

□ File No.: EXP202202641

RESOLUTION OF SANCTIONING PROCEDURE

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

based on the following

BACKGROUND

FIRST: On 01/26/2022 it has entered the Spanish Protection Agency

of Data (AEPD), sent by the Catalan Data Protection Authority, the

claim made by A.A.A. (hereinafter, the claiming party). the claim

is directed against B.B.B., with NIF ***NIF.1 (hereinafter, the claimed party).

The reasons on which you base your claim are the following: The claimed party has

used your image, without your consent or knowledge, to advertise on networks

social services it provides. He adds that, on the occasion of the aesthetic treatment that

received in the center of which the defendant is the owner, her image was recorded and

It was later spread on social media.

The complainant affirms that his image was disseminated on these web pages:

1. On Instagram, in the profile "****PERFIL.1":

1.1. ***URL.1

1.2. ***URL.2

2. In "24-hour stories published on the same profile" on Instagram,

***PROFILE.1. The claimant declares that the claimed party disseminated his image among

from November 22 to 26, although the image disappeared after twenty-four hours.

3. On the defendant's YouTube channel, "****CANAL.1". The claimant states

that his image was disseminated in these three videos:

3.1. "Welcome to the YouTube channel of ***CANAL.1:

***URL.3.

3.2. "Treatment of dark circles and bags under the eyes:

***URL.4.

3.3. "Lip treatment with hyaluronic acid:

***URL.5.

The claimant has explained that she underwent an aesthetic treatment in a establishment of the claimed party and that the broadcast images were recorded during that treatment. That she was unaware that she was being recorded and that nor was he subsequently informed of the recording made. that has never given your consent to the defendant, or to anyone, for your image to be used as It has been: on web pages to advertise beauty services that lends the claimed That he had news of the events when he accessed the networks social networks of which he has provided images and that he does not know if the defendant is acting

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directly or through a legal person, such as a corporation, in in which case he requests that his complaint be extended to such a legal entity.

Attached to your claim are five screenshots with your image that were obtained from the advertising of XXXXXXXXXX on social networks previously cited. In three of the screenshots you can see the face of the claimant while receiving cosmetic treatment. The remaining two show the claimant sitting in the premises of the establishment of XXXXXXXXXX.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5

December, Protection of Personal Data and guarantee of digital rights (in

forward LOPDGDD), the claim was transferred to the claimed party so that proceed to its analysis and inform this Agency, within a month, of the actions carried out to adapt to the requirements established in the regulations of Data Protection.

The transfer of the claim was made by electronic means. As of 03/10/2022 it was made available to the defendant who accepted the communication the same day. So appears in the certificate issued by the Authorized Electronic Address Service Unique (DEHÚ).

It should be noted that, although natural persons are not obliged to relate electronically with the Administration (article 14 LPACAP), article 42 of the Royal Decree 203/2021 provides:

"2. Regardless of the fact that an interested party is not obliged to relate electronically with the Public Administrations or that it has not communicated that notifications be made by electronic means, his appearance voluntary or that of its representative in the electronic headquarters or associated headquarters of a Administration, public body or public law entity linked or dependent or through the only Authorized Electronic Address, and the subsequent access to the content of the notification or the express rejection of it will have full legal effects."

The claimed party did not respond to the transfer of information.

THIRD: On 04/26/2022, in accordance with article 65 of the LOPDGDD,

The claim presented was admitted for processing. The admission was notified to the claimant by postal mail that is received on 05/11/2022.

FOURTH: Agreement to start the disciplinary procedure.

On 09/12/2022, the Director of the Spanish Data Protection Agency agreed to initiate disciplinary proceedings against the party claimed by an alleged

violation of article 6.1. of the GDPR, typified in article 83.5.a) of the GDPR.

FIFTH: Notification of the initiation agreement.

The opening agreement was notified to the claimed party in accordance with the provisions of the LPACAP.

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The certificate issued by the DEHÚ service in which the
that the defendant accepted the notification on 10/08/2022.

SIXTH: Allegations to the initiation agreement.

On 10/03/2022, the claimed party presents its allegations to the
opening in which he states:

-That she is a "doctor who works at the ***CANAL.1 medical center."

-That he acknowledges having performed various treatments on the claimant at the center
aesthetic.

