

## SPAIN'S DATA PROTECTION ACT ENTERS INTO FORCE

*On February 1st 1993, Spain's Data Protection Act entered into force after being adopted by the legislature on October 8th 1992 (PL&B Oct '92 p.3) and signed by the King on October 29th. But the new law has received a mixed reception. Different sectors of Spanish society, among them political parties, associations, the business sector and academics, have criticized parts of the Act. An appeal is even pending before the Constitutional Court to have part of the Act declared unconstitutional.*

Throughout this report, the law is designated by LORTAD, an abbreviation of its Spanish name, *Ley Organica (5/1992) de Regulación del Tratamiento Automatizado de los Datos de carácter personal*.

### Legislative History

Although the LORTAD was adopted recently, Spain has not been inactive in the field of data protection until this decade (PL&B July '91 p.11). Since 1976, a number of drafts regulating the processing of personal data and the protection of individual rights have circulated in the Ministry of Justice. But none of those drafts were presented to Parliament. In 1978 the Spanish Constitution was adopted. The Constitution called for the adoption of a law that would "limit the use of information and other means of automated treatment of personal data in order to guarantee the personal dignity, privacy and family life of all citizens as well as the full exercise of their rights" (Art. 18.4).

Then, in 1982, Parliament adopted Act 1/1982 of May 5th, on the Civil Protection of the Rights of Honour, Personal and Family Privacy and Self-Image. This Act was meant as a temporary answer to the call for specific data protection set forth in the Constitution. The Act purported to protect the "honour, personal and family privacy against illegal interference derived from the use of informatics

and other means of automated processing of personal data" until new regulations pursuant to article 18 section 4 of the Constitution were approved.

Subsequently, on January 31st, 1984, Spain ratified the Council of Europe Convention on Data Protection (the COE Convention), even though at that time in Spain only a draft bill on data protection was circulating. The ratification of the Convention prior to the adoption of a national law contravenes its article 4 section 2 which demands that each Party has adopted a Data Protection Act "at the latest at the time of entry into force of this Convention in respect of that party." Spanish diplomacy succeeded in convincing the other national delegations that the Spanish government would submit a bill to Parliament and seek its adoption the same year. Spanish diplomacy turned out to be more successful abroad than at home. Eight years after the COE Convention was ratified, Parliament adopted the LORTAD.

On June 25th, 1991, Spain signed the Schengen Convention applying the Schengen Agreement of June 14th 1985. Unlike the COE Convention, the Schengen Convention does not enter into force until the signatory Party has in fact adopted legislation on data protection. Where the COE Convention failed, the Schengen Convention succeeded in putting pressure on the Spanish government to seek the adoption of a Data Protection Act. Thus in October 1992, Parliament adopted the LORTAD, 16 years after the first initiatives.

### General Provisions

**Scope.** The Act applies to any information relating to an identified or identifiable individual contained in automated files held by both private and public sectors. In addition, it also applies to all subsequent forms of use (including non-automated use) of personal data recorded in any way which is capable of undergoing automated processing.

However, the Act provides that a rather large number of files are exempted from compliance with the law. Among these are:

1. files kept by individuals for *personal* purposes;
2. public sector automated files kept for the purpose of storing data for *consultation by the general public*;
3. files kept by *political parties, trade unions, churches and communities*, insofar as the data relates to their members.

There are other types of files regulated by *special provisions*, such as those:

- kept for *statistical* purposes;
- regarding "*professional*" *military personnel*;
- derived from the *Register of Births, Marriages and Deaths*;
- derived from the *Central Register of Convicts and Escaped Prisoners*;
- regarding *classified* matters; and
- regulated by the legislation on *elections*.

One of the significant differences between the LORTAD as adopted and the bill as introduced into Parliament, is the restriction of its scope. The Bill gave the Government the power to extend the Act's scope to include rights to files containing data related to companies, societies and other legal persons. The business community has actively lobbied against such Governmental power and this particular provision was amended during the parliamentary debates.

**Author's comment:** *Even though I do not oppose the regulation of files concerning legal persons, I believe that the legal regime of such files should be rather different than that for files concerning individuals. In many respects legal persons can effectively be treated as natural persons. However, where notions of human rights are involved, there are reasons to treat legal and natural persons differently.*

#### **Data Protection Principles**

Among the principles adopted in the LORTAD are:

- Personal data undergoing automated processing shall be gathered for *specified*

*and legitimate purposes only*, and shall not be used in a way incompatible with those purposes

- Data must be *accurate, kept up to date and erased when no longer needed* for the purpose for which they were gathered and stored
- The controller of the file must take all measures necessary to *guarantee the security of the personal data* (these measures shall be specified in an Administrative Order)
- Data may *not be collected by unlawful means*
- The *consent of a data subject* is required for the automated processing of data relating to this person, unless provided otherwise by law
- The data subject has a number of *individual rights* such as: a right of access to the file; a right to know whether an automated data file exists, its content, the purpose for which the file is kept and the identity of the controller of the file; a right to be kept informed while his/her data are stored; a right to have all data which are inaccurate, incomplete or erroneous corrected or erased; a legal remedy for compensation if the data subject suffers damage as a result of the controller's failure to comply with the provisions of the Act; a right to seek the Data Authority's protection if the provisions of the Act have been violated.

