apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 11/2019, referring to the Catalan Corporation of Audiovisual Media, SA

Background

1. On 06/06/2018, the Catalan Data Protection Authority received a letter from the Grievance Ombudsman notifying this Authority of the complaint made by the pre-adoptive family of a minor, with reason for the broadcast of the documentary series (...)", broadcast on (...) on TV3. Specifically, the complaint referred to the dissemination in said documentary of certain information (name, images, etc.) relating to a minor - who had been in foster care with Mr. (...) (who appeared in the documentary explaining his case)-; information that, according to the current pre-adoptive family of the minor, would allow the identification of her, who at the time of the events disclosed in the documentary would have been (...) years old. The Ombudsman transferred this complaint to this Authority in order to analyze whether the facts exposed could contravene data protection regulations.

2. The Authority opened a preliminary information phase (no. IP 137/2018), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 06/13/2018, the Authority's Inspection Area carried out a series of checks via the Internet on the facts reported. Thus, the documentary indicated in the complaint available on the website of Corporació Catalana de Mitjans Audiovisuals, SA (hereafter CCMASA) was viewed, and the following was found:

- That, starting from minute (...) of the documentary, reference is made to the case that is the subject of the complaint, with Mr. (...) to explain his case. The voice-over of the documentary reports the following: *"Paco (...) already (...) years ago he lost custody of his daughter when he was about to complete the adoption process and after (. ..) years of having her with him"*
- That, among others, the following information is provided in the documentary:
  a. The voice-over of the documentary identifies at the minute (...) the minor with the name of *"(...)",* i he also does this at other times throughout the documentary.
  b. At minute (...) the voice-over explains that the minor *"is listed as (...) in the official papers".*
  c. From the minute (...) a video is shown of the *"judgment on the withdrawal of the (...)"* - according to the voice-over of the documentary - in which the minor is identified as *"(...)".*

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d. At minute (...) a document drawn up by the Association (...) appears on the screen - which also includes a stamp of approval from the Catalan Institute of Reception and Adoption of the Generalitat of Catalonia dated 04/28/2009 - referring to the minor as *"(...)"*

e. In the same document indicated in the previous section, the last name of the child's previous foster mother is also listed in the following terms: *"Mr. (...) has always accompanied Mrs. (...) to the visits with the doctor of the unit of (...)".*

f. The -pixelated- image and voice of the minor also appear in the video.

4. On 03/07/2018, the CCMA was required to answer the following questions:

- Set out the reasons that, in his opinion, would justify the informative/journalistic interest in disseminating various data about the minor, data that, according to the current pre-adoptive family, could allow her identification.
- Indicate whether the minor's voice that is heard in the videos broadcast in the documentary was altered or misrepresented so that it did not correspond to the original recording (similarly to the pixelation of images).
- Indicate what were the elements that were taken into account to consider that it was not necessary to obtain the consent of the person holding parental authority or guardianship of the minor to disseminate certain information that could allow their identification, and affect their rights and freedoms

5. On 07/18/2018, the CCMASA responded to the aforementioned request in writing in which it stated the following:

- That the CCMASA considers that *"the processing of the images, which is detailed below, is intended, precisely, to prevent the identification of the minor, because if it had been that way, they would not have been used.*

  (...) *the images (photo and video) of this minor and all the others that appear in the documentary are pixelated. In the specific case of the minor, they are images that correspond to the age range (...) years, while she was in custody and in adoption procedures by the family (...)*
  and, therefore, a time very distant from the current age of the minor (...). No personal information is given (biological origin of the girl, health details, etc.), only memories and anecdotes of the three years she spent with the family are discussed (...). The images and references to the girl are always from the point of view of the previous pre-adoptive father, Mr. Francesc (...), and refers to the time that he received her, already (...) years ago.
  (...) The name of (...) is the one used by the pre-adoptive family at the time, the family (...). The CCMA cannot know what its current name is, whether it is the same or has changed. The previous pre-adoptive parent refers to the girl on several occasions during the interview by the name they were using at the time. No previous (biological) or current (we can't know) last name appears."

- That the voice of the minor who can be heard in the video was not treated, given that the voice *"of a (...)-year-old girl seemed to us to be hardly recognizable with the one that a teenager might have today of (...)".*

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- That it was considered that it was not necessary to obtain the consent of the person holding parental authority or guardianship of the minor *"precisely because of the treatment that has been done of the images that we have detailed in the previous sections, the identification of the minor it was not possible".*

6. On 07/25/2018, also during this preliminary information phase, certain information regarding the minor was requested from the Síndic de Greuges, specifically, whether the minor had kept the name of stack with which she was identified in the documentary ((...) – (...) in the family sphere).