-Regarding the recording of the image of the claimant, it says that "[...] she herself
lent itself to be recorded and images to be taken." And adds:

"What's more, the recordings were made with a mobile in which nothing was hidden.

with which she cannot allude to the fact that she was not being knowledgeable because that is
impossible. I can provide several recordings in which you can see looking at the camera and
joke about the fact that she was being recorded.

All patients, not just her, consent to the use of their image

both for the follow-up of their treatments and the use in social networks and

advertising. This is something common in the field of aesthetic medicine as I suppose

that they already know

It is done to all patients. Everyone signs it the first time they come to the center and

she also signed it, it is true that they only sign it once, it is a consent

A.A.A.

don't remember."

generic and maybe

-Regarding the dissemination of the images on social networks, he indicates:

"The day I was informed of this procedure [...], the withdrawal of

all the images even having the consent as a sign of good faith because they do not

it is in my interest to disturb any of my patients. This is why I closed

the case. The 24-hour images had already disappeared and the other two were withdrawn

the same day."

-About the responsibility of manifest treatment:

"As for the data, although I did the treatments, it is the company responsible

from the center the one with all the rights and the owner of the social networks. The

company is Neos Youth Partner, and it is the one that will appear in the documentation of the

data. You have registered the name of ***CANAL.1 so you can use it." (He

underlined is ours)

He attaches to his allegations a document that, in his opinion, includes the "consent"

of the claimant for the treatment of her image that is the subject of this

claim. The document has in the header ***CANAL.1" and the name of

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NEOS YOUTH PARTNER, S.L.U., with CIF B-67488734. On the left, the name and the first surname of the claimant and the indication "Documents: ***NIF.1", which is the NIF of the claimant. At the end of the document is the date: 06/28/2021.

The stipulations of the document that are related to the right are reproduced to the protection of personal data.

The first paragraph of the document says that the indicated person -identified by the name, first surname and NIF of the claimant - knows that the company NEOS YOUTH PARTNER will process the personal data provided in this form, including those related to your health, for these purposes:

"(1) provide the requested aesthetic medical services being the legal basis for this treatment of the established contractual relationship and (2) send you the newsletter and commercial communications of own products based on their legitimate interest except who opposes through the corresponding box." (The underlining is ours)

There is no box in the document provided, either checked or unchecked, with that or any other purpose.

The second paragraph indicates: "In addition, for the provision of some of our aesthetic medical services, it is convenient that the staff of the center take photographs of the affected areas that accredit their state and evolution. In this sense, we need that you give us your express consent by marking the following box for the treatment of your image, in order to make a better follow-up of the treatment received. In any case, you may revoke in the consent given at any time, and the non-provision of the same does not will prevent the contracting of the service." (The underlining is ours)

There is no box in the document provided, either checked or unchecked, with that or any other purpose.

The third to sixth paragraphs say, respectively, the following:

"I consent to image processing in order to guarantee the best monitoring of the treatment that I will receive and the treatment of my data for the sending communications."

"Your data will not be transferred to third parties, and ours may have access to them. providers of technological services, call centers, advisory services and our service doctor."

"In the event that you do not oppose the processing of your data for the sending of commercial communications, your data will be stored on servers located within of the European Economic Area, for whose security we have enabled the guarantees necessary. You have the right to access, rectify, delete your data and to oppose the treatment of the same, as well as other rights, as explained in the Privacy Policy privacy that you can find on the back of this document, as well as to contact contact our Data Protection Officer at the address above referred or by sending an email to the address info@XXXXXXXXXX.com."

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(The underlining is ours)

The back of the document that supposedly included the Privacy Policy has not been provided. privacy.

"All the information collected is essential to provide our services aesthetic doctor and keep you informed about our treatments."

The following ten paragraphs of the document provided with the allegations to the agreement

Initially they are related to the medical intervention. After those ten paragraphs, the

next, penultimate of the writing, reads as follows:

"I AUTHORIZE the taking of photographs in the area to be treated of the object that can be carry out an adequate monitoring of the treatment and may be used in the networks social. They may not be transferred to third parties. The data will be kept in digital format and as long as you do not request its deletion. Consent withdrawn via of the corresponding request, the data will be deleted with the security measures adequate, proceeding to the total destruction of the same." (The underlining is our)

The document ends by saying: "I have also been informed of my right to refuse treatment or revoke this consent. I have been able to clarify all my doubts about all of the above and I fully understand this CONSENT DOCUMENT reaffirming myself in each and every one of its points and by signing the document I ratify and consent to the treatment being carried out."

