

FRA

Thematic Legal Study on assessment of
data protection measures and relevant
institutions
[Spain]

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Executive summary

- [1]. The right to the protection of personal data is a key element of the current Spanish legal framework of fundamental rights. Citizens have increasingly become aware of their right to informative self-determination, which allows them to protect their right to data privacy. In addition to this, the public bodies have assumed a greater responsibility on this matter. Both factors have led to create a solid protective legal framework. The ratification of several treaties of the Council of Europe and the incorporation of the European Union law into Spanish domestic law have also contributed to this situation.
- [2]. The Spanish legal framework on data protection meets all European Union Law standards. The Spanish *Constitución* [Constitution] does not include a specific right to data protection. This right has been incorporated into the Spanish legal system by the decisions of the *Tribunal Constitucional* [Constitutional Court] and due to the influence of European Union Law. Organic Law 15/1999 of 13 December on *Protección de Datos de Carácter Personal* [Personal Data Protection] is the main law on this issue at the national level. Both, the Organic Law on the Protection of Personal Data and the specific and complementary legislation on data protection offer very effective measures of protection.
- [3]. The *Agencia Nacional de Protección de Datos* [Spanish Data Protection Agency] is regulated by Title VI of the Organic Law 15/1999 of 13 December on the Protection of Personal Data as a body under public law, which guarantees data protection in Spain. Royal Decree 428/1993 of 26 March implemented the Organic Law providing the Agency with its own Statute. Three out of the nineteen *Comunidades* and *Ciudades Autónomas* [Autonomous Communities and Cities] in Spain, in concrete, Cataluña, Madrid and País Vasco, have also their own independent data protection authorities. The powers given by the Law to the Spanish Data Protection Agency and also to the Autonomous Communities Data Protection Agencies fulfil the requirements of Article 28 of Directive 95/46/EC.
- [4]. The Organic Law 15/1999 applies to personal data recorded on a physical support which makes them capable of being processed, and to any type of subsequent use of such data by the public and private sectors.
- [5]. The Organic Law on the Protection of Personal Data allows files in public and private ownership and regulates them separately. Any person or body creating files of personal data shall notify the Data

Protection Agency prior to the creation of the files. With regard to data specially protected, the general rule is that they can only be processed if the data subject has given his/her consent.

- [6]. Controllers and processors are subject to the penalties set out in Organic Law 15/1999 both for files in public and private ownership. The Organic Law of Data Protection sets out three types of penalties: minor, serious and very serious. The amount of the penalties shall be graded taking into account, among others, the nature of the personal rights involved, the volume of the processing operations carried out or the profits gained.
- [7]. The interested party may appeal against the decisions of the Agencies to the contentious administrative courts. The Director of the Spanish National Agency and the Directors of the Autonomous Communities Agencies have follow up competences on open procedures and can periodically inspect, on their own initiative, certain files to check if their recommendations or decisions have been applied.
- [8]. Both the national and the autonomous Data Protection Agencies have developed a highly remarkable awareness rising activity.
- [9]. The current Spanish data protection system is efficient and does not show any important deficiency, except for the need of increasing the budget every year to attend the demand of data protection and dissemination. It is necessary to point out how difficult the existence of Internet makes data protection. The data protection of minors requires a special attention. There are some types of files excluded from the scope of the Organic Law on Data Protection (for example, files established for the investigation of terrorism and serious forms of organised crime). However, these exclusions cannot be regarded as deficiencies of the system but as a particular choice of the legislator.
- [10]. The most important decisions of the Spanish Constitutional Court on personal data protection are the Decisions 290/2000 of 30 November 2000 and the Decision 292/2000 of 30 November 2000, which resolved the appeals for unconstitutionality against several articles of the Organic Law on the Protection of Personal Data. These decisions incorporate a fundamental right to data protection into the Spanish legal system, distinguishing it from the right to privacy guaranteed in Article 18 of the Spanish Constitution.
- [11]. The Director of the Spanish Data Protection Agency appears before the Parliament. Since the year 2005, the Director has appeared every year before the Parliament to present and explain the annual report of activities of the Agency. He/she also appears before the Parliament upon its request.