7. On 01/10/2018, a response was received from the Guardian informing that the current pre-adoptive family had reported that the minor *"is called (...)".*

8. On 01/10/2018 a new request was made to the CCMASA in order for it to answer the following questions related to the appearance in the documentary of a document prepared by the Association (...) - in the which also includes a stamp of approval from the Catalan Institute of Fostering and Adoption of the Generalitat of Catalonia dated 28/04/2009-, which includes information about the previous foster mother of the minor, specifically: *"Mr. (...) has always accompanied Mrs. (...) to the visits with the doctor of the unit of (...)":*

- If they had the explicit consent of Mrs. (...) in order to disseminate their data personal; and if so, document it.
- If you do not have the consent of said person, indicate the elements taken into account to consider that it was not necessary to obtain their consent to disseminate their personal data, especially considering that some of the data refer to their Health.

9. On 17/10/2018 the CCMASA responded to this last request by means of a letter in which it stated the following:

- That *"in relation to whether the CCMA has the explicit consent of Ms. (...) for the dissemination of their personal data it is necessary to state that it was not available".*
- That *"the document appears from (...), that is to say a second, so it is impossible to see any details unless it is in pause mode. The name of the lady (...) and her health circumstances are unappreciable for the viewers unless they have gone specifically to look for it and in the aforementioned frozen image mode. A graphic effect was quickly created that erased all the text (...)".*

- That, *"the documentary teams of the CCMA have been careful in the treatment of the information and the document that appears on the screen takes only 1 second to become unreadable, and the phrases that are interesting to highlight are highlighted (...). The way the document was presented did not allow to see personal data in a normal viewing".*
- That *"In relation to the elements taken into account to consider that it was not necessary to obtain the consent of Ms. (...) for the dissemination of your personal data, it should be mentioned that there are elements that determine that Ms. (...) he did not oppose it. After the broadcast of the documentary, Ms. (...) contacted the documentary team for others related issues and at no time showed his disagreement in the communication*

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of any personal data. Therefore, it was not considered necessary to make any changes to the report since there was no complaint about it from Ms. (...) about your personal information".

10. On 03/13/2019, it is confirmed that the documentary *"(...)"* is still accessible through the CCMASA website on *"TV3 a la carta".*

11. On 28/03/2019, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the CCMASA for an alleged infringement provided for in article 83.5.a), in relation to the article 5.1.f of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free circulation thereof (hereinafter, RGPD), and 5 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD). Likewise, she appointed Mrs. (...), an employee of the Catalan Data Protection Authority, as instructor of the file.

In the same initiation resolution, the precautionary measure was agreed upon requiring the CCMASA so that as soon as possible, and in any case within a maximum period of five counting days from the day after the notification of the initiation agreement, carried out the necessary actions in order to avoid the dissemination in the documentary "(...)" of the personal data that gave rise to the initiation of the procedure.

12. This initiation agreement was notified to the imputed entity on 04/02/2019, which was granted a period of 10 days to formulate allegations.

13. On 09/04/2019 the CCMASA requested an extension of the deadline to present allegations, a request that was accepted.

14. On 04/12/2019 the Director of the Authority, in view of the fact that CCMASA had not made any statement in relation to the request of this Authority to adopt the provisional measures indicated in the agreement of initiation within the period provided for that purpose, agreed to order the execution of said measures.

15. On 04/16/2019 the CCMASA informed this Authority that it had adopted the provisional measures required in the initiation agreement, detailing to that effect the actions that had been taken, including the withdrawal of the documentary of the online service "TV3 à la carte", from the platform "youtube" and the social network "Vímeo".

16. On 02/05/2019 the CCMASA made objections to the initiation agreement.

17. On 30/05/2019 it was found that the documentary of the series "(...)" "(...)" through which it was no longer accessible through the online service "TV3 a la carta" the personal data that had led to the initiation of the present sanctioning procedure was not disclosed, nor did it appear to be accessible through other platforms such as YouTube.

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18. On 07/24/2019, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority impose on CCMASA a penalty consisting of a fine of 20,000 euros, as responsible for the infringement provided for in article 83.5.a) in relation to article 5.1.f) of the RGPD and 5 of the LOPDGDD.

This resolution proposal was notified on 07/24/2019 and granted a period of 10 days to formulate allegations.

19. On 05/08/2019, the CCMASA presented a statement of objections to the proposed resolution.

20. On 07/08/2019 it was found that the documentary *"(...)"* was again available on the "TV3 a la carte" online service. That, once the documentary has been viewed, it is observed that it has been edited again, in relation to the piece that had been published previously and which had given rise to the initiation of this procedure.

proven facts

Of all the actions taken in this procedure, the facts detailed below are considered accredited.

On (...) the documentary piece *"(...)",* from the *"(...)" series, was broadcast on TV3 - dependent on the CCMASA.*

The documentary deals with the removal of minors by the administration, and among other cases, narrates the case of Mr. (...) from whom the administration withdrew custody of a minor who was in pre-adoptive care. The documentary provides a series of information relating to the minor, specifically:

a) Images of the minor at the time she was in the family's pre-adoptive care (...).
These images, despite being pixelated, make it possible to distinguish that it is a girl of approximately (...) years.
b) That it was (...) years ago that Mr. (...) custody of the minor had been taken away from him.
c) That the minor was called "(...)" - "(...)" in the family circle.