In the "Patient Signature" section, a fragment of a rubric appears.

SEVENTH: Opening of the test phase. Practiced tests.

1. First request for evidence from the defendant.

On 10/28/2022, in accordance with article 77 of the LPACAP, it is agreed

open a trial phase and carry out the following trial actions:

1.1. Deem reproduced the claim formulated and its annexed documents; the documents generated and obtained by the Inspection Sub-directorate of the AEPD during the informative transfer, prior to the admission of the claim for processing, as well as such as the allegations presented by the defendant against the agreement of opening and its attached documents.

Incorporate the screenshots obtained from the Mercantile Registry into the file (R.M.) with information related to the company NEOS YOUTH PARTNER, S.L.U.

1.2. Request the claimed party to provide documentary evidence of the identity of the

natural or legal persons who, in the month of November 2021, were the holders of

Open accounts on the following social networks:

-On YouTube, from the account “***PERFIL.1”.

-On INSTAGRAM, from the account “***CANAL.1”.

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If from the opening of these accounts in the respective social network and until November

2021 there would have been changes in the ownership of the YouTube accounts and

Instagram, it is requested that you document the physical or legal person/s

were/were holders of each of them and during what period of time.

It was stated in the opening document of the test phase that the result of the

tests could lead to the completion of others.

The opening of the evidentiary phase and the request for evidence was notified electronically

to the claimed party on 10/28/2022.

1.3. On 10/28/2022, the opening of the

test phase in the disciplinary procedure and the incorporation into the file of

various screenshots obtained from the R.M. with company information

NEOS YOUTH PARTNER, S.L.U., with NIF B 67488734. The company began

its operations on 08/02/2019 and was registered in the R.M. on 08/29/2019.

The screenshots collected show the registered office of the company, its

corporate purpose and, among other corporate agreements, the one adopted on 03/01/2022 through the

that the appointment of the joint and several administrators is revoked, the

sole administrator to the current claimed party and the sole proprietorship of the

society.

1.4. By diligence signed on 10/31/2022 they are incorporated into the file administrative, for evidence purposes, the screenshots obtained on that date from the web page "XXXXXXXXXXXX.com" with the information of its Privacy Policy Privacy.

We transcribe below point 1 of the Privacy Policy that is carried out by under the heading "Data Controller", which makes it possible to verify that the reported in it the identity of the person responsible:

<<In compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 regarding the protection of people physical with regard to the processing of personal data and the free circulation of these data (hereinafter "RGPD") and Organic Law 3/2018, of 5 December, Protection of Personal Data and guarantee of rights digital, we inform you that XXXXXXXXXX, a company domiciled in Avinguda del Mar 2-6, local 3, Gavá Mar (Barcelona), and telephone ***TELEPHONE.1 (in hereinafter, "XXXXXXXXXX" or the "Company") is responsible for the treatment of your personal information. This privacy policy provides information about the use that the Company will make of your personal data in your status as a user of the web (the "Website").>>

1.5 By diligence signed on 10/31/2022 they are incorporated into the file administrative, for testing purposes, the following screenshots:

-(i) Obtained from Instagram ***PROFILE.1 on 02/28/2022

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-(ii) Obtained from YouTube on 09/23/2021. It shows a close-up of the face of the claimant while undergoing an aesthetic treatment by personnel of XXXXXXXXXX.

-(iii) Obtained from Lindekin on 02/28/2022.

EIGHTH: Response of the claimed party to the first request for evidence. Second and third evidence requests addressed to the claimed party.

1. On 11/03/2022, the AEPD received the respondent's response to the evidence that was required (first request for evidence) through the writ of dated 10/28/2022, in which he was also notified of the opening of the evidentiary phase.

The defendant replied:

<<Regarding the file, the social networks of YouTube and Instagram of XXXXXXXXXX belong to the company NEOS YOUTH PARTNER.

The patient A.A.A. gave their consent to undergo treatments, and assign their data and your image.

However, we still removed it months ago when it was reported.

We understand with this that we have not breached the Data Protection law in no time.

What's more, we have videos in which the patient knows and participates in the recordings and give your oral consent.

I can't upload them because they are heavy.

