

Draft Law for the transposition of European Union directives on digital fraud

Mayte Requejo Naveros, Sofia Larrauri Rodríguez de Viguri

On 20 May 2022, the Council of Ministers approved the Draft Organic Law (the "**Draft Law**") amending Organic Law 10/1995 of 23 November 1995 on the Criminal Code to transpose directives on combating fraud and counterfeiting of non-cash payment instruments and market abuse, and Organic Law 7/2014 of 12 November 2014 on the exchange of information on criminal records and the recognition of criminal judgments in the European Union ("**Organic Law 7/2014**").

Specifically, the Draft Law transposes - or perfects the transposition already carried out - of three Directives: (i) Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash payment instruments and replacing Council Framework Decision 2001/413/JHA ("**Directive 2019/713**"), which governs methods of combating digital fraud and penalties for fraudulent use of payment instruments related to new technologies; (ii) Directive 2014/57 of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse ("**Directive 2014/57**"), which aims to combat economic corruption and, among other conduct, sanctions market abuse that occurs through the use of privileged information (*insider trading*); and (iii) Directive 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA, which transforms the system for the exchange of information from the criminal records of third-country nationals and introduces the European Criminal Records Information System ("**ECRIS**"), which provides for the use of facial recognition and fingerprinting to facilitate the transferability of convictions between EU Member States ("**Directive 2019/884**").

Through this new regulation, important new features have been introduced to both the Criminal Code and Organic Law 7/2014. The Draft Law is currently in the amendment period, which ends on 7 June 2022.

The essential objective pursued by the Draft Law is to comply with the regulatory commitments established with the European Union and to adapt the current regulation to the new forms of crime, thus contributing to the harmonisation of the legal systems of the EU Member States.

The most important new features are highlighted below:

1. "**Third-generation**" criminal law protection

Given the growth of cybercrime through virtual currencies, with this transposition and consequent reform, all the types of conduct whose independent classification is required by Directive 2019/713, as well as the corresponding penalties, are made explicit and updated in the Spanish Criminal Code.

Firstly, the new regulatory concept of "*any non-cash payment instrument*" is introduced, defined in the new Article 399 *ter* CC, according to which "[f]or the purposes of this Code, a non-cash payment instrument means any device, object or protected record, tangible or intangible, or a combination thereof, except legal tender, which, alone or in combination with a process or set of processes, enables the holder or user to transfer money or monetary value including through

digital means of exchange". This involves the inclusion of an authentic interpretation clause of the concept of virtual currency, as well as a definition of this type of payment instrument that is open and adaptable to constant and future technological developments, pursuing the fraudulent use of new digital means of payment, which are becoming more and more widespread in our society.

This includes all non-cash payment instruments, including virtual currencies and other crypto-assets, as well as electronic wallets and mobile payment applications that can be used regularly for various payments.

Together with this regulatory concept, the expression "*any other specifically designed or adapted means*" is included, which is added to certain offences as an open clause with the aim of covering the maximum number of scenarios relating to digital fraud, avoiding gaps in enforceability.

The Draft Law, through this new concept, extends to the regulation, in the Criminal Code, of the types of conduct that correspond to the classification of the following crimes and their corresponding preparatory acts:

- (i) Fraud offence (Articles 248 and 249 of the Criminal Code). It highlights the amendment of Article 249 of the Criminal Code in so far as:
 - a. The penalty for the offence of fraud and the criteria to be taken into account for the determination of the penalty are included in Article 248 of the Criminal Code.
 - b. In the regulation of computer fraud, which now forms part of this provision, the list of the types of conduct through which the offence can be committed is expanded, although the penalty associated with this offence is maintained. This includes the conduct of hindering or unduly interfering with the operation of an information system, or the introduction, alteration, erasure, transmission or deletion of computer data in order to obtain "*any property asset to the detriment of another*", as new ways of committing the offence.
 - c. In the criminalisation of fraud committed using a credit card, debit card, traveller's cheque or the data contained therein, also included in Article 249 PC and with the same penalty, "*any other material or immaterial payment instrument other than cash*" is introduced as an instrument through which the offence can be committed in order to carry out "*transactions of any kind to the detriment of the holder or a third party*".
 - d. In addition to the preparatory conduct relating to the manufacture, introduction, possession or facilitation of software intended for the commission of computer-related fraud, the new acts of importation, transport or trade are included, as well as the possibility of these types of conduct being carried out on instruments, or data, or any other means specifically designed or adapted for the commission of computer-related fraud.
 - e. A new preparatory act is introduced consisting of the theft, misappropriation or unlawful acquisition of credit or debit cards, travellers' cheques or any other tangible or

intangible payment instrument other than cash for fraudulent use.

- f** Finally, it establishes the imposition of the penalty provided for this offence in its lower section on those who "***for fraudulent use and knowing that they were obtained unlawfully, possess, acquire, transfer, distribute or make available to third parties credit or debit cards, traveller's cheques or any other material or immaterial payment instruments*** other than cash".
- (ii)** Offence of counterfeiting credit and debit cards and travellers' cheques (Articles 399 *bis*, new 399 *ter* and 400 of the Criminal Code). In addition to the new Article 399 *ter*, which incorporates the concept of non-cash payment instruments referred to above, the following new features are introduced:

 - a.** Article 399 *bis* introduces the open clause consisting of "*any other instrument other than cash*" together with the rest of the objects whose falsification, possession or use are part of the offences punishable under the aforementioned article.
 - b.** A new offence is introduced in paragraph 4, consisting of possessing or obtaining debit or credit cards, travellers' cheques or any other non-cash payment instrument, for fraudulent use and knowing it to be false.
 - c.** Finally, in relation to the offence defined in Article 400 of the Criminal Code, the conduct of distribution, making available or marketing is incorporated, adding that the criminal conduct may also be committed on any other means specifically designed or adapted for the commission of the above offences of counterfeiting.

2. Amendment of penalties provided in the Criminal Code and the fight against economic corruption

The reform sought by the Draft Law, transposing Directive 2014/57, eliminates the attenuated type of offence against the market and consumers of privileged information, established in Article 285 of the Criminal Code. It thus equates the penalty between the perpetrator who commits this offence having reserved access to "privileged information" and the one who, without having it, obtains it in any other way provided for in the said article.

Consequently, the Draft Law establishes, in the Spanish legal system, a penalty for this offence whose maximum duration is more than four years, as provided in Directive 2014/57.

3. The real fight against national and international crime

Directive 2019/884 introduces in Organic Law 7/2014 the broadening of information that is allowed to be collected on the identity of citizens, namely facial recognition and fingerprints, through the European Criminal Records Information System ("**ECRIS**"). ECRIS is complemented by a new centralised system for the identification of Member States holding information on

convictions of third-country nationals and stateless persons (ECRIS-TCN).

This development is intended to benefit the retransmission and exchange of judgments and convictions (criminal records) as well as the interoperability of databases between Member States of the European Union (principle of reciprocity). Furthermore, this measure favours legal cooperation between countries and, therefore, the effective fight against organised crime and terrorism, thus building a common area of justice, security and freedom within the European Union.

Finally, it includes the creation of a Central Register of Minors which contains a central register of final sentences, precautionary measures adopted for the custody and defence of minors, requisitions and default judgments issued or agreed upon in all proceedings processed in accordance with the Organic Law. This registration system will enter into force one year after the entry into force of the Organic Law.

CONTACTS



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

www.perezllorca.com | Madrid | Barcelona | London | New York | Brussels

The information in this Legal Briefing is of a general nature and does not constitute legal advice.
This document was prepared on 20 June 2022 and Pérez-Llorca does not assume any commitment to update or revise its contents.