- [12]. Being conscious of the importance of the dissemination and spreading of the fundamental right to data protection, data control authorities edit a very important number of publications and audios and maintain frequent relationships with the mass media.

1. Overview

1.1. Introduction

- [13]. The right to the protection of personal data is a key element of the current Spanish legal framework of fundamental rights. Citizens have increasingly become aware of their right to informative self-determination, which allows them to protect their right to data privacy. In addition to this, the public bodies have assumed a greater responsibility on this matter. Both factors have led to create a solid protective legal framework. The ratification of several treaties of the Council of Europe and the incorporation of the European Union law into Spanish domestic law have also contributed to this situation (see Section 1.2.2. of this report).
- [14]. Spain has set up a number of data protection authorities. The *Agencia Nacional de Protección de Datos* [Spanish Data Protection Agency] has nationwide jurisdiction. Three out of the nineteen *Comunidades* and *Ciudades Autónomas* [Autonomous Communities and Cities] in Spain, in concrete, Cataluña, Madrid and the País Vasco, have also their own independent data protection authorities. The autonomous authorities are competent only in their respective territories, so that they can only control the respective autonomous public bodies (see Section 2.1 of this report).
- [15]. The Spanish legal framework on data protection meets all European Union Law standards, such as the principle of the quality of data, the right to information and the need to obtain the consent of the data subject, together with the right to rectification and cancellation of data. In addition to this, the Spanish legislation distinguishes, following the European Union directives, certain categories of data which require a special protection, and forbids the misleading or fraudulent collection of data.

1.2. Legal framework

1.2.1. Spanish Constitution and Constitutional Doctrine

- [16]. The Spanish *Constitución* [Constitution] does not include a specific right to data protection.¹ This right has been incorporated into the Spanish legal system by the decisions of the *Tribunal Constitucional* [Constitutional Court] and due to the influence of European Union Law. Article 18(1) of the Spanish Constitution lays down that: 'The rights to honor, to personal and family privacy and to identity shall be guaranteed.' Article 18(3) of the Constitution lays down that the 'Secrecy of communications, particularly regarding postal, telegraphic, and telephone communications, shall be guaranteed, except for judicial order.' Article 18(4) lays down that: 'The law shall limit the use of information to guarantee personal and family honor, the privacy of citizens and the full exercise of their rights.' This section 4 of Article 18 has been alleged by the Constitutional Court as the legal basis which justifies the existence of a right to data protection in the Spanish Constitution.
- [17]. Thus, Decision number 292/2000 of 30 November of the Constitutional Court (see Annex 2) highlights the important effects of computer-based information systems on the control of personal data.² It also points out that the fundamental right to privacy (Article 18(1) of the Spanish Constitution) does not guarantee by itself the level of protection required in a new context of development of technological communications. The Court concludes that section 4 of Article 18 constitutes the constitutional basis to guarantee a right to data protection, which offers the individual a means of protection against the new threats to dignity and rights and liberties. The Constitutional Court adds that the right to data protection 'is a fundamental right or freedom' (Decision number 254/1993 of 20 July, paragraph 6).³ The Constitutional Court distinguishes between the right to privacy and the right to data protection. The fundamental right to privacy, laid down in Article 18(1) of the Spanish Constitution, protects against any invasion which may occur in a personal and family context and against unwanted inferences of a third party (Decision of the Constitutional Court 144/1999 of 22 July, paragraph 8).⁴ However, the fundamental right to data protection seeks to ensure individuals a

1 Spain/Constitución (27.12.1978).

2 Spain/Tribunal Constitucional/292/2000 (30.11.2000).

3 Spain/Tribunal Constitucional/254/1993 (20.07.1993).

4 Spain/Tribunal Constitucional/144/1999 (22.07.1999).

power of control on their personal data in order to avoid unlawful data transfer and damage to dignity and other rights of the individual.