The data referring to the name of the minor, as well as the fact that custody of the minor had been withdrawn from Mr. (...), provided by the voice-over of the documentary.

The set of data set out above would make the minor recognizable, since they would allow the following to be determined: that she is a girl, who would have been subject to pre-adoptive care by the indicated family until the age of (...) and from another foster home from this age, that the minor would currently be about (...) years old, and that she currently goes by the name (...) or (...).

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Through this documentary, the CCMASA disseminated the data relating to the minor without the consent of the persons to whom her representation corresponded, as she was a minor who would at most be (.. .) years.

Likewise, this documentary shows a document drawn up by the Association (...) - which also includes a stamp of approval from the Catalan Institute of Reception and Adoption of the Generalitat of Catalonia date 04/28/2009 - in which the child's previous foster mother is identified by last name, and details of her health are revealed, in the following terms: *"Mr. (...) has always accompanied Mrs. (...) to the visits with the doctor of the unit of (...)".*

The CCMASA disseminated through this documentary the last name and health data relating to the child's previous foster mother, without the express/explicit consent of the affected person.

This documentary was broadcast on (...) on TV3; and, at least until 13/03/2019, it was still accessible through the CCMASA website on *"TV3 a la carte".*

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2. The accused entity has made allegations both in the initiation agreement and in the resolution proposal. The first ones were already analyzed in the proposed resolution, but even so it is considered appropriate to mention them here, given that they are partly reproduced in the second ones. Next the set of allegations made by the accused entity are analyzed.

2.1.- On *"the lack of identification of the minor"*

In its statement of objections to the initiation agreement, the CCMA argued that the minor's first name and age were not sufficient data to identify her, since in the Spanish state *"there are many people with the name of (...) or of (...) who may be of a similar age",* apart from the fact that the CCMASA was unaware of whether or not the minor had kept her name.

In this regard, in the proposal the instructor evidenced, first of all, that, as indicated in the proven facts, the data provided in the documentary relating to the minor was not only the name and age, but also that this is a girl who would have been subject to pre-adoptive care until the age of (...) and another care after that age, is also identified with

the surnames of the members of the host family, and in addition, in the report appears the image of Mr. (...).

Secondly, it was indicated in the proposal that the CCMASA could certainly not be absolutely certain that at present the minor continued to be called (...) or (...), but that it was clear that she could be reasonably sure that this was the case, since the minor in all the official papers - as indicated in the documentary itself - was officially called (...).

And thirdly and lastly, it was also evident in the proposal that it was not reasonable, as CCMASA did in its allegations in the initiation agreement, to go to the number of people who could be called (.. .) or (...) in Spain. Considering that the report referred to the DGAIA - a body dependent on the Generalitat de Catalunya - as the body that processed the entire reception process in relation to the said minor, it was clear that he resided in Catalonia during time in which the events discussed in the report took place, and it could not be ruled out that at the time of the broadcast he also resided in Catalonia with his current host family. And a simple query on the website of the Institut d'Estadística de Catalunya showed that in the decade (...) only 53 girls were given the name of (...) or Maria (. ..), and less than 4 the name of (...).
This reduced the number of people referred to in the report very significantly, and taking into account the set of additional data mentioned in the first place (age, surnames of the host family, picture of Mr. (...)), all this context would make the minor absolutely recognizable.

Faced with the proposed resolution, the CCMASA alleges that *"the proposed resolution does not declare that the minor was recognizable and identifiable in an unequivocal and undoubted way, but declares that in the specific context described in the resolution, and based on to some presumptions, it would make it recognizable, in such a way that there is no certainty that it was identified or identifiable".*

Contrary to what the CCMASA states, in the proposed resolution it is clearly indicated that the data provided by the minor in the documentary in relation to the context in which they are treated, *"would make the minor absolutely recognisable".* In other words, every data
relating to the minor that is provided in the report, by itself and treated in isolation would not make the minor recognizable; for example, the simple mention of the name of (...), obviously would not allow the identification of the minor, but this data, treated together with the others provided in the documentary, in relation to the context, would make the minor clearly recognizable or identifiable.

Article 4, paragraph 1) of the RGPD defines “personal data” *as “all information about an identified or identifiable natural person”;* and continues *"an identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, for example a number, an identification number, location data, an online identifier or one or several proprietary elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person".*

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One of the components contained in the definition transcribed above is that of *"[natural person] identified or identifiable",* this element (identified or identifiable) on which the allegation formulated focuses and on which it is appropriate to make the following reflections .

Already the previous Directive 95/46/CE, of the European Parliament and of the Council, of October 24, 1995, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data -currently repealed by the RGPD-, defined personal data as *"all information about an identified or identifiable natural person (the "data subject"); every person whose identity can be determined, directly or indirectly, in particular by means of an identification number or one or more specific elements, characteristic of their physical, physiological, psychological, economic, cultural or social identity, is considered identifiable" ;* that is to say, said Directive defined this concept of "personal data" in terms very similar to how the RGPD does it now, and using the same defining element of "identified or identifiable natural person".

