

ENTRY INTO FORCE OF THE ORGANIC LAW GOVERNING THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN SPAIN

The Spanish Parliament has approved Organic Law 9/2021 of 1 July (“**LO 9/2021**”), which supplements Council Regulation (EU) 2017/1939 of 12 October 2017 establishing enhanced cooperation for the establishment of the European Public Prosecutor's Office (the “**Regulation**”) and governs the procedure to be followed in Spain to investigate crimes against the financial interests of the European Union (“**EU**”).

This new regulation introduces two particularly important changes to Spanish legislation. Firstly, it grants powers to prosecute these offences to a supranational body, the European Public Prosecutor's Office, which is distinct from the Spanish Public Prosecutor's Office and has its own legal personality. Secondly, in these cases, the management of the investigation is entrusted to this body rather than the Investigating Courts [*los Juzgados de Instrucción*]. This alters the principles of Spanish criminal procedure and to a certain extent foreshadows the implementation of the new model contained in the Preliminary Draft of the Organic Criminal Procedure Act (the “**Preliminary Draft of the Criminal Procedure Act**”), which seeks to grant the management of all criminal investigations to the Public Prosecutor's Office.

Although LO 9/2021 formally came into force on 3 July and requires the European Public Prosecutor's Office to be informed from the entry into force of the Regulation of all those facts that may fall within the scope of its powers, in practice this new body will not begin to act until this is approved by a Community Decision.

Main new features of LO 9/2021

The main new features of LO 9/2021 are as follows:

1. Jurisdiction of the European Public Prosecutor's Office to investigate certain offences

LO 9/2021 authorises the European Public Prosecutor's Office to investigate and prosecute offences against the EU's financial interests in Spain - subject to certain exceptions provided for in the Regulation. In particular, it is authorised to investigate and prosecute the following offences under the Spanish Criminal Code (“**CP**”):

- (i) Offences against the EU tax authorities that do not relate to national direct taxes, as defined in Articles 305, 305*bis* and 306 of the CP. In the case of revenue from VAT own resources, the European Public Prosecutor's Office will have jurisdiction only where the

offences relate to the jurisdiction of two or more Member States and involve EUR 10 million in total.

- (ii) The offence of fraud in relation to European subsidies and aid, as defined in Article 308 of the CP.
- (iii) Money laundering offences involving assets originating from offences against EU financial interests.
- (iv) Offences of bribery, embezzlement and those contained in Organic Law 12/1995, of 12 December, on the Prevention of Smuggling.
- (v) The offence of participation in a criminal organisation as defined in Article 570 *bis* of the CP, when the main activity of the organisation is to commit any of the above offences.

Under the Regulation, the jurisdiction of the European Public Prosecutor's Office may also be expanded to include offences inextricably linked to those referred to in (i) to (iv) above.

Furthermore, although LO 9/2021 refers, on a supplementary basis, to the regulation contained in the current Spanish Criminal Procedure Act, it excludes the application of the time limits for the duration of the criminal investigations provided for in Article 324 of the Act.

2. Jurisdiction of the National Court

LO 9/2021 grants the National Court judicial authority to prosecute these crimes – except for those cases in which privilege of jurisdiction [*aforamiento*] arises - through the Central Criminal Courts or the Criminal Chamber, depending on the seriousness of the crime in question.

3. The position of Supervisory Judge is introduced

In relation to the provisions established in the Preliminary Draft of the Criminal Procedure Act, LO 9/2021 orders the creation of the position of Supervisory Judge, whose main function will be to control the investigative activity of the European Public Prosecutor's Office and whose decisions may be subject to appeal in certain cases.

Given that, to date, this position does not exist in the Spanish legal system, LO 9/2021 provides for its functions to be performed by the Central Investigating Courts of the National Court – except for those cases in which privilege of jurisdiction arises. The functions granted to the Supervisory Judge are as follows:

- (i) To authorise investigative measures that restrict fundamental rights.
- (ii) To authorise personal precautionary measures the adoption of which is reserved for the judicial authority.

- (iii) To safeguard sources of personal evidence against the risk of their loss.
- (iv) To authorise the secrecy of the investigation and its renewal.
- (v) To authorise the opening of oral proceedings or the dismissal of the case.
- (vi) To resolve appeals lodged against decisions made by the European Public Prosecutor's Office.
- (vii) To adopt the appropriate measures for the protection of witnesses and experts.

4. Private prosecutions are prohibited and the separate exercise of civil action is permitted

Following the provisions of the other European countries that have implemented the Regulation, LO 9/2021 prohibits private prosecutions in these proceedings.

A new feature of the civil action is that the victims of the crime may bring it separately from the criminal action. In such cases, they may appear exclusively as civil plaintiffs in the proceedings.

5. New configuration of the intermediate stage of criminal proceedings. The preliminary hearing

LO 9/2021 effectively abolishes the issuing of what is now known as a “conversion order”. Instead, the European Public Prosecutor is authorised to issue a “decree terminating the proceedings”, which may entail: (i) the provisional closure of the proceedings; (ii) a request for a consent decree; (iii) a request for the opening of oral proceedings, bringing an indictment; or (iv) bringing criminal proceedings before the judicial authorities of another Member State, ordering the proceedings to be closed in Spain.

In the event that the European Public Prosecutor files an indictment - which may be followed, where appropriate, by those of the private prosecutors and civil plaintiffs - the defence may oppose it by filing the now-familiar defence brief. However, and again in keeping with the spirit of the Preliminary Draft of the Criminal Procedure Act, the latter may include a specific section in which the accusations made are challenged, if it is considered that there are grounds for dismissing the case.

If this is the case, LO 9/2021 orders the holding of a hearing before the Supervisory Judge - known as a "preliminary hearing" - in which all parties will be heard and the grounds for the challenge will be examined. The decision taken by the Supervisory Judge may only be appealed against if he decides to dismiss the proceedings. Otherwise, the already well-known “order to open the oral proceedings” will be issued.

Finally, as a new feature and in keeping with the Preliminary Draft of the Criminal Procedure Act, with a view to the oral trial, the parties are authorised to request a copy of all the statements made or contributed to the investigation. Their content may be subject to cross-examination during the trial, in the event that the statements made by witnesses during the trial differ substantially from those obtained during the investigation phase.

This Legal Briefing was prepared by Guillermo Meilán, Lidia González and Juan García, lawyers in the Economic Crime and Investigations practice.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 7 July 2021 and Pérez-Llorca does not commit to update or revise its contents.

For more information, please contact:

Juan Palomino

Partner, Economic Crime and Investigations

jpalomino@perezllorca.com

T: + 34 91 423 20 87