- [18]. In Spain, the fundamental right to data protection protects all relevant data and data related to any right or liberty, regardless of the constitutional status of the right or liberty. It is not necessary that honor, ideology, personal and family privacy or any other right protected by the Spanish Constitution are concerned. Protection does not only refer to private personal data but also to any kind of personal data, private or not, so that knowledge or use by a third party may damage the fundamental or not fundamental rights of the individual. The reason for this is that the aim of the fundamental right to data protection is not the individual privacy (which is already guaranteed in Article 18(1) of the Spanish Constitution). The aim of the right is to protect personal data. Therefore, it also concerns not private personal data. In Spain, following the doctrine of the Constitutional Court, data protection is regarded and regulated as a fundamental right.

1.2.2. International and European Union Law

- [19]. On 31 January 1984, Spain ratified the 108 Convention of the Council of Europe of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, and its Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of personal data regarding supervisory authorities and transborder data flows, prepared on 8 November 2001 in Strasbourg. The Convention is in force in Spain since 1 October 1985. In the field of biomedical applications, Spain has also ratified the Convention of the Council of Europe for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine) of 4 April 1997. This Convention contains a detailed regulation on data protection in the field of health system and biomedical research. Both Conventions and the Protocol are legally binding in Spain.
- [20]. Spain has transposed and implemented European Union Law and, following the principle of primacy, has adapted its legislation on data protection to the EU Directives (as showed along the present study).
- [21]. Also in the frame of the European Union, Spain ratified in 2005 the Treaty on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration (Prüm Treaty). The Convention aims at improving the exchange of information within the European Union, particularly in combating

terrorism, cross border crime and illegal migration. A priority objective of the Convention is to create a police network in Europe in order to increase the effectiveness of both the prevention and repression of crimes referred to in the Convention.

1.2.3. National Law

- [22]. Organic Law 15/1999 of 13 December on *Protección de Datos de Carácter Personal* [Personal Data Protection] is the main law on this issue at the national level.⁵ The Organic Law is intended to guarantee and protect the public liberties and fundamental rights of natural persons, and in particular their personal and family privacy, with regard to the processing of personal data.
- [23]. Eight years after the enter into force of the Organic Law, Royal Decree 1720/2007 of 21 December, the *Reglamento* [Statutory Regulation] of the Organic Law 15/1999 of 13 December on Personal Data Protection was approved.⁶ With regard to the data protection authority, Royal Decree 428/1993 of 26 March approved the *Estatuto de la Agencia Española de Protección de Datos* [Statutory Regulation of the Spanish Data Protection Agency].⁷ This Royal Decree was modified by Royal Decree 156/1996 of 2 February,⁸ which, in accordance to Article 29 of Directive 95/46/CE,⁹ granted the Data Protection Agency the Spanish representation in the Working Party and authorized the Agency's Director to designate a person to become a member of the Working Party. The Regulation of the Agency has also been modified by Royal Decree 1665/2008, of 17 October, which adapts several norms regarding the independent authority to the Regulation approved in 2007.¹⁰
- [24]. According to the distribution of competences between the Spanish government and the Autonomous Communities, the latter may create their own independent data protection authorities. These agencies collaborate with the Spanish Data Protection Agency. As mentioned before, three out of the nineteen Autonomous Communities and Cities have set up independent agencies in their respective territories (See Section 2.1 of this report).

5 Spain/Ley Orgánica 15/1999 (13.12.1999).

6 Spain/Real Decreto 1720/2007 (21.12.2007).

7 Spain/Real Decreto 428/1993 (26.03.1993).

8 Spain/Real Decreto 156/1996 (02.02.1996).

9 Directive 95/46/EC (24.10.1995).

10 Spain/Real Decreto 1665/2008 (17.10.2008).

- [25]. Not all type of personal data files (for example files maintained in the exercise of purely personal activities) fall under the scope of the Organic Law 15/1999 (see Section 2.3 of the report for further details).