I am waiting if you need more information.>> (The underlining is our)

2. Second request for evidence addressed to the defendant:

In view of the respondent's response, on 11/08/2022 a second evidence request document with the following text:

"In order to be able to prove that the claimant gave her consent for her image was disseminated on social networks in order to advertise the services of XXXXXXXXXX, a new test procedure is carried out:

1. The claimed party, B.B.B., is required to provide the AEPD with a copy of the recorded videos in his possession in which, according to what he has declared, the party The claimant consented to the processing of their personal data, in particular their image, in order to be published on social networks.

Taking into account that the weight of the video or videos is greater than that allowed by the electronic submission, you must send the indicated documentation to this Agency -the

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mentioned videos- through postal mail, incorporating them into a physical support

(a recorded CD or a "pen drive"), stating in his writing that, for the reason indicated,

No

electronic submission is possible."

3. Response of the defendant to the second request for evidence (dated 11/10/2022).

The answer it offers consists of a few paragraphs written on the form of "presentation at the Registry Office", in the box for "Information on the Record" "Summary/Subject", in which it says:

<<In response to file EXP2022022641 I send you a download link of the videos in which A.A.A. participates. There are many so he sent a selection in which is seen to be an advertising video in which she participates without oppression and

consent.

In addition, as I said, he signed it in the consent of the clinic.

This is the link to download it. It is more effective for me to send the link instead of the flash drive which is more cumbersome.

***LINK.1>>. (The underlining is ours)

In that same form, in the "Attachments" section, with the name

"procedimientoGenericoEntrada_11107727278035308667.xml.xsig", this is included

Hash:

“(…).

Numerous attempts to download the videos were unsuccessful. When accessing from the "link" a message appears in English: << Yikes, that page can't be found.

Head back to wetransfer.com or cheer up your eyes with some nice things we wrote.>>. (Oops, that page can't be found. Go back to wetransfer.com or encourage your eyes with some nice things we wrote).

4. Third request for evidence addressed to the defendant:

In writing dated 11/18/2022, notified electronically and accepted by the claimed the same day, the request is reiterated to send a copy to the AEPD of the videos that, according to what he said, were in his possession and regarding which he stated that accredited that the complaining party had consented to the processing of their data materialized in the publication of your image on related social networks with the services of XXXXXXXXXX.

In this third test letter addressed to the defendant, he is informed that the Link that he had provided to the AEPD with his response to the second request for evidence “does not refer to any video”. In addition, the following is communicated:

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<<"The link leads only to this message: "Whoops, that page can't be found find. Come back to wetransfer.com or cheer your eyes up with some nice things that we wrote".

Consequently, through this third evidence request document:

(i) The claimed party is informed that they have not provided the videos that were sent to them required.

(ii) It is required for the second and last time so that, in order to be able to prove that -as she maintains- the claimant consented to her image being disseminated on networks with the purpose of publicizing the services of XXXXXXXXXX, proceed in the non-extendable period of 5 days (five days) to send to this Agency -either through a physical support or either through a link that effectively allows its download- the documentation to which he has repeatedly alluded.>>

5. Response of the defendant to the third request for evidence:

The defendant responded to the third request for evidence on 11/21/2022 in these terms:

<<Answer for EXP202202641

I am attaching again the download link of the videos. The validity of the Link is limited 7 days from today. If you want you can give me an email to send it.

***LINK.1

It is evident that in 73 videos that appears and I think I have more it was absolutely aware that she was being recorded and was participating in a video.

Thank you.>>

6. Also on this occasion the attempts to download from the link were unsuccessful

sent the videos that the defendant claimed to have provided us.

By diligence dated 11/23/2022, a

screenshot with the result obtained on that date from the link provided

otherwise in order to access the videos. The access attempt was made, by

Therefore, two days after the defendant had sent the link from which,

allegedly, it was possible to access the videos, complying with the term of seven days to the

which alludes

The screenshot incorporated into the file includes the image accessed

from the link provided: a screen with a spiral in the center that leads

written in the upper left corner "Me" and in the lower center of the image is

caption: << Yikes, that page can't be found. Head back to wetransfer.com or cheer up

your eyes with some nice things we wrote.>>

NINTH: Summary of the documents provided by the claimed party and of the

tests practiced.

1. Documentary evidence provided annexed to the allegations to the opening agreement.

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The defendant does not certify in any case through the document provided that the

claimant had consented to the taking of images of her during the

aesthetic treatment or that the images were used in social networks. In addition,

as long as the signature of the defendant does not appear in the document, it is not proven that

would have been informed in the terms provided in article 13 of the GDPR.

