-Law 5/2018, of July 27, on urgent measures is repealed for the adaptation of Spanish Law to the regulations of the European Union in matter of data protection.

3. Likewise, many provisions of equal or lower rank are repealed contradict, oppose, or are incompatible with the provisions of the Regulation (EU) 2016/679 and in this organic law."

The RGPD indicates in its article 2:

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"1. This Regulation applies to the processing wholly or partially automated processing of personal data, as well as the non-automated processing of personal data contained or intended to be included in a file.

2. This Regulation does not apply to the processing of personal data:

a) in the exercise of an activity not included in the scope of application of the Union Law;

b) by the Member States when carrying out activities

included in the scope of application of Chapter 2 of Title V of the TEU;

c) carried out by a natural person in the exercise of activities exclusively personal or domestic;

d) by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses, or execution of sanctions criminal law, including protection against threats to public security and its prevention.

The LOPDGDD in its article 2.2 indicates:

"two. This organic law will not apply:

a) To the treatments excluded from the scope of application of the General Regulation of data protection by its article 2.2, without prejudice to the provisions of sections 3 and 4 of this article."

And in article 19: "Processing of contact data, of individual entrepreneurs.

dual and liberal professionals":

1. Unless proven otherwise, it will be presumed covered by the provisions of article 6.1.f) of Regulation (EU) 2016/679 the treatment of contact data and in its case those related to the function or position held by natural persons who provide services in a legal person provided that the following are met requirements:

a) That the treatment refers only to the data necessary for its processing. professional location.

b) That the purpose of the treatment is only to maintain relations of any nature with the legal entity in which the affected party renders his services.

2. The same presumption will operate for the treatment of the data related to the individual entrepreneurs and liberal professionals, when they refer to them solely in that condition and are not processed to establish a relationship with the



themselves as natural persons.

3. Those responsible or in charge of the treatment referred to in the article

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77.1 of this organic law may also process the data mentioned in the two previous sections when this is derived from a legal obligation or is necessary for the exercise of its powers.”

Regarding the data of the claimant, which are additionally found in the invoice, it is not relevant in this case and context, the use of these data as a person legal, no activity is commented on as a contractor, but as a reference identification as a person of the establishment. In addition, its owner is identified only with the name, but the NIF and the bank account are added, and they are used to relate him to people belonging to the PP environment in \*\*\*LOCATION.1, as the claimant means, that is, as a way to identify the owner of the establishment, a center in which people who feel related to the popular party came and celebrated different events. The claimant is a secondary in the presentation of the facts, insofar as the protagonists are the group that attended the celebration or meal, on which the opinion is expressed by the reclaimed. Freedom of expression manifests itself on this aspect, being able to add that \*\*\*RESTAURANTE.1 or its owner is related to the ideas of the party, but not violating the right of the owner of the data that by the fact of being the owner of the establishment, you have to sacrifice your personal data, so that the claimed reveal. One of the limits to the aforementioned right is respect for the rights

fundamental, and in this case, the protagonist was not the claimant, being the only

that is fully identified through a data set, when not even

Participate in the tweet.

The tweet is used as criticism of public spending, being the owner of the

establishment also related to said group, and according to the respondent, it was necessary

know his identity, even if he did not participate in the aforementioned tweet.

There is no doubt that the reference to public spending by a political group is

of interest, but if fully identifying data is included, not only name and

surnames, but NIF and bank account of someone who does not participate in said event, but

who is responsible for the establishment, no matter how close he is to the political ideas that are

In other words, the objective of expressing oneself collides with the ownership of personal data, especially

which govern some basic principles. Such data in this case and context is

considered included within the scope of application of the regulations for the protection of

data.

III

The document presented by the claimant certifies that the claimed person makes

a treatment of data when exposing in the social network an invoice with data of the

claimant in which your personal data is contained, relating local, NIF

issuer of the invoice and bank account, in order to state that said food is

went to the treasury. The origin, the title and the reason why the

claimed has said document and the jurisdictional purpose attributed in the

management of the same in relation to its private use on your Twitter. The fact of including the

invoice, without realizing it, even if it had been done without bad faith, figuring their

data, reveals a lack of diligence in the elements that are exposed in the social network.

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It does not follow that for the disclosure of third parties through the social network of the expenses of a group of people related to a party, which was the literal of the expression expressed in the tweet, the personal data must be given full details of the issuer of the invoice, and the complete bank account. It does not participate in food, is not relevant compared to the group, and it does not seem that even if there is an interest in informing that the owner is a supporter, it must be identified with said data, with the own repercussion that the treatment carried out may have out on social media.

The defendant, in a private capacity, with his name and surnames on Twitter, expresses their opinions, and identifies the data of the complainant. In the use of the data, you must attend any legitimate basis provided for in article 6.1 of the RGPD. The right of the claimant, that their data is not used in social networks, prevails when it comes to commenting on a meal of a PP group that passes to the treasury, or that meet very often in that place, without it being necessary

In addition, express and graphically display the data of the claimant in the photograph, In addition, owner of the establishment.

The aforementioned exposition in relation to the intention of the news does not add or is of interest or relevant for the data to appear in the photograph, not being adequate, necessary or justified, and if, on the contrary intrusive in that they are further provided, financial data such as the bank account, the NIF and the name and surnames, with the associated risks that it may entail.

It is considered that in front of his nominal citation and the object of the comment, he does not add nothing significant the fact of knowing your identity, the NIF and the bank account that

make them identified or identifiable without problems, since the expression of the expense goes related in your case to the site where you meet often, not to the data of the person who owns the site where they often meet, who is not related with the comment.