1.2.3.1. Special Legislation

- [26]. According to Article 2(3) of the Organic Law 15/1999 of 13 December on the Protection of Personal Data, the following special types of files shall be governed by specific laws and, in its case, by the special provisions of Organic Law 15/1999:

- Files related to elections. This issue is regulated by the Organic Law 5/1985 of 19 June on *Régimen Electoral General* [General Electoral Regime], which has been modified several times.¹¹
- Files used solely for statistical purposes and protected by the central or regional legislation on public statistical activities.¹² In Spain, this topic is regulated by Law 12/1989 of 9 May on the *Función Estadística Pública* [Statistical Public Service] (modified by Article 9 of Law 36/2006 of 29 November on *Medidas para la prevención del fraude fiscal* [Measures for the prevention of fiscal fraud]).¹³
- Files intended for the storage of the data contained in the personal assessment reports covered by the legislation on the personnel regulations of the armed forces.
- Files contained in the *Registro Civil* [Civil Register] and the *Registro Central de Penados y Rebeldes* [Central Criminal Register]. The Civil Register Office is regulated in Spain by the Law of 8 June 1957, which has been modified several times.¹⁴ The criminal records of the persons who committed an offence included in the Criminal Code or in any other special criminal law are registered in the Central Criminal Register. This Register depends on the Ministry of Justice and is regulated by the Criminal Code (Organic Law 10/1995 of 23 November)¹⁵ and by the Royal Mandate of 1 April 1896 on the *Acceso de los particulares al Registro Central de Penados y Rebeldes* [Access of citizens to the Central Criminal Register].¹⁶

11 Spain/Ley Orgánica 5/1985 (19.06.1985).

12 In Spain the Autonomous Communities legislate through their autonomous Parliaments. Each of the seventeen Autonomous Communities in Spain has its own autonomous Parliament.

13 Spain/Ley 12/1989 (09.05.1989). Spain/Ley 36/2006 (29.11.2006).

14 Spain/Ley (08.06.1957).

15 Spain/Ley Orgánica 10/1995 (23.11.1995).

16 Spain/Real Orden (01.04.1896).

- Files deriving from images and sound recorded by video cameras for the security forces. Organic Law 4/1997, of 4 August, on the *Utilización de las videocámaras por las Fuerzas y Cuerpos de Seguridad en lugares públicos* [Use of video cameras by the Armed and Security Forces in public places], rules how to obtain and use images and sound recorded by video cameras by the Armed and Security Forces.¹⁷ This Organic Law has been implemented by Royal Decree 596/1999 of 16 April on the *Reglamento de desarrollo y ejecución* [Statutory Regulation].¹⁸ Also, the Spanish Data Protection Agency issued the Instruction 1/2006 of 8 November on the *Tratamiento de datos personales con fines de vigilancia a través de sistemas de cámaras o videocámaras* [Processing of personal data recorded by cameras or video cameras for surveillance purposes]. In addition to the mentioned legislation, there is Royal Decree 2364/1994 of 9 December on the *Reglamento de Seguridad Privada* [Statutory Regulation on Private Security].¹⁹

[27]. In Spain, there are also specific provisions on genetic data. This category of data is not specifically mentioned in the Organic Law on the Protection of Personal Data but, following the legislation of the Council of Europe and of the European Union, these data have been being considered health data. Therefore, they receive the highest level of protection. With regard to police implementations, the basic regulation is contained in the Organic Law 10/2007 of 8 October on the *Base de datos policial sobre identificadores obtenidos a partir del ADN* [DNA police database].²⁰ This Law regulates the creation of a database in which all the Armed and Security Forces' files identifying DNA related data are included. This database contains the data obtained in criminal investigations, in corpse identification processes, or data obtained in investigations on disappeared persons. In the field of medical applications and research, Law 14/2007 of 3 July on *Investigación biomédica* [Biomedical Research] regulates the processing of data obtained in genetic tests.²¹ These data are classified by the Law as data with special protection, giving them a legal status which they already had in practice.

1.2.3.2. Complementary Legislation

[28]. With regard to certain issues, the provisions contained in the Organic Law on the Protection of Personal Data have been developed by specific laws. It is important to highlight the following norms:

17 Spain/Ley Orgánica 4/1997 (04.08.1997).
 18 Spain/Real Decreto 596/1999 (16.04.1999).
 19 Spain/Real Decreto 2364/1994 (09.12.1994).
 20 Spain/Ley Orgánica 10/2007 (08.10.2007).
 21 Spain/Ley 14/2007 (03.07.2007).