The document that the defendant has provided to the AEPD, of which it says that it accredits the "consent" of the claimant for the treatment of her image, has in her heading NEOS YOUTH PARTNER, S.L.U., with CIF B-67488734 and the name and first name of the claimant and their NIF. At the end of the document the date 06/28/2021.

The document is not signed by the complaining party. It only includes THE "fragment" of a rubric.

Regarding the stipulations of the document provided, the following are worth mentioning: following:

In the first paragraph it says that the person identified by the first name, first last name and NIF of the claimant knows that the company NEOS YOUTH PARTNER will process the personal data provided in this form, including those relating to your health, for these purposes:

"(1) provide the requested aesthetic medical services being the legal basis for this treatment of the established contractual relationship and (2) send you the newsletter and commercial communications of own products based on their legitimate interest except who opposes through the corresponding box." (The underlining is ours). Without However, there is no box in the document provided, neither checked nor unchecked, for this or any other purpose.

In the second paragraph, the document reports the need to take photographs during aesthetic treatment with a specific purpose: to perform a better follow-up of the treatment received. It reads like this: "Furthermore, for the provision of some of our aesthetic medical services, it is convenient that the staff of the center take Photographs of the affected areas that prove their state and evolution. In this In this sense, we need you to give us your express consent through the marking the following box for the treatment of your image, in order to better follow-up of the treatment received. In any case, you may

revoke the consent given at any time, and the non-provision of the

It will not prevent the contracting of the service.” (The underlining is ours) Without

However, despite indicating that consent is obtained by marking

a box, there is no box in the document, neither checked nor unchecked, with

that or any other purpose.

In the following paragraphs it is exhaustively stated that the treatment of

the image with the indicated purpose, the best follow-up of the treatment: "I consent to the

image treatment in order to guarantee the best follow-up of the

treatment that I will receive and the treatment of my data for the sending of

communications.”

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The document includes a stipulation that says that the data will not be transferred to

third parties: "Your data will not be transferred to third parties, and they may have access to them

our providers of technological services, call centers, advisory services and our

medical service."

In its penultimate paragraph, the document, in addition to returning to the authorization to

photograph the areas affected by the aesthetic intervention in order to make a

adequate follow-up, includes without interruption an authorization for

These images can be used on social networks:

"I AUTHORIZE the taking of photographs in the area to be treated of the object that can be

carry out an adequate monitoring of the treatment and may be used in the networks

social. They may not be transferred to third parties. The data will be kept in

digital format and as long as you do not request its deletion. Consent withdrawn through of the corresponding request, the data will be deleted with the security measures adequate, proceeding to the total destruction of the same.” (The underlining is our)

In the last paragraph the document states: "I have also been informed of my right to refuse treatment or revoke this consent. I have been able to clarify all my doubts about all of the above and I have fully understood this CONSENT DOCUMENT reaffirming myself in each and every one of your points and by signing the document I ratify and consent that the treatment will be perform.”

2. About the identity of the data controller.

In the brief of allegations, the defendant reported the identity of the company responsible for the treatment and owner of the accounts of XXXXXXXXXX on the networks social networks YouTube and Instagram. It is about NEOS YOUTH PARTNER. In the R.M. figure registered since 08/29/2019 NEOS YOUTH PARTNER, S.L.U., with NIF B 67488734.

3.As a result of the test phase.

The defendant stated that the claimant had given consent to give up her data and her image and added "we have videos in which the patient knows and participates in the recordings and gives oral consent. I can't upload them because they weigh a lot.”

The defendant has not provided this Agency with any video in which -according to defended - it is proven that the claimant consents to the processing and assignment of her image.

After having argued that he could not send them to the AEPD electronically because they were too heavy, he was informed that he could send them via postal mail,

incorporated into a physical support (CD or flash drive). Replied (11/10/2022) providing a "Link" from which, according to what he said, it was possible to download them.

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Was informed (11/18/2022) that there was no video that could be downloaded from that Link and the copy of the videos was requested again.

The defendant sent on 11/21/2022, again, a Link that, supposedly,

It allowed when opening it to access the videos to which it alludes, noting that the Link would be operational only 7 days. On 11/23/2023, the Link sent is accessed again, obtaining the same message that informs, when opened, that the page cannot be found.