In the interpretation of this Directive, the Working Group of article 29 – body of the Union European of a consultative and independent nature, which dealt with issues related to the protection of privacy and personal data until 25/05/2018 (entry into application of the RGPD) in which the G29 became integrated into the European Data Protection Committee-, issued its Opinion 4/2007 on the concept of personal data. In this opinion, the G29 considered the following in relation to one of the components of the definition of "personal data": "[natural person] identified or identifiable":

"The Directive requires that the information refers to an "identified or identifiable" natural person. This raises the following considerations. In general, a natural person can be considered "identified" when, within a group of people, they are "distinguished" from all the other members of the group. Therefore, the natural person is "identifiable" when, although it has not been identified yet, it is possible to do so (which is the meaning of the suffix "ble"). So, this second alternative is, in practice, the sufficient condition to consider that the information falls within the scope of application of the third component. Identification is usually achieved through concrete data that we can call "identifiers" and that have a privileged and very close relationship with a certain person. Examples include your external appearance, i.e. your height, hair color, clothes, etc. or a quality of the person that cannot be perceived immediately, such as his profession, the position he holds, his number, etc" (...) what certain identifiers are considered sufficient to achieve identification is something that depends on the context of the situation of that it is about".

Next, for a better understanding of the concept, G29 gives the example of a person's surname:

"A very common surname will not be enough to identify a person - that is, to isolate him - within the population of a country, while it is likely to allow the identification of a student within a class. Even auxiliary information, like, for example, "the man."

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who wears a black suit", can identify some of the passers-by waiting at a traffic light. So, what is identified or not to the person to whom an information refers depends on the specific circumstances of the case".

Taking these considerations into account, this Authority considers that the data provided about the minor in the documentary, in relation to the context, make the minor absolutely recognizable.

Apart from the identification of the minor, it is worth remembering that in this procedure the dissemination of data is imputed, not only of the minor, but also of her previous foster mother, a matter that is analyzed in the following section.

2.2.- On the treatment of the data referred to the child's previous foster mother.

In relation to this issue, in its statement of objections to the initiation agreement, CCMASA alleged that they inferred that they had the consent of Ms. (...) to disseminate his data, since after the broadcast of the documentary this person contacted the documentary team for other related issues and at no time showed his disagreement and did not 'he objected to it; although they admitted that the consent would not be explicit.

In this regard, suffice it to say that, as the CCMASA admitted, the explicit consent of the affected person was not obtained in order to reveal their data in the controversial documentary, a type of consent that article 9.2.a of the RGPD expressly requires to treat, among other special categories of personal data, data relating to health.

On the other hand, the CCMASA stated that *"in the documents presented in the documentary, it was and is very difficult to appreciate the specific information of this person, since in order to access this information it is necessary to freeze the image because it only appears for a second and the optical effects of the report emphasize another part of the document".* Certainly, CCMASA was right when it stated that the data of the previous foster mother is shown in a document, which appears in its entirety for a brief moment, and that the image must be frozen in order to appreciate this data. Despite admitting this circumstance, the fact is that the data relating to the child's previous foster mother are shown in said documentary and that anyone who proceeded to freeze the image - as the instructor did - could know this information relating to this person. And it should be emphasized at this point that the data disclosed was not trivial or insignificant data, but related to the health of the affected person.

2.3.- On *"the consideration of the facts imputed to the CCMASA"*

The accused entity added in its letter of allegations to the initiation agreement, first of all, that *"the facts imputed to the CCMASA do not have the consideration of processing personal data to the extent that the production and emission of the program "(...)" is not an operation or set of operations carried out on personal data or sets of personal data".* And secondly, he questioned
that the data protection regulations and not Organic Law 1/1982, of May 5, on the protection of

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civil right to honor, personal and family privacy and one's image. He considered that *"the dissemination of the personal circumstances of Ms. (...) they could fall under article 7 of the aforementioned law (Law 1/1982), which foresees as illegitimate interference in the field of the right to privacy "the disclosure of facts relating to the private life of a person or family that affect their reputation and good name",* so that if such dissemination had *"the consideration of an illegality, this illegality should be prosecuted through the jurisdictional channels provided for the aforementioned law (Law 1/1982"* because if this were not the case, the CCMASA argued, both Organic Law 1/1982 and the Rectification Law *"would be empty of content".*

As was explained in the proposal, in relation to the first element - the existence or not of processing of personal data - it is first necessary to remember what article 4.2 of the RGPD defines as processing: "any *operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any another form of enabling access, comparison or interconnection, limitation, suppression or destruction".*

In view of the previous definition it is clear that the dissemination of personal data, not only of the previous foster mother of the minor, but also of the minor herself, is a processing of personal data. And this specific treatment of personal data carried out by the CCMASA in relation to the collection and dissemination of the data of the minor and the previous foster mother, is subject to protection by the data protection regulations, in accordance with the provisions of articles 1 and 2 of the RGPD.