#### **Exemptions weaken principles**

Based on a review of those principles, one could say that the LORTAD complies with the principles laid down in the COE Convention. However, the LORTAD contains additional provisions which, as their primary goal, *reduce* the protection of privacy with regard to the automated processing of personal data. For example, regarding the *consent* of the data subject to gather data, the LORTAD provides a rather long list of exemptions:

1. data gathered from sources which are open to the general public;

2. data collected for the performance of functions entrusted to public administration within their specific competence;
3. data which refer to persons linked by a business, labour or administrative relationship or by contract, as far as the collecting of data are necessary to fulfill these relationships or to perform the contract (Art. 6.2).

**Author's comment:** *The list of exemptions seems far too long. As a result, if in all these instances the consent of data subjects need not be obtained, they will not be aware that their personal data is automatically processed. Therefore, data subjects will not be able to use their rights, such as access and correction.*

It is widely accepted by international experts that individual rights are the "golden rule" of any legislation on data protection, and that these rights have to be guaranteed. The LORTAD mentions individuals rights, but instead of including a specific regulation in the text of the Act, its implementation is left to a governmental administrative order.

Furthermore, there are a number of unclear provisions such as Article 15.4 which regulates the exception to the right to erase data. According to this article, erasure of personal data cannot occur if the interests of data subjects or third persons are involved or if an obligation exists to keep these data. This provision seems to affirm that the controller of the file is given an opportunity to assert that he "knows" better than data subjects what their own interests are.

#### **Transfer of data to a third party**

The LORTAD provides for transfer of data to a third party. A transfer requires the consent of the data subject, unless at the time the file was created the relationship between the third party and the controller implied a transfer of personal data.

#### **Sensitive data**

The LORTAD states that it is forbidden to create files for the purpose of storing personal

data regarding ideology, religion, other beliefs, racial origins and sexual life. However:

- Personal data on *criminal convictions* or *administrative infringements* may be stored by authorised public agencies.
- Personal data regarding *racial origins, health and sexual life* may be gathered and processed either for reasons of the "general interest," as provided by law, or with the express consent of the data subject;
- Data on *ideology, religion and other beliefs*, may be processed with the express consent of the data subject.

#### **Automated personality profile**

Furthermore, if a public and private entity appraises human conduct based on automated data files which describe the personality of the data subject, the data subject may appeal against this decision.

#### **Public automated files**

The LORTAD provides that public automated files may be created, modified or erased only after an intention to do so has been published in the national gazette, the *Boletín Oficial del Estado* or its regional equivalents. Automated files must not be transferred between different bodies of the public administration, unless such transfer was contemplated at the time the file was created or if an administrative order provides for a transfer, stating the use of the file (Article 19.1).

Automated files gathered by *national security bodies* must be held in accordance with the provisions of the Act, unless public safety, rights and freedoms of third parties, suppression of criminal behaviour, state security, or monetary interests of the State are at stake. If the right of access to public files is denied on the basis of any of these grounds, the data subject can petition the Data Protection Agency, established by this Act, to assess the lawfulness of the denial or to the Regional Authorities (Comunidad Autónoma) if it concerns automated files held by the regional police body or regional tax authorities.

### Private automated files

Private automated files containing personal data may be created when it is necessary for the achievement of a business activity and compliance with the regime established in the LORTAD. The Data Protection Agency must be notified so that the General Register may be updated when:

- a file is created, or
- the purpose of such a file is modified, or
- when the controller's identity or the location of such a file is changed.

An automated file is considered registered one month after application for registration is made, unless the application is refused. There is no provision in the LORTAD for the Data Protection Agency to withdraw registration at a later date.

The LORTAD contains special provisions on time limitation, consent of the data subject and duties of the controller of the file, in the following sectors: *credit rating agencies, direct mail agencies, electronic data processing agencies, opinion polls, scientific research* and similar activities. For example, for *credit rating agencies*, a negative decision must not be based on data older than six years.

### Codes of conduct

The LORTAD encourages the private sector to adopt some form of self-regulating norms, or codes of conduct. Such codes would provide rules of ethical conduct in accordance with the principles set forth in the Act. The Act is rather vague on the question of how many organizations need to adopt a code before it is held representative for a particular sector. It seems, however, that this will not be an important factor for the endorsement of such a code by the Data Protection Agency. The LORTAD states that the sole ground for denying approval is the fact that the provisions of a code of conduct are contrary to those set forth in the Act. There is no obligation on the DPA to draft a sectoral code nor approve one prepared by a particular sector. But the DPA may register a sectoral code.

### Transborder Data Flows Restrictions

The LORTAD contains a general restriction against transferring personal data to countries where the level of protection is not equivalent to the level established by the Act, regardless of:

- whether the transfer is temporary or not,
- whether the data to be transferred has already been automatically processed, or
- whether the data has been gathered for that purpose.

The Director of the Data Protection Agency, however, has the power to authorise the transfer if adequate guarantees are obtained.