- **Health and Health System.** The Spanish legislation on health contains specific references to the Organic Law on the Protection of Personal Data, so that the biomedical applications respect the confidentiality of the patients' personal data and of the persons participating in research and test projects. The most important norms in this area are:
 - Organic Law 3/1986 of 14 April on *Medidas especiales en materia de Salud Pública* [Special Measures on Public Health].²²
 - General Law 14/1986 of 25 April on *Sanidad* [Health].²³
 - Law 14/2007 of 3 July on *Investigación Biomédica* [Biomedical Research].²⁴
 - Law 29/2006 of 26 July on *Garantías y uso racional de los medicamentos y productos sanitarios* [Guarantees and Rational Use of Medicines and Health Products].²⁵
 - Law 14/2006 of 26 May on *Técnicas de reproducción humana asistida* [Assisted Human Reproduction Techniques].²⁶
 - Law 44/2003 of 21 November on *Ordenación de las profesiones sanitarias* [Regulation of the Health Professions].²⁷
 - Law 41/2002 of 14 November *Básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica* [of Basic Regulation of the Patient's Autonomy and of Rights and Duties in the field of information and clinical documentation].²⁸
 - Law 16/2003 of 28 May on *Cohesión y calidad del Sistema Nacional de Salud* [Cohesion and Quality of the National Health System].²⁹
 - Royal Decree 2070/1999 of 30 December on *Actividades de obtención y utilización clínica de órganos humanos y la coordinación territorial en materia de donación y trasplante de órganos y tejidos* [Clinical Obtention and Use of Human Organs and the Territorial Coordination of Organ and Tissue Donation and Transplantation].³⁰
- **Telecommunications and Information Society.** Several laws on the information society also include specific provisions for the protection of

22 Spain/Ley Orgánica 3/1986 (14.04.1986).
23 Spain/Ley 14/1986 (25.04.1986).
24 Spain/Ley 14/2007 (03.07.2007).
25 Spain/Ley 29/2006 (26.07.2006).
26 Spain/Ley 14/2006 (26.05.2006).
27 Spain/Ley 44/2003 (21.11.2003).
28 Spain/Ley 41/2002 (14.11.2002).
29 Spain/Ley 16/2003 (28.05.2003).
30 Spain/Real Decreto 2070/1999 (30.11.1999).

personal data, within the framework of the Organic Law on the Protection of Personal Data.

- Law 56/2007 of 28 December on *Medidas de Impulso de la Sociedad de la Información* [Measures to Promote the Information Society].³¹
- Law 25/2007 of 18 October on *Conservación de datos relativos a las comunicaciones electrónicas y a las redes públicas de comunicación* [Preservation of Data related to Electronic Communications and Public Communications Networks].³²
- General Law 32/2003 of 3 November on *Telecomunicaciones* [Telecommunications].³³
- Law 34/2002 of 11 July on the *Servicios de la sociedad de la información y de comercio electrónico* [Information Society and Electronic Trade Services].³⁴
- **Labour field.** The main labour norms containing references to national law on data protection are:
 - Organic Law 11/1985 of 2 August on *Libertad Sindical* [Freedom of Trade Union Activities].³⁵
 - Law 9/1987 of 12 June on *Representación, Condiciones de Trabajo y Participación del personal de la Administración* [Representation, Working Conditions and Participation of the Public Administration Staff].³⁶
 - Law 54/2003 of 12 December on *Reforma del marco normativo de la prevención de riesgos laborales* [Reform of the Legal Framework on Work Risks].³⁷
 - Law 31/1995 of 8 November on *Prevención de Riesgos Laborales* [Prevention of Work Risks].³⁸
 - Royal Legislative Decree 1/1995 of 24 March on *por el que se aprueba el Texto Refundido de la Ley del Estatuto de los Trabajadores* [approving the Consolidated Text of the Law on the Statute of Workers].³⁹
 - Royal Decree 1844/1994 of 9 September which enacts the *Reglamento de elecciones a órganos de representación de los trabajadores en la*

