

□ File No.: PS/00432/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the complaining party) dated 02/03/2021
filed a claim with the Spanish Data Protection Agency. The
claim is directed against D. B.B.B. with NIF ***NIF.1 (hereinafter, the part
claimed). The grounds on which the claim is based are as follows: the claimant
upload and put up for sale in the VINTED app, bikini including photos of her with the garment
put, later these photos appear on the website ***URL.1.

Relevant documentation provided by the claimant:

- Screenshots of the posts published in which the users of***URL.1
“***USER.1”, dated January 29, 2021 at 7:03 p.m., and “***USER.2”,
dated January 29, 2021 at 7:10 p.m., replicate the images published in the
clothing sales portal adding inappropriate and degrading comments.

SECOND: On 02/26/2021 the Director of the Spanish Protection Agency

Data agreed to admit the claim filed by the claimant for processing.

THIRD: The General Subdirectorate for 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 57.1 of Regulation (EU) 2016/679 (General Regulation of
Data Protection, hereinafter RGPD), and in accordance with the provisions of the
Title VII, Chapter I, Second Section, of the LOPDGDD, having knowledge of the
following ends:

On 02/26/2021, within the scope of procedure E/01350/2021, the Spanish Agency for Data Protection agreed to carry out these investigation actions in order to determine the authorship of the facts claimed.

During these proceedings, D. C.C.C. (investigated 1); user ***USER.1 of the website ***URL.1 (D. B.B.B., the claimed one); User ***USER.2 of website ***URL.1 (investigated 2)

No link is found between these publications with the investigated 1 to from the claim filed with this Agency by the claimant.

Information request made to LINK WORLD NETWORK, S.L. (onwards, LWN) owner of the website ***URL.1 on Internet addresses (addresses IP) used by the users who published the claimed content, dated 04/02/2021 is received in this Agency, written answer informing of IP indicated in the application, being these:

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***IP.1 user ***USER.1 operated by TELEFÓNICA DE ESPAÑA S.A.U

***IP.2 user ***USER.2 operated by ORANGE ESPAGNE S.A.U

Requested information from ORANGE about the owner of the assignment of the IP address indicated above on the date on which the claimed events occurred, with date of 06/14/2021 is received in this Agency, written response to the request facilitating the assignments of that IP address throughout the indicated day. Nope However, it has not been possible to determine the owner with certainty since this address is assigned through mobile technologies and during the exact hour and minute in which

posted the image, the IP was assigned to six different owners. Therefore, it cannot be determine with certainty the authorship of the publication of one of the images claimed.

Requested information from TELEFÓNICA on the holder of the assignment of the address IP corresponding to this operator on the date the events occurred claimed, dated 05/07/2021, this Agency receives a response letter to the request indicating that the IP address ***IP.1 from which one of the the photographs indicated in the claim were assigned at the time of the publication to the investigated that appears in entities investigated as a user ***USER.1.

FOURTH: On 11/19/2021, the Director of the Spanish Protection Agency of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement of article 6.1.a) of the RGPD, typified in article 83.5.a) of the aforementioned Regulation, a fine of 2,000 euros.

FIFTH: Once the initiation agreement has been notified, the one claimed at the time of this The resolution has not presented a written statement of allegations, for which reason the indicated in article 64 of Law 39/2015, of October 1, on the Procedure Common Administrative Law of Public Administrations, which in section f) establishes that in the event of not making allegations within the period established on the content of the initiation agreement, it may be considered a proposal for resolution when it contains a precise statement about the responsibility imputed, reason why a Resolution is issued.

SIXTH: Of the actions carried out in this proceeding, they have been accredited the following:

PROVEN FACTS

FIRST: On 02/03/2021 the claimant submitted a written document to the Spanish Agency for

Data Protection, stating that it had been uploaded and put up for sale in the app

VINTED, a bikini including photographs with the garment on, later these

photos have appeared on the web ***URL.1.