Under the principles of adequacy, pertinence, congruence, and relevance in the use of the data, when treating them without the consent of the claimant, may use Twitter to express opinions. However, in this case, the identity of that person is not relevant to what is meant by the comment, which was that the food was to be paid for from the public budget.

The same results would have been obtained by covering the account and the NIF, and name and surname of the claimant, since the right of its owner has been limited to Your data is not exposed in a medium in which your data can be multiplied. effects when the message is shared.

In accordance with the constitutional jurisprudence that defines the profile of the right of data protection, in this case, the use of the claimant's data on Twitter is a use that has not been consented by its owner, and there is no legitimate basis in the treatment of said data in relation to the purpose that is to be understood in the message that the defendant spread.

It is considered that the claimed party has infringed article 5.1.a) of the RGPD that indicates: "The personal data will be:

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a) processed in a lawful, loyal and transparent manner in relation to the interested party

("legality, loyalty and transparency"); as it is not considered lawful to send the aforementioned data exposed in the photo that associates the expressive literal of his opinion, which uploads it to the said network.

The respondent does not certify that the processing of the claimant's data appears incardinated in some legitimizing scheme of the assumptions that would enable the treatment, for which the commission of the imputed infraction of article 5.1.a of the GDPR.

IV

Regarding the fact that the data had been obtained from "Public access sources" co".

On this point, we limit ourselves to indicating -reiterating what was stated by this Agency- cia in its Report of 10/03/2019, entry record 045824/2019- that "as of the entry into force of the GDPR, we cannot speak of a legal concept of "accessible sources" public" such as the one that existed in the previous Organic Law 15/1999 (...) The GDPR only talks about public access sources when regulating the right to information if the data has not been collected from the interested party".

Therefore, the concept of public access source does not exist in the RGPD or in the LO-PDGDD and, what is more, despite the terms in which article 6.2 of the repealed LOPD, was not a valid concept in our legal system during

During the validity of the repealed Organic Law 15/1999 as a result of the STS of 02/08/2012 (Rec.25/2008). The STS relied on the STJUE of 04/24/2011, which resolved the issue preliminary ruling filed by Spain; declared null article 6.2 LOPD for being contrary to the Article 7.f) of Directive 95/46 and considered that, given the incorrect transposition of the Directive 95/46 that the LOPD made on that point, article 7.f) of the Directive was direct application. Article 7.f) of Directive 95/46, the text of which was practically identical co to the current article 6.1.f) of the RGPD. In addition, the bank account number does not appear

in those supposed public access sources.

Nor can the argument be upheld that the fact that the data

appear in this type of sources legitimize the treatment without further ado. The GDPR only speaks

from publicly accessible sources by regulating the right to information if the data is not

have collected from the interested party.

Article 14 of the RGPD indicates:

“1. When the personal data has not been obtained from the interested party, the

The data controller will provide you with the following information:

2.f) the source from which the personal data comes and, where appropriate, if they come from

public access sources;”

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Nor the publication in official bulletins, in which it did not foreseeably appear.

the bank account of the affected party, supposes the existence of a legitimizing basis for the

treatment of the claimant's data, especially when the data is exposed as re-

ference, in a social network open to the general public.

Regarding the news of the newspaper "\*\*\*\*DIARIO.1", the report does not identify

with personal data as does the tweet that is the object of the claim.

v

Article 83.5 a) of the RGPD, considers that the infringement of “the basic principles

for treatment, including the conditions for consent under the articles

5, 6, 7 and 9” is punishable, in accordance with section 5 of the aforementioned article 83

of the aforementioned Regulation, with administrative fines of a maximum of €20,000,000 or, alternatively,

being from a company, of an amount equivalent to a maximum of 4% of the volume of total annual global business of the previous financial year, opting for the one with the highest amount.”

Article 58.2 of the RGPD indicates: "Each control authority will have all the following corrective powers indicated below:

b) sanction any person responsible or in charge of the treatment with a warning when the treatment operations have violated the provisions of this Regulation.

glament;

d) order the person in charge or in charge of the treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate, in accordance with a specified manner and within a specified time.

In this case, the respondent is a natural person, who does not habitually carry out or professional mainly treatment of personal data, and they do not know history of previous infractions in the matter of data protection, for which reason opted for a penalty of warning. It would be advisable, if you have not yet made, that the data of the claimant exposed and related to the subject of this complaint were removed from the aforementioned tweet, in order not to persist in the behavior that motivates this proceeding.

Therefore,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE B.B.B., with NIF \*\*\*NIF.1, for an infraction of article 5.1.a) of the RGPD, as indicated in Article 83.5 a) of the RGPD, a penalty of warning.

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

THIRD

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

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

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Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of one month from the

day following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

in accordance with the provisions of article 25 and section 5 of the additional provision

fourth of Law 29/1998, of July 13, regulating the Contentious Jurisdiction-

administrative, within a period of two months from the day following the notification

of this act, as provided for in article 46.1 of the aforementioned Law.

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

may provisionally suspend the firm resolution in administrative proceedings if the interested party states its intention to file a contentious-administrative appeal. If this is the

In this case, the interested party must formally communicate this fact in writing addressed to

the Spanish Agency for Data Protection, presenting it through the Registry

Electronic Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through

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

October. You must also transfer to the Agency the documentation that accredits the

effective filing of the contentious-administrative appeal. If the Agency did not have

knowledge of the filing of the contentious-administrative appeal within the period of

two months from the day following the notification of this resolution, I would



The precautionary suspension has ended.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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