31 Spain/Ley 56/2007 (28.12.2007).

32 Spain/Ley 25/2007 (18.11.2007).

33 Spain/Ley General 32/2003 (03.11.2003).

34 Spain/Ley 34/2002 (11.07.2002).

35 Spain/Ley Orgánica 11/1985 (02.08.1985).

36 Spain/Ley 9/1987 (12.06.1987).

37 Spain/Ley 54/2003 (12.12.2003).

38 Spain/Ley 31/1995 (08.11.1995).

39 Spain/Real Decreto 1/1995 (24.03.1995).

empresa [Statutory Regulation on the Elections of Workers' Representative Bodies within the Companies].⁴⁰

1.2.3.3. Data with special protection

[29]. According to Convention number 108 of the Council of Europe, the Organic Law 15/1999 of 13 December on the Protection of Personal Data distinguishes certain categories of data with special protection. Article 7 of the Organic Law lays down that:

- In accordance with the provisions of Article 16(2) of the Constitution, nobody may be obliged to state his/her ideology, religion or beliefs. If, in relation to such data, the consent of the data subject is necessary, he/she shall be warned of his/her right to refuse such consent. Personal data which reveal the ideology, trade union membership, religion and beliefs may be processed only with the explicit and written consent of the data subject. Exceptions shall be files maintained by political parties, trade unions, churches, religious confessions or communities, and associations, foundations and other non-profit-seeking bodies with a political, philosophical, religious or trade-union aim, as regards the data relating to their associates or members, without prejudice to the fact that assignment of such data shall always require the prior consent of the data subject.
- Personal data which refer to racial origin, health or sex life may be collected, processed and assigned only when, for reasons of general interest, this is so provided for by law or the data subject has given his/her explicit consent.
- Files created for the sole purpose of storing personal data which reveal the ideology, trade union membership, religion, beliefs, racial or ethnic origin or sex life remain prohibited.
- Personal data on criminal or administrative offences may be included in files of the competent public administrations only under the circumstances laid down in the respective regulations.
- Any of the data previously mentioned can only be processed when such processing is necessary for purposes of preventive medicine or diagnosis, the provision of medical care or treatment, or the management of health-care services, provided such data processing is effected by a health professional subject to professional secrecy or by another person also subject to an equivalent obligation of secrecy. The mentioned data may also be processed when this is necessary to safeguard the vital interests of the data subject or another person in the event that the data subject is physically or legally incapable of giving his/her consent.

40 Spain/Real Decreto 1844/1994 (09.09.1994).

- In addition to this, Article 8 of the Organic Law lays down that public and private health-care institutions and centres and the corresponding professionals that may process personal data relating to the health of persons consulting them or admitted to them for treatment, in accordance with the provisions of the central or regional legislation on health care.

1.3. Debates regarding the effectiveness of the data protection system

- [30]. In Spain, there is a high level of data protection. Both, the Organic Law on the Protection of Personal Data and the specific and complementary legislation on data protection offer very effective measures of protection. In addition to this, the Spanish Data Protection Agency and the Agencies of the Autonomous Communities of Cataluña, Madrid and País Vasco have achieved very positive results, as shown in the annual reports published by each of these independent authorities.
- [31]. The existence of the Internet makes the protection of personal data very difficult. This problem was admitted by the Director of the Spanish Data Protection Agency in his appearance before the Constitutional Committee in the *Congreso de los Diputados* [Spanish Congress] in October 2008.⁴¹ The Director informed the Parliament that the Agency had resolved 18 proceedings on access to P2P networks which had led to 11,300 cases of access via Internet to the clinical histories of a gynaecological clinic; 50,000 cases of persons who had participated in trade unions' training courses; and other cases on personal data of applicants for international adoption, mentally ill persons and patients of the public health system. With regard to the dissemination of images on the Internet, especially on YouTube, the Agency approved the first Resolution sanctioning the citizens who had put videos containing images of prostitutes working in certain streets of Madrid.⁴² The providers of these services and telecommunication operators helped the Agency to identify the authors of the infringements.
- [32]. Data protection of minors is a field which requires more economic resources. In the above mentioