Pérez-Llorca

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THE COUNCIL OF MINISTERS APPROVES THE DRAFT ORGANIC LAW REGULATING THE PROTECTION OF PERSONAL DATA USED IN THE PREVENTION, DETECTION, INVESTIGATION, OR PROSECUTION OF CRIMINAL OFFENCES

On Tuesday 9 February, the Council of Ministers approved and sent to the Spanish Parliament the Draft Organic Law regulating the protection of personal data used in the prevention, detection, investigation, or prosecution of criminal offences and the enforcement of criminal sanctions, as well as in the protection and prevention of threats to public safety (the **"Draft Law"**). The main purpose of this Draft Law is to transpose into Spanish law Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 (the **"Directive"**) on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the enforcement of criminal sanctions, and the free movement of such data.

This Draft Law represents a decisive step forward in terms of the effectiveness of international legal cooperation between authorities in different sectors -security, criminal justice, tax, prevention of money laundering, financial offences and financing of terrorism, and the securities market- with each other, and with judicial and police authorities at the European Union level. Enabling the aforementioned international legal cooperation will undoubtedly be decisive for the success of the work of these authorities in the context of criminal investigations.

To this end, it is essential to establish a minimum level of harmonisation regarding the standards in place in all Member States, thus consolidating a suitable legal framework for the transfer of data for effective police and judicial cooperation in criminal matters. This is the objective of the Directive now transposed into Spanish law. Similarly, the Directive provides for the possibility that the recipient of the transfer of this type of personal data may be a third country or international organisation, in which case the European Commission, or in its absence the data controller, will assess the adequate level of data protection in that third party outside the European Union.

Thus, the Directive has two fundamental aims. On one hand, the protection of the fundamental rights and freedoms of natural persons, especially their right to the protection of personal data, in cases where the processing is carried out by law enforcement authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences, including the prevention of and protection against threats to public security. On the other hand, it is intended to ensure that the exchange of such personal data by competent authorities within the Union, where such

exchange is required by Union or Member State law, is not restricted or prohibited on grounds relating to the protection of natural persons with regard to the processing of personal data.

In view of the nature of the personal data referred to in the Draft Law, combining the protection of the right to privacy of the owner of such data with the aforementioned need for cooperation means that the principle of proportionality takes on special importance. To this end, a significant number of guarantees are contemplated to ensure that the processing of personal data is proportional, timely, minimal, and sufficient for the fulfilment of the objectives pursued: namely, the success of international legal cooperation in the field of criminal law and public security.

As a corollary to the foregoing, the Draft Law expressly prohibits the use of personal data for criminal profiling in this area, since this would contravene the standards of imputation of criminal law, according to which it is only possible to hold individuals criminally liable for their acts, and not for their internal attitudes or thoughts. To admit otherwise would be, at the very least, potentially discriminatory.

Similarly, the rights of access, rectification, erasure, and restriction are recognised with respect to the data subject, the owner of the data. These rights, for practical purposes, would entail, for example, the opportunity for a data subject with a criminal record to request that such data not be used in the context of the investigation carried out in another country, when such personal data should be retained solely for evidentiary or security purposes or when the data subject doubts the accuracy of such data. However, the data subject may be restricted in the exercise of these rights where this is necessary in order to avoid hindering the success of a criminal investigation or where public safety is endangered.

Furthermore, the Draft Law will mean the arrival of specific and updated regulations that go hand in hand with rapid technological development, especially of the Internet, as well as the increasing globalisation of the global and European economies, ensuring that international cooperation and the transmission of personal information is done lawfully and effectively from the point of view of data protection.

The approval of this Draft Law has to be considered, together with the European Data Protection Regulation and the Organic Law 3/2018, of 5 December, on the Protection of Personal Data and guarantee of digital rights, as a regulatory unit, albeit with its own substantive nature.

Within the common spirit of ensuring the lawful processing of personal data, the regulatory text aims to facilitate as much as possible the European international police and judicial cooperation while ensuring the effective protection and defence of citizens' rights. In circumstances where it is a fundamental right, the Council of Ministers has requested that the parliamentary processing of the Draft Law be carried out by the urgent procedure provided for in Article 93.1 of the Regulations of the Congress of Deputies and Article 133.1 of the Regulations of the Senate.

In this regard, it is important to note that in accordance with Article 64.1 of the Directive, the Member States were urged to adopt and publish it before 6 May 2018. For its part, the Council of

Ministers did not examine the Preliminary Draft in the first stage until 10 March 2020. This accumulated delay, together with the importance of keeping the data protection regulations up to date, is a compelling reason for the urgent administrative processing of the Draft Law.

The Draft Law is made up of sixty-one articles that are divided into eight sections, two additional provisions, and eleven final provisions, which transpose Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. Regarding the penalty regime contained therein, it is interesting to note that those who fail to comply with its provisions may be subject to penalties ranging from €6,000 to €240,000, depending on the seriousness of the offences.

The different sections that make up the regulatory text also include essential issues such as, for example, the new principle of cooperation with the competent authorities - which extends to both public administrations and private individuals-, the time limits for the conservation and review of processed personal data, and the obligations and responsibilities of data protection officers and data controllers.

Although the final text submitted for approval has not yet been published and we cannot go into an in-depth evaluation of the provisions contained in it, this Draft Law is undoubtedly a great step forward in the regulation of the rapidly changing world of personal data protection.

This Legal Briefing was prepared by Juan Palomino, Partner of the White Collar Crime and Investigations practice área and Andrea Sánchez, Associate of the Intellectual Property and Technology practice area.

The information contained in this Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 12 February 2021 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

For more information,
please contact:

Juan Palomino
White Collar Crime and Investigations Partner
jpalomino@perezllorca.com
T: + 34 91 423 20 87

Andy Ramos
Intellectual Property and Technology Counsel
aramos@perezllorca.com
T: + 34 91 423 20 72