Clarified then that in the case at hand personal data was processed, it is necessary to analyze the following question raised by the CCMASA in this allegation, that is, whether the controversial dissemination, if it were illegal, would constitute a breach of data protection regulations; and therefore, punishable by the control authorities - as this Authority is -; or, as the CCMASA defended, such conduct would constitute an action subsumable in the conduct provided for in section 7 of article 7 of Organic Law 1/1982 as an interference with honor, object of protection by said rule and which eventual transgression would be subject to civil jurisdiction.

As was explained in the proposal, in this regard it should be stated that despite the fact that the right to honor and the right to data protection are guaranteed in article 18 of the Spanish Constitution (in section 1 and 4, respectively), both rights have their own entity and protect distinct legal assets, in the words of the Constitutional Court *"if todos los derechos identified in article 18 of the EC maintain a close relationship, insofar as they are registered in the field of personality, each of them has its own specific content" (STC* 176/2013).

And evidence of this is the recent sentence, cited in the proposal, of the Constitutional Court 58/2018, in which it declares that the right to honor and privacy has been violated (art. 18.1 of the EC), by on the one hand, and the right to the protection of personal data (art. 18.4), on the other; sentence that by way of example is fully applicable - contrary to what the CCMASA holds in its

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allegations in the proposal - since it makes perfectly clear the possibility that a single fact can constitute a breach of the right to data protection and, in turn, of the right to honor and the image, which is precisely what the CCMASA was discussing with its allegation.

Well, in this sentence, the high court ruled in the following terms:

"Honor, linked to the dignity of the person (art. 10.1 CE), protects him, "against expressions or messages that discredit him in the consideration of others by discrediting or disparaging him or that are held in the public opinion by afrentosas" (SSTC 14/2003, of January 28, FJ 12; 216/2013, of December 19, FJ 5, and 65/2015, of April 13, FJ 3). (...)

The link between the first and fourth sections of article 18 EC is made clear in STC 290/2000, of November 30, which resolved the appeals of unconstitutionality raised by the Executive Council of the Generalitat of Catalonia, the Ombudsman , the Parliament of Catalonia and by deputies of the Popular Parliamentary Group, against Organic Law 5/1992, of October 29, regulating the automated processing of personal data (LORTAD).

In this pronouncement, the Court recalled, citing consolidated jurisprudence, that Article 18.4 EC contains an institution guaranteeing the rights to privacy and honor and the full enjoyment of the remaining rights of citizens without, therefore, ceasing to be a fundamental right, "the right to freedom in the face of potential attacks on the dignity and freedom of the person resulting from an illegitimate use of automated data processing"

(STC 290/2000, FJ 7). Along the same lines, STC 292/2000, also of November 30, responding to the appeal raised by the Ombudsman, against some provisions of Organic Law 15/1999, of December 13, on the protection of personal data, reinforces that same link, but distinguishing both dimensions of article 18 CE.(...)

Therefore, article 18.4 CE guarantees a specific protection area but also more suitable than that which could be offered, by themselves, the fundamental rights mentioned in the first section of the precept (STC 292/2000, FJ 4), so that "the guarantee of the private life of the person and his reputation today have a positive dimension that exceeds the scope of the fundamental right to privacy (art. 18.1 EC), and that translates into a right of control over the relative data to the person himself. The so-called 'informatics freedom' is thus the right to control the use of the same data inserted in a computer program (habeas data) and includes, among other aspects, the citizen's opposition to certain personal data being used for purposes other than those legitimate that justified his obtaining" (STC 292/2000, FJ 5, and case law cited there)".

In conclusion, that it is completely compatible that a single fact can be constitutive, on the one hand, of an infringement of data protection regulations, insofar as it is an attempt against the free disposal of personal data and on the its control; and, on the other hand, of a violation of the honor of this same person to the extent that the dissemination of that data may represent an attack against his reputation; and which prosecution is the competence of different institutions/powers: the data protection control authorities, on the one hand, and; the judiciary, for another. Therefore, the person affected by the publication could turn to the civil jurisdiction, if he considered that the publication could have attempted against his honor, regardless of what this Authority decides in relation to the eventual violation of the protection regulations of data, what fou

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juridical, as we have seen, is different. In other words, the initiation of this sanctioning procedure does not prevent the affected person from taking the actions he considers appropriate, and in particular, those provided for in Organic Law 1/1982.

As an addition to the above, it should be remembered that the possibility of resorting to different channels on the part of the affected person is provided for in recital 146 of the RGPD when it determines that *"the person responsible or the person in charge of the treatment must indemnify cualesquiera daños y perjuicios that a person may suffer as a result of treatment in breach of this Regulation. The person in charge or the person in charge must be exempted from liability if it is shown that they are in any way responsible for the damages. The concept of damages and perjuicios must be interpreted in a broad sense in the light of the jurisprudence of the Court of Justice, in such a way that the objectives of this Regulation are fully respected. The above is understood without prejudice to any claim for damages and losses derived from the violation of other rules of the Law of the Union or of the Member States".*

2.4.- *On "the legal nature of the CCMA and the application of the sanctioning regime provided for in article 70"* of the LOPDGDD.

In its statement of objections to the initiation agreement, the CCMASA argued that *"it should not be sanctioned financially given its status as a public law entity dependent on the Administration (article 70.1 State LOPD), this being so because it is a public law entity or public company that adopts the form of a limited company (Article 18.1 of the Law of the Parliament of Catalonia 11/2007, of October 11, of the CCMA) through which the public law entity "Corporació Catalana de Mitjans Audiovisuals" manages the essential public audiovisual communication service entrusted to it by the Generalitat. The legal form through which the CCMA SA develops the activity does not alter either its content or its purpose. Consequently, this legal form must not alter the specialties that Public Administrations have in the exercise of their rights (...) A differentiated treatment would leave the CCMA SA in a worse legal position than that of a public body , such as the Corporació Catalana de Mitjans Audiovisuals (entity governed by public law to which CCMASA depends) That is, the provision of a public service through a public company in the form of a limited company (CCMA SA) wholly owned by a Public Administration would end up having lower legal protection than the entity it depends on, which would be a contradiction. A definitive interpretation of the regulations must lead, in understanding this part, to recognize the right to be exempted from the application of the financial fines regime".*

In its statement of objections to the proposal, the CCMASA reiterates this allegation and maintains that the fact that the CCMASA falls within the subjective scope of application of Law 40/2015, of October 1, would strengthen its argument - of application of the special regime provided for in article 77.1 of the LOPDGDD , of the Legal Regime of the Public Sector (hereafter, LRJSP) in accordance with the provisions of its article 2.2 b), since it is clear that *"the CCMA is a public company that belongs to the institutional public sector. In relation to this issue, a question must be asked: why do foundations in the public sector benefit from the aforementioned sanctioning regime and cannot a*

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public company, with wholly public share capital, which manages essential audiovisual communication services under the jurisdiction of the Generalitat de Catalunya".

Regarding this allegation, first of all, it must be clarified that article 70 of the LOPDGDD determines which are the figures that are subject to the sanctioning regime established in the RGPD and the LOPDGDD, a regime which, for what is of interest here, it will apply to the CCMASA as the person responsible for the processing of the personal data that has led to the initiation of this procedure.

Having said that, what the CCMASA defends in its allegation, as has been said, is the application to this entity of the special regime of article 77.1 of the LOPDGDD, which foresees not imposing financial sanctions on certain categories of those responsible (or in charge) of treatment who have violated the regulations, categories listed in a closed list that does not allow an application by analogy. The relationship between entities created by this article is essentially based on the form/legal nature adopted by the active subject of the infringement, in some cases combined with the purpose, it is true, as is the case of letter g) (corporations of public law when the purposes of the treatment are related to the exercise of public law powers), but not only in this, as the CCMASA intends. Certainly, the Catalan Corporation of Audiovisual Media (on which CCMASA depends) is a public law entity linked to or dependent on the Generalitat de Catalunya, and as a public law entity it would be subject to this special regime provided for in article 77.1 of the LOPDGDD. Not so the CCMASA, which although, as has been advanced, depends on the body of public law CCMA, it cannot fit neither in this section nor in any of the others
related to the precept. If the legislator had wanted entities dependent on or linked to a public administration, whatever their legal form, to be subject to the regime provided for in article 77.1 of the LOPDGDD, they would have expressly included them in this closed list.

Finally, it should be noted that the fact that the LRJSP applies to the CCMASA, and incidentally, also the LJPAC Law -with certain particularities-; does not affect at all what has been argued above, since as we have seen the LOPDGDD provides for a specific sanctioning regime in the matter of data protection, a sanctioning regime that has clearly established which are the entities to which the the specific regime provided for in article 77 is applicable; entities that do not include companies that adopt the form of a limited company, whatever the origin of their share capital.

2.5.- On *"the infringement and its amount".*

In its last allegation in the initiation agreement, CCMASA advocated the application of the LOPD (Organic Law 15/1999, of December 13, on the Protection of Personal Data) while listing a series of mitigating circumstances that would allow the reduction in grade - as established by the previous organic law - and set an amount at its minimum grade. In its statement of objections to the proposal, the CCMASA insists on its argument, maintaining that *"the date of the alleged infringement of the CCMASA is (...)",* so it should be apply the LOPD to be the most favorable rule.

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First of all, it should be noted that, as indicated in the initiation agreement, an offense classified in article 83.5.a of the RGPD is charged in this procedure, also collected - for the purposes of prescription and description of typical conduct - in article 72.1 of the LOPDGDD; that is to say, that the LOPD, currently repealed with its entry into force on 07/12/2018, would not apply in this procedure.

On this issue, and as indicated in the proposal, it is true that the documentary that gave rise to the disclosure of the controversial personal data was broadcast on (...), a date on which it was not yet fully application of the RGPD and the LOPD was still in force. But the full broadcast of the aforementioned documentary through "TV3 a la carta" was maintained at least until 03/13/2019, as indicated in the proven facts. It would therefore be a permanent infraction, defined by the Supreme Court in its judgment of 04/11/2013 as *"those anti-legal behaviors that persist over time and do not end with a single act, determining the maintenance of the situation illegal at the will of the author".*

Based on this premise, and as it was argued in the proposal, the LOPDGDD will apply to the facts alleged in this procedure, in accordance with the provisions of article 26.1 of Law 40/2015, of 1 of October, of the legal regime of the public sector *("The sanctioning provisions in force at the time of the occurrence of the facts that constitute an administrative infraction are applicable"),* which is also consistent with the provisions of the article 30.2 of this same rule *("In the case of continuous or permanent infringements, the period [of prescription] begins to run from the end of the infringing conduct.").*

The analysis of the mitigating factors invoked by the entity imputed in the initiation agreement, will be carried out in the following legal basis, in which the penalty to be imposed in this procedure is indicated.

3. In relation to the facts described in the proven facts section, relating to the principle of data confidentiality, and as advanced in section 2.4 of the 2nd legal basis, it should be noted that, all and that the disclosure of the data began on (...) (date of broadcast of the controversial documentary) when the LOPD was still in force, the documentary has been accessible on the internet at least until 03/13/2019. In this regard, it should be borne in mind that from 25/05/2018 the RGPD was already applicable. Likewise, since 06/12/2018 the LOPDGDD has also been in force - as a supplement to the RGPD - which repeals the previous LOPD. It would therefore be a case of permanent infringement because despite having started the conduct that is imputed here on (...) - that is to say (...) days before the start of the application of the RGPD-, the imputed conduct has continued during the following months and until the moment the procedure was initiated. Therefore, the alleged infringement would be subject to the RGPD and the LOPDGDD.

Based on the above, it is necessary to go to article 5.1.f of the RGPD, which provides for the following in relation to the principle of data confidentiality:

> *"1. The personal data will be:*
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f) processed in such a way as to guarantee an adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality»).

Likewise, the LOPDGDD establishes the following in its article 5, relating to the duty of confidentiality:

"1. Those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.
2. The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with its applicable regulations. (...)"

As indicated by the instructor, during the processing of this procedure the fact described in the section on proven facts, constituting an infringement, as provided for in article 83.5.a of the RGPD, has been duly proven, which typifies as such the violation of the basic principles of the treatment.

For the purpose of determining the limitation periods and the description of typical conduct, the LOPDGDD categorizes the offenses into minor, serious and very serious. In any case, the typical behaviors provided for in the LOPDGDD must be understood as included in the general types of offenders established by the RGPD.

Having said that, the conduct that is addressed here and that is typified as an infringement in article 83.5.a of the RGPD, has been collected as a very serious infringement in article 72.1.a of the LOPDGDD, in the following form:

"The processing of personal data that violates the principles and guarantees of legality of the processing established by Article 5 of Regulation (EU) 2016/679"

4. As the CCMASA does not fit into any of the categories provided for in article 77.1 of the LODGDD, the general sanctioning regime provided for in article 83 of the GDPR applies. In accordance with the provisions of articles 83.2 and 83.5 of the RGPD, an infringement such as the one charged here must be sanctioned with administrative fines of 20,000,000 euros at most or, in the case of a company, of an amount equivalent to 4%, at the most, of the global total annual business volume of the previous financial year, and between the two options, the higher amount must be chosen. This, without prejudice to the fact that, additionally or substitutively, the measures provided for in letters a) to h), ij) of article 58.2 of the RGPD may be applied.

According to the provisions of article 83.2 of the RGPD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, this Authority decides to impose a penalty of 20,000 euros (twenty thousand). This quantification of the fine is based on the concurrence of the following circumstances already analyzed by the instructor in the proposal:

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On the one hand, we appreciate the following circumstances that operate as mitigating criteria and that were invoked by the CCMASA in its statement of objections to the initiation agreement:

- The number of people affected (83.2.a RGPD)
- The lack of intentionality in the commission of the offense (art. 83.2.b RGPD)
- The degree of cooperation with the control authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement (83.2.f RGPD). The mitigating factors invoked by the CCMASA in letters g) and following of its statement of objections, must be understood as included in this single mitigating factor.

- The lack of profits obtained as a result of the commission of the offense (art. 83.2.k of the RGPD and 76.2.c of the LOPDGDD).

In accordance with the analysis carried out by the instructor in the proposal, it is considered that they do not concur as mitigating criteria of other circumstances mentioned by the imputed entity in its statement of allegations in the initiation agreement , specifically:

- The circumstances indicated in letters a) and b) of your last allegation, which are based on the lack of processing or lack of linking the broadcast of the documentary with the processing of data.

  In this regard, it is simply necessary to remember what has already been explained in section 2.3 of the 2nd legal basis, in which it is concluded that the CCMASA, with the issuance of the documentary, processed personal data subject to the regulations of data protection.