It is important to note that the Act is silent not only on the question as to what protection level is required in a foreign country to enable a transfer, but also on the question as to what guarantees are required to obtain authorisation to make a transfer. According to the Act's Explanatory Statement, the intention of the legislator has been to require that the recipient country has the same level of protection as that required by the Council of Europe Convention, in short "an equivalent protection." When the European Community adopts a directive on data protection one could question what will happen if the level of protection in the COE Convention and that of the EC directive are not the same. Since Spain would be bound by both legal instruments, the LORTAD will have to be amended in order to comply with both the EC directive and the COE Convention.

On the adequacy of the guarantees needed for authorisation of transborder data flows, it seems that the Data Protection Agency has discretionary powers. Therefore, the DPA may accept *contractual solutions, or voluntary endorsements of a code of conduct by the recipient party* located in a country that has not adopted an omnibus data protection approach.

Furthermore, there are *exceptions to the general restriction on TDF* in the following instances. Transborder data flows are permitted when:

1. personal data are transferred cross border as a result of *international*

- commitments* which Spain has undertaken.
2. its objective is to provide or to secure *international judicial help*.
  3. the transfer is made, for the purpose of *exchanging medical data* between practitioners and health centres or when such transfer is necessary for the treatment of the data subject for medical research on diseases and for research on the outbreak of diseases.
  4. *money is transferred*, subject to specific legal provisions.

#### **Data Protection Agency**

The Act provides for the establishment of a Data Protection Agency which will be independent from other public bodies. The Agency will be headed by a Director who will be assisted by a Consultative Board. The Director is appointed by the Government and reports annually to the Ministry of Justice. The Consultative Board consists of nine persons including: two representatives from Parliament (Congress and the Senate); central government; local government; one expert on data protection; a regional representative; a member of the Royal History Academy; a representative from the consumers organisation; a representative from the Regional Authorities (Comunidad Autónoma); and a representative from the private sector.

Among the tasks of the Data Protection Agency are:

1. enforcing the Act, in particular the provisions concerning the right of access, rectification and erasure of automated files
2. complaints and requests from individuals
3. informing the public about their individual rights concerning automated data files
4. rendering advice on new laws and regulations which may affect the provisions of the Act

5. erasing files which are not in accordance with the law
6. carrying out inspections on its own account
7. securing cooperation from the administrative entities of the Regional Communities
8. supervising transborder data flows
9. securing international cooperation regarding issues of data protection that affect other jurisdictions
10. reporting annually to the Ministry of Justice
11. other functions provided for by other laws or by Administrative Order.

The government is expected to adopt an administrative order establishing the Data Protection Agency before this summer, and to appoint its first Director immediately after. There are various reasons for swift action on the part of the government. Firstly, because most of the LORTAD's provisions are like a lion without teeth as long as there is no Agency to enforce them. Secondly, the Schengen Convention does not become effective in the country until Spain has established a Data Protection Agency.

#### **Sanctions**

Infringements of the Act are classified in three different categories: light, serious and very serious with sanctions as appropriate. Offenders may be fined up to a maximum of 100 million pesetas (£533,000). An administrative appeal is possible against decisions of the Data Protection Agency. The Director of the Data Protection Agency must notify infringements of the Act as follows:

- If in the *public sector*, the DPA must inform the Ombudsman about the decisions he has taken or the nature of the breach of the law
- If in the *private sector*, the DPA informs the relevant sectoral association.

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### **Will the new law prove effective?**

Most of Spain's data protection experts hope that their patience (from 1976 until 1992) would be rewarded by the adoption of an innovative and state-of-the-art Data Protection Act. To these people, the LORTAD has been a rude awakening. Some of the Act's provisions make one doubt whether the Spanish Act has substantially benefited from the experience of other Data Protection Acts. However, Spain has its long awaited Data Protection Act. From now on, the question will be how to amend an existing law rather than whether to introduce a new one.

Until now the LORTAD has been a rather academic affair. From now on, the Act must prove that it effectively protects the privacy of individuals in practice. How effectively it works will depend, to a large extent, on the administrative orders that will implement various sections of the Act. Much will depend on how actively the DPA will enforce the Act and whether the Agency, in doing so, will benefit from the experience of Data Protection Agencies in other COE Member States.

### **Does the LORTAD violate the constitution?**

Finally, the future of the LORTAD will be affected by the outcome of proceedings which are presently pending before Spain's Constitutional Court. The appeal has been launched by the Ombudsman on a request by the Comisión de Libertades e Informática (Commission for Freedom and Informatics); the Grupo Popular (a right wing party); and the Generalitat y el Parlamento de Cataluña (the Catalan government). The petitioners argue that some provisions of the LORTAD violate Spain's Constitution, and therefore they must be declared unconstitutional.

There will be a report on the proceedings before the Constitutional Court in a future issue.

**This report was written by and the opinions expressed are those of Dr. Olga Estadella-Yuste, Assistant Professor, Department of Public International Law, the Autonomous University of Barcelona. Dr. Estadella-Yuste will give a presentation on Spain's new law at the Privacy Laws & Business 6th Annual Conference in Oxford June 28th-30th.**