SECOND: The complainant has provided screenshots of the published posts

in which the users of ***URL.1 “***USER.1”, dated from 01/29/2021 to

at 7:03 p.m., and “***USER.2”, dated 01/29/2021 at 7:10 p.m., replicate the

images published on the VINTED clothing sales portal adding comments

inappropriate and vexatious.

THIRD: LWN, as a provider of internet forum services ***URL.1

and owner of the website ***URL.1 has reported on 04/02/2021 in relation to the

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IP addresses used by users who posted the claimed content,

being these:

***IP.1 user ***USER.1 operated by TELEFÓNICA DE ESPAÑA S.A.U

***IP.2 user ***USER.2 operated by ORANGE ESPAGNE S.A.U

FOURTH: ORANGE has reported that it has not been possible to determine with certainty the

owner of the IP since said address was assigned through mobile technologies and

during the exact hour and minute the image was posted to six different headlines,

not being able to establish certainty the authorship of the publication.

FIFTH: TELEFÓNICA has informed about the holder of the IP address

on the date on which the claimed facts occurred, indicating

that “Consulted the corresponding area, they inform us that the IP address ***IP.1

specifically, on January 29, 2021, she was assigned to the line

***TELEPHONE.1, whose owner is the defendant, NIF ***NIF.1, with address at

***ADDRESS 1,

Barcelona".

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

Law 39/2015, of October 1, on the Common Administrative Procedure of the Public Administrations, in its article 64 "Agreement of initiation in the procedures of a sanctioning nature", provides:

"1. The initiation agreement will be communicated to the instructor of the procedure, with transfer of how many actions exist in this regard, and the interested parties will be notified, understanding in any case by such the accused.

Likewise, the initiation will be communicated to the complainant when the rules regulators of the procedure so provide.

2. The initiation agreement must contain at least:

- a) Identification of the person or persons allegedly responsible.
- b) The facts that motivate the initiation of the procedure, its possible rating and sanctions that may apply, without prejudice to what result of the instruction.
- c) Identification of the instructor and, where appropriate, Secretary of the procedure, with express indication of the system of recusal of the same.

d) Competent body for the resolution of the procedure and regulation that attribute such competence, indicating the possibility that the presumed responsible can voluntarily acknowledge their responsibility, with the effects provided for in article 85.

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e) Provisional measures that have been agreed by the body competent to initiate the sanctioning procedure, without prejudice to those that may be adopted during the same in accordance with article 56.

f) Indication of the right to formulate allegations and to the hearing in the procedure and the deadlines for its exercise, as well as an indication that, in If you do not make allegations within the stipulated period on the content of the initiation agreement, this may be considered a resolution proposal when it contains a precise statement about the responsibility imputed.

3. Exceptionally, when at the time of issuing the initiation agreement there are not sufficient elements for the initial qualification of the facts that motivate the initiation of the procedure, the aforementioned qualification may be carried out in a phase later by drawing up a List of Charges, which must be notified to the interested".

In application of the previous precept and taking into account that no formulated allegations to the initial agreement, it is appropriate to resolve the procedure initiated.

III

The claimed facts materialize in the publication without legitimation or consent of the image of the claimant on the web ***URL.1 accompanied by inappropriate comments; images or photographs that had been published in the Vinted clothing sales portal by the claimant, which implies a violation of the regulations on the protection of personal data.

Article 58 of the RGPD, Powers, states:

"two. Each supervisory authority will have all of the following powers corrections listed below:

(...)

i) impose an administrative fine under article 83, in addition to or in

Instead of the measures mentioned in this section, according to the circumstances of each particular case;

(...)"

Article 6, Legality of the treatment, of the RGPD establishes:

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

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

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;

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c) the treatment is necessary for the fulfillment of a legal obligation

applicable to the data controller;

d) the processing is necessary to protect the vital interests of the data subject or

of another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the controller

of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests

pursued by the data controller or by a third party, provided that

over said interests do not prevail the interests or the rights and freedoms

fundamental data of the interested party that require the protection of personal data,

in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to

treatment carried out by public authorities in the exercise of their

functions.

(...)"

On this question of the legality of the treatment, it also affects the

Recital 40 of the aforementioned RGPD, when it states that "For the

processing is lawful, personal data must be processed with the consent

of the interested party or on any other legitimate basis established in accordance with Law, either

either in this Regulation or by virtue of other law of the Union or of the

Member States covered by this Regulation, including the need to

comply with the legal obligation applicable to the data controller or the need to

to execute a contract to which the interested party is a party or in order to take measures

at the request of the interested party prior to the conclusion of a contract.»

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

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

Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on Data Protection Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

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

2. When the data processing is intended to be based on consent of the affected party for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

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3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship”.

Therefore, there is evidence that the data processing carried out by

the claimant with the dissemination on the website ***URL.1 of the claimant's photographs accompanied by insulting comments has been made without legitimate cause of the collected in article 6.1 of the RGPD.

IV

The infraction attributed to the defendant is typified in the article 83.5 a) of the RGPD, which considers that the infringement of “the basic principles for processing, 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 €20,000,000 as maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The LOPDGDD in its article 71, Violations, states that: "They constitute infractions 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”.

And in its article 72, it considers for prescription purposes, which are: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly the following:

(...)

b) The treatment of personal personal data without the concurrence of any of the the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(...)"

In order to establish the administrative fine to be imposed,
observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which
point out:

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"1. Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

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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 will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate 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, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the treatment;

f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;

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 if the person in charge or the person in charge notified the infringement and, in such case, what extent;

i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms 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 realized or losses avoided, direct or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGD, the LOPDGDD, in its

Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the 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 treatments of personal data.

c) The profits obtained as a result of committing the offence.

- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when it is not mandatory, a delegate for the protection of
- h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those data.

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assumptions in which there are controversies between those and any interested."

In accordance with the precepts transcribed, in order to set the amount of the sanction of a fine to be imposed in the present case for the infraction typified in the article 83.5 of the RGPD for which the claimed person is responsible, they are estimated concurrent the following factors:

Aggravating circumstances are:

The nature, seriousness, duration of the infringement and the scope of the treatment carried out by the defendant because we must not forget that this has been carried out through a web page with great visibility, so its dissemination is older.

The damage caused to the claimant by causing the publication of the

photographs accompanied by insulting and degrading comments.

The action of claimed implies intentionality detaching itself from the
itself the voluntariness and the purpose of causing damage to the claimant.

They are extenuating circumstances:

There is no evidence that the offender's activity is linked to
the processing of personal data.

The respondent is a natural person.

A person has been affected by the offending conduct.

Therefore, in accordance with the applicable legislation and having assessed the criteria for
graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE D. B.B.B., with NIF ***NIF.1, for an infraction of article
6.1.a) of the RGPD, typified in article 83.5.a) of the RGPD, a fine of €2,000 (two
a thousand euros).

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

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common 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, through its entry, 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, opened on behalf of the Agency

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Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

is between the 1st and 15th of each month, both inclusive, the term to carry out the

voluntary payment will be until the 20th day of the following month or immediately after, and if

is between the 16th and last day of each month, both inclusive, the term of the

payment will be until the 5th of the second following month or immediately after.

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

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

Against this resolution, which puts an end to the administrative procedure in accordance with art.

48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the

LPACAP, the interested parties may optionally file an appeal for reconsideration

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

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

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

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

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

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

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

aforementioned Law.

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

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

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

administrative. If this is the case, the interested party must formally communicate this made by writing to the Spanish Agency for Data Protection, introducing him to the agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also must transfer to the Agency the documentation that proves the effective filing of the contentious-administrative appeal. If the Agency were not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of this resolution, it would end the precautionary suspension.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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