TENTH: Resolution proposal.

The resolution proposal, which is signed on 04/13/2023 and on the same date notifies electronically and is accepted by the defendant, is formulated in these terms:

<<That, by the Director of the Spanish Data Protection Agency, the FILE of the disciplinary procedure PS/00228/2021 open to B.B.B., with NIF ***NIF.1, for an alleged violation of article 6.1 of the GDPR, typified in article 83.5.a) of the GDPR.

As the person against whom this disciplinary file is directed is not the responsible for the treatment, but rather a legal person -NEOS YOUTH PARTNER, S.L.U.- of which she is the sole administrator, appears exempt from responsibility in relation to the infringement of the RGPD that is imputed to him.>>

ELEVENTH: No allegations are presented to the proposed resolution of the

The period granted to make allegations to the resolution proposal ended on 04/27/2023. As of 05/04/2023, this Agency does not record the receipt of allegations to the proposed resolution made by the claimed party.

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

PROVEN FACTS

FIRST: The claimant declares that B.B.B., whom he identifies as the owner of the XXXXXXXXXX beauty center where she underwent a treatment, recorded her image without their consent and, later, spread it on social networks to advertise the services it provides. He declares that his image was published, in particular, on these web pages:

1. On Instagram, in the profile “***PERFIL.1”:

1.1. ***URL.1

1.2. ***URL.2

2. In "24-hour stories published on the same profile" on Instagram,

***PROFILE.1. The claimant states that the claimed party disseminated her image among the days from November 22 to 26, but after twenty-four hours the image disappeared.

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3. On the YouTube channel “***CANAL.1”. The claimant states that her image was spread in these three videos:

3.1. “Welcome to the YouTube channel of ***CANAL.1:

***URL.3".

3.2. "Treatment of dark circles and bags under the eyes:

***URL.4".

3.3. "Lip treatment with hyaluronic acid:

***URL.5".

SECOND: There are five arrests in the file, provided by the claimant.

screen shot of XXXXXXXXXX advertising on social networks previously cited, Instagram and YouTube. In three of the captured images you can see the face of the claimant while receiving an aesthetic treatment. In the remaining two it is seen to the claimant sitting in the premises of the establishment.

THIRD: The complaining party denies having given his consent for his image was published as it has been, on web pages, in order to publicize the aesthetic services provided by the defendant.

FOURTH: The defendant has stated in her allegations to the initiation agreement that is not the owner of the establishment with the commercial name XXXXXXXXXX nor of the Open accounts on the social networks YouTube and Instagram. It affirms that the owner is the trading company "NEOS YOUTH PARTNER". In the Mercantile Registry there is registered since 08/29/2019 NEOS YOUTH PARTNER, S.L.U., with NIF B 67488734.

Thus, the defendant said in her pleadings brief:

"Regarding the data, although I did the [aesthetic] treatments, it is the company person in charge of the center who has all the rights and the owner of the networks social. The company is Neos Youth Partner, and it is the one that will appear in the data documentation. It has registered the name of ***CANAL.1, that's why it You can use."

FIFTH: The defendant has acknowledged in her pleadings to the agreement of start that images of the complaining party were published in the accounts of

XXXXXXXXXX on YouTube, Instagram and in Stories.

SIXTH: The defendant has stated in her pleadings to the agreement of

beginning that the claimant consented to the recording of the videos with his image and his

Assignment for dissemination on social networks. He has not accredited such a statement.

SEVENTH: The defendant has stated in her response to the tests carried out

that he has in his possession more than seventy videos in which it is accredited that the part

The claimant consents to the recording of his image and the assignment for dissemination on networks

social. The defendant has not proven the reality of her statements.

The defendant did not provide any of the videos, despite the fact that she was required to do so.

end twice during the trial process. He first justified that he could not

remit them electronically by weight. When offered to send by postal mail

a CD or flash drive type medium rejected the option and sent a link for the download. He

Link provided did not include any videos. He was duly informed of that

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circumstance and again sent a Link from which no

document.

FUNDAMENTALS OF LAW

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Competence

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679

(General Data Protection Regulation, hereinafter GDPR), grants each

control authority and as established in articles 47, 48.1, 64.2 and 68.1 of the

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

Article 63.2 of the LOPDGDD determines that "The procedures processed by the Spanish Data Protection Agency will be governed by the provisions of the 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."

