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Approval of Organic Law 9/2022 of 28 July, facilitating the use of financial and other information to prevent, detect, investigate or prosecute criminal offences

On 29 July, Organic Law 9/2022 of 28 July ("**Law 9/2022**"), approved by the Spanish Parliament, was published in the Official State Gazette. It establishes rules to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of criminal offences, amending Organic Law 8/1980 of 22 September on the Financing of the Autonomous Communities and other related provisions and amending Organic Law 10/1995 of 23 November on the Criminal Code (the "**Criminal Code**"). Law 9/2022 will enter into force one month after its publication in the Official State Gazette, i.e. on 29 August 2022.

Law 9/2022 transposes Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 July 2019 into Spanish law. It establishes rules to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of criminal offences and repeals Council Decision 2000/642/JHA ("**Directive 2019/1153**").

The main objective of Law 9/2022 is to facilitate the exchange of and access to financial data for the purpose of preventing, detecting, investigating or prosecuting, in other words, expediting the fight against financial fraud, money laundering and terrorist financing, as well as other particularly serious crimes. This objective has been and remains a priority for the European Union. Proof of this is the long history of the regulatory framework that regulates this issue and its many amendments and updates. Through this legislation, the European Union has always tried to provide the best possible response to this problem.

It is important to highlight that the access to financial information provided for in Law 9/2022 is subject to compliance with the guarantees and requirements of the right to privacy of citizens, regulated in Article 18.4 of the Spanish Constitution. This provides that "*the law shall limit the use of information technology to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights*", and the right to the protection of personal data, which has been recognised by the Constitutional Court and the European Court of Human Rights as an autonomous category distinct from the right to privacy.

Law 9/2022 comprises four chapters, fourteen articles, three additional provisions and eleven final provisions.

The most important new features of the legislation are highlighted below:

1. Where does Directive 2019/1153 stand in relation to existing European legislation?

Directive 2019/1153 provides a new perspective, with the objective of improving access to and the exchange of financial information, without displacing or replacing Commission Directive 2006/70/EC and Directive 2013/36/EU of the European Parliament and of the Council ("**4th Anti-Money Laundering Directive**" and "**5th Anti-Money Laundering Directive**" respectively; together the "**Anti-Money Laundering Directives**"), but rather existing alongside them. Thus, while the Anti-Money Laundering Directives are based on Internal Market regulation, Directive 2019/1153 is structured as a separate

and specific legal instrument, which allows direct and immediate access by competent authorities to centralised records of bank accounts and payments, and focuses on strengthening police and judicial cooperation in criminal matters.

2. The regulation of access to information in the Financial Ownership File

The Financial Ownership File (the "**File**") contains data identifying the account holders, but not the movements (deposits or transfers) and balances of the accounts, and therefore provides a "snapshot" of the contents of the accounts. Law 9/2022 provides for direct and immediate access by the competent authorities to the File and, in turn, by the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences ("**SEPBLAC**"), which has the status of a Financial Intelligence Unit ("**FIU**") in Spain, to the information held by these authorities.

Thus, it is worth highlighting the removal of the requirement for prior judicial or prosecutorial authorisation to access the contents of the File, contained in the third paragraph of Article 43 of Law 10/2010 of 28 April, on the prevention of money laundering and terrorist financing ("**Law 10/2010**"), amended accordingly by Law 9/2022 (First final provision). Therefore, it will only be necessary to request such authorisation in the event of requiring access that goes over and above the "snapshot" of the File (identification data of bank account holders).

Therefore, the competent authorities to access and consult the File, without prejudice to those included in the aforementioned provision, and in the exercise of their powers in the prevention, detection, investigation or prosecution of serious criminal offences, which are the purposes of the use of financial information established by Directive 2019/1153 are the Judges and Courts of the criminal jurisdiction; the Public Prosecutor's Office; the European Public Prosecutor's Office; the State Security Forces and Corps; the Autonomous Regional Police with statutorily assumed powers for the investigation of serious crimes; the Asset Management and Recovery Office of the Ministry of Justice; the asset recovery offices designated by Spain under Decision 2007/845/JHA of 6 December 2007; and the Deputy Directorate of Customs Surveillance of the State Tax Administration Agency (together, the "**Competent Authorities**").

3. The regulation of collaboration for the exchange of financial information between the competent authorities and SEPBLAC, with other Member States of the European Union and with the European Union Agency for Police Cooperation

Before the entry into force of Directive 2019/1153, most competent authorities in the European Union did not have direct access to the information stored in the File, which led to significant delays that hindered criminal investigations. The transposition of Directive 2019/1153 aims to address this scenario.

A. Information requests between SEPBLAC and the Competent Authorities in Spain

Directive 2019/1153 provides for direct access by the Competent Authorities to centralised national registers of bank accounts or data retrieval systems. Thus, Law 9/2022 provides that SEPBLAC and the Competent Authorities are responsible for responding to law enforcement requests as soon as possible (also between the two entities) and, in the case of financial information, within seventy-two hours.

In addition, SEPBLAC must keep a record of each of the access and consultation operations carried out by the Competent Authorities, which is regularly examined by the data protection officer of that entity and is available to the Spanish Data Protection Agency.

B. Exchange of financial information with the European Union Agency for Police Cooperation and other EU Member States

In response to the need for a more effective exchange of information and closer cross-border coordination between national authorities, Law 9/2022 also allows the European Union Agency for Police Cooperation ("**Europol**") indirect access to the data in the File, via the National Units of the Member States. It should be noted that, while Europol does not conduct criminal investigations, it does support Member States' actions in this regard.

The Competent Authorities are responsible for responding to requests for information relating to the File made by Europol. However, requests made by Europol for financial information and analysis shall be answered electronically by SEPBLAC. Such requests shall be made by that entity through the Europol National Unit and must be duly justified.

4. Guarantee and processing of personal data

Given the sensitive nature of financial information, the regulation of the right to the protection of personal data is particularly relevant. This is expressly stated and provided for in Law 9/2022, which establishes that, in relation to the protection of personal data, the following provisions shall apply: (i) Organic Law 7/2021 of 26 May on the protection of personal data processed for the purposes of the prevention, detection, investigation and prosecution of criminal offences and the execution of criminal penalties; (ii) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons; (iii) Organic Law 3/2018 of 5 December on the protection of personal data and guarantee of digital rights; and (iv) Law 10/2010.

Thus, both Competent Authorities and SEPBLAC must keep a register of information requests made in the context of Law 9/2022, which must be kept for five years.

5. Amendment of the Criminal Code and Organic Law 8/1980 of 22 September on the Financing of the Autonomous Communities and other related provisions

This new regulation also amends several aspects of Organic Law 8/1980 of 22 September, on the Financing of the Autonomous Communities and other related provisions (Final Provisions two to five) and the second section of Article 234 of the Criminal Code, which regulates the crime of theft (Sixth final provision).

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