- That the infringement *"has not caused any damage or prejudice to those affected, neither of an economic nor reputational nature".* The CCMASA inferred the concurrence of this mitigating factor based on two circumstances, first of the fact that *"Mrs. (...) he has not taken any legal action against the CCMASA, neither in the Authority nor in the jurisdictional field";* and the fact that *"this procedure is not opened as a result of a complaint by the minor's legal representatives, but as a result of a complaint by the Ombudsman".*

  In relation to this matter, it is worth saying, first of all, that the previous investigation that preceded this sanctioning procedure was not initiated following a complaint made by the Ombudsman, but because this institution transferred it to this Authority facts that fell within the jurisdiction of this Authority and of which the Ombudsman had become aware following a complaint made by the child's current foster family.

  Secondly, this Authority does not share the criteria of the imputed entity and considers that the dissemination of a person's health data (without their consent and without legal authorization) - such as the dissemination of Ms. (...)-, as well as the dissemination of the minor's data, particularly in a case as sensitive as that of foster care, *implies* a detriment to the people affected, since we are dealing with information that affects the most intimate and private sphere of people, and with more reason when this dissemination is done in an open and unrestricted way through the emission of 'a documentary which, in addition, has been

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available through the TV3 website for many months. And these considerations are not distorted by the fact that Ms. (...) has not initiated any legal action in this regard. And with regard to the dissemination of the minor's data, as has already been said, her current foster family complained to the Síndic de Greuges about the dissemination, stating that with the broadcast of the documentary had attempted against *"her privacy [of the minor], her own image and dignity, as well as her emotional recovery".*

In contrast to the attenuating causes exposed, a series of criteria from article 83.2 of the RGPD that operate in an aggravating sense concur, some of them with a special intensity, as is the case of the data category.

- The duration of the infringement, since the documentary was accessible in the open for practically 10 months (art. 83.2.a RGPD).
- The existence of previous infringements committed by the data controller, to the extent that the CCMASA had already been sanctioned by this Authority previously (art. 83.2.e RGPD).
- The categories of personal data affected by the infringement in relation to one of the people affected by the dissemination -health data- (art. 83.2.g RGPD).
- Linking the activity of CCMASA with the processing of personal data (art. 83.2.k RGPD and 77.2.b LOPDGDD).
- Affecting the rights of minors in relation to one of the people affected by the dissemination (art. 83.2.k RGPD and 77.2.f LOPDGDD).

5. Faced with the finding of the violations provided for in article 83 of the RGPD, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority so that the resolution declaring the infringement establishes the appropriate measures so that its effects cease or are corrected, in line with what is also provided for in art. 58.2 of the RGPD, in addition to imposing the corresponding fine.

In the case at hand, it should be remembered that by means of an agreement dated 04/12/2019, the Director of the Authority ordered the execution of the corrective measures agreed in the initiation agreement, consisting of taking carry out the necessary actions in order to avoid the dissemination of the controversial personal data in the documentary "(...)". In this regard, it must be said that on 30/05/2019 it was found that the documentary of the series "(...)" "(...)" was no longer accessible on "TV3 a la carte" through whose personal data that had led to the initiation of the present sanctioning procedure was revealed, nor did it appear to be accessible through other platforms such as YouTube.

In the proposed resolution, given the provisional nature of the precautionary measure ordered and executed by the CCMASA, the instructor proposed that this entity be required so that the cessation in the publication of the mentioned personal data becomes definitive, so that 'avítés were accessible again. In this sense, the instructor indicated that it was not necessary to permanently withdraw the documentary -a measure that had been adopted by the CCMASA-

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, since as a piece of journalism and research it had a clear interest, but what could be done was to treat the documentary in such a way that the controversial data would not be revealed.

Well, as stated in the antecedents, CCMASA, following this indication, has proceeded to re-edit the documentary - accessible again through the "TV3 a la carta" online platform-. It has been noted that in the new documentary piece edited no longer appears any data related to
the child's previous foster mother and also that a significant part of the data relating to the child has been deleted, so that it would not be recognizable.

Given the above, it is not necessary to require any corrective measures from the CCMASA, since this new edition avoids the dissemination of those data of the minor and her previous foster mother that would make them recognisable. With this accredited action, the main purpose pursued with the exercise of the inspection and sanctioning powers entrusted to this Authority would have been achieved, which is to ensure that the regulations on the protection of personal data are complied with and to prevent it from returning to violate this fundamental right.

resolution

For all this, I resolve:

1. Impose on Corporació Catalana de Mitjans Audiovisuals, SA the sanction consisting of a fine of 20,000 euros (twenty thousand), as responsible for the infringement provided for in article 83.5.a, in relation to article 5.1.f of the RGPD and 5 of the LOPDGDD.

It is not necessary to adopt the corrective measures proposed by the instructing person in the resolution proposal, given that it has been established that the CCMASA has carried out the relevant actions for correct the effects of the infringement, in accordance with what has been set out in the 5th legal basis.

2. Notify this resolution to Corporació Catalana de Mitjans Audiovisuals, SA

3. Order that this resolution be published on the Authority's website (www.apd.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from
the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC.
You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its

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notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,