Erroneous identification of the data controller. Guilt principle.

II

1. Article 64 of Law 39/2015, of October 1, on administrative procedure of Public Administrations (LPACAP), which specifies the minimum content of the agreement to start the disciplinary procedure, indicates that it must include the "Identification of the person or persons allegedly responsible."

In the agreement to initiate the procedure at hand, the person physics B.B.B. as responsible for data processing allegedly contrary to the RGD materialized in the capture of the image of the claimed and its dissemination in social networks through the accounts of XXXXXXXXX illustrating the activity of that Commercial brand.

However, in its allegations to the initiation agreement, the claimed party has reported of the identity of the owner of the trademark XXXXXXXXX as well as the establishment of aesthetics with that name and of the accounts opened with the name of XXXXXXXXX in Instagram and YouTube.

It should be noted that it was not possible to know before the opening of the file sanctioning the identification data of the legal entity owner of the centers of

aesthetics XXXXXXXXXX and YouTube accounts, "****CANAL.1", and Instagram,

"****PROFILE.1".

The privacy policy of the web page associated with the name of XXXXXXXXXX does not reported the identity of the "company" that presented itself as responsible for the processing of personal data: he did not provide his name, nor the NIF, nor the company type

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nor any characteristics that would allow it to be identified. In addition, the search in the Mercantile Registry under the name of XXXXXXXXXX and others similar had a negative result, since no company was found that included in its denomination of that term or other similar ones and had as its corporate purpose the activity that takes place in the establishments of XXXXXXXXXX. Added to the above is the circumstance that the defendant did not respond to the transfer of information made by the Data Inspection Sub-Directorate. If you had responded, you could have clarified this procedure the identity of the subject allegedly infringing, as has been done later in the processing of allegations to the opening agreement of this procedure.

It should be remembered that in the agreement to start this sanctioning procedure it is

He said in relation to this matter, (Fundamentals II) the following:

<<This disciplinary file is directed against the natural person claimed, B.B.B., as responsible for the processing of personal data of the claimant that constitutes its object.

Article 4.7. of the GDPR understands by data controller "the person

physical or legal entity, public authority, service or other body which, alone or jointly with others determines the purposes and means of processing”.

[...] The information collected about the owner of the XXXXXXXXXX centers, in one of which the images of the claimant were recorded, leads us to conclude that the person who determined the purposes and means of processing was the natural person claimed.

In this regard, it has been verified that the Mercantile Registry does not contain registered any company with the name XXXXXXXXXX or another similar whose corporate purpose coincides, at least partially, with the activity claimed was carried out in the establishment where the claimant received the service aesthetic. This activity was advertised on social networks from the Instagram profile “***PERFIL.1” and the YouTube channel “***CANAL.1”. The claimed does not appear nor in the Mercantile Registry as proxy or administrator of any society.

On the other hand, the information accessible through the Internet related to the trade name XXXXXXXXXX introduces us to the natural person claimed as "doctor of medicine and surgery" and "responsible and director" of the clinics identified with that trade name. An example of this is the social network Lindekin, in which the claimed party, identified by name and two surnames, is presented in her profile as "CEO Director - XXXXXXXXXX".

Lastly, it should be made clear that, despite the fact that the website www.XXXXXXXXXXXXXX.com informs in its Privacy Policy that the responsible for the processing of the data of the users of this website is a "company" called "XXXXXXXXXX", in no case informs of the type nor does it provide the NIF of the supposed company. It reproduces the

following excerpt from that policy:

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“[...] we inform you that XXXXXXXXXX, a company domiciled in Avinguda del Mar 2-6, local 3, Gavà Mar (Barcelona), and telephone ***TELEPHONE.1 (in hereinafter, "XXXXXXX" or the "Company") is responsible for the treatment of your personal information. This privacy policy provides the information about the use that the Company will make of your personal data in your status as a user of the website (the "Website").">>

2. In the process of making claims to the initiation agreement, the claimed party has informed the AEPD of the identity of the company that owns the beauty centers that operate under the trade name XXXXXXXXXX. This is NEOS YOUTH PARTNER S.L., with NIF B67488734.

The defendant has added that this company is also the owner of the profiles on Instagram and YouTube (“***PERFIL.1” and “***CANAL.1”) through which spread the image of the complaining party.

The Mercantile Registry (R.M.) informs that Neos Youth Partner, S.L., began its activity on 08/02/2019 and that on that date there were two joint and several administrators, one of them the claimant. On 03/01/2022 -months after the treatment that originates the initiation of this disciplinary file- was registered in the R.M. an amendment to the Bylaws that, among other changes, affected the social composition, since the company was constituted as a sole proprietorship being the sole partner B.B.B. who also became its sole administrator.

3. According to reiterated jurisprudence, the principles that inspire the criminal order are applied, with certain nuances, to the sanctioning Administrative Law, since both are manifestations of the punitive order of the State. Among those principles is special virtuality the element or principle of guilt.

The Judgment of the Constitutional Court (STC) 76/1990, of April 26, (F.J. 8.B) pointed out that the presumption of innocence has to do with the proof of authorship of the facts and, furthermore, with the guilt attributable to the one who, where appropriate, carries them out, whether that any disciplinary resolution, whether criminal or administrative, requires at the same time certainty of the facts charged, obtained through prosecution evidence, and certainty of the judgment of guilt over those same facts.

In this sense, and limited to the scope of the disciplinary administrative procedure, it is cite the judgment of the Supreme Court, Third Chamber, of 06/24/1998 (Rec. 1776/1994), Legal Foundation 2, which says: "Personal responsibility becomes the basis on which the punitive system is based, since no one can be sentenced or sanctioned but for acts that, either by fraud or negligence, may be directly accused."

Article 28 of Law 40/2015, of October 1, on the Legal Regime of the Sector Public (LRJSP), under the heading "Responsibility" provides in section 1: "Only those that may be penalized for acts constituting an administrative infraction physical and legal persons, [...], who are responsible for them by way of fraud or fault."

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4. Based on the allegations made and the evidence provided, the person person against whom this disciplinary procedure is directed appears exempt from responsibility, since it was not she who determined the ends and means of the treatment of the personal data of the affected party, but the legal person NEOS YOUTH PARTNER, S.L.U.

The intervention of the current defendant in the facts on which the disciplinary proceedings, in particular the publication of the image of the defendant in social networks, took place in his capacity as legal representative of the company aforementioned mercantile.

Thus, the person responsible for the treatment that has given rise to the opening of this disciplinary file is the sole proprietorship limited company NEOS YOUTH PARTNER, S.L.U., of which the defendant, the natural person B.B.B., has been since March from 2022 its sole administrator.

Based on the foregoing, it is reported that, to the extent that the processing of data that is the subject of the claim, and that is allegedly contrary to the GDPR, does not prescribed, nothing prevents the AEPD, in relation to the aforementioned treatment, from proceeding to the opening of a disciplinary procedure against the person responsible, the company NEOS YOUTH PARTNER, S.L.U.

For this purpose, it should be remembered that the processing of personal data to which it relates the claim made before this AEPD could constitute an infringement of the article 6.1 of the RGPD and that article 72 of the LOPDGDD qualifies the infringement of the Article 6.1 of the GDPR is very serious, for which it sets a limitation period of three years. Regarding the calculation of the limitation period, article 30 of the LRJSP says that "it will begin to be counted from the day the infraction was committed. In the case of continued or permanent infringements, the term will begin to run since the offending conduct ended."

Thus, whenever the processing of the personal data of the party claimant is not attributable to the natural person against whom this claim is directed. disciplinary procedure PS/00228/2022, it is appropriate to agree on the file of the referenced procedure directed against B.B.B..

Therefore, in accordance with applicable law,
the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: AGREE on the FILING OF THE SANCTIONING PROCEDURE

PS/00228/2022 open to B.B.B., with NIF ***NIF.1, since this individual is not the responsible for the processing of the data of the complaining party that allegedly violates the GDPR.

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

THIRD: In accordance with the provisions of article 50 of the LOPDGDD, the
This Resolution will be made public once the interested parties have been notified.

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Against this resolution, which puts an end to the administrative process in accordance with article 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 article 90.3 a) of the LPACAP,

The firm resolution may be temporarily suspended 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-](https://sedeagpd.gob.es/sede-electronica-web/)

web/], or through any of the other registries provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative proceedings within a period of two months from the day following the

Notification of this resolution would terminate the precautionary suspension.

Mar Spain Marti

Director of the Spanish Data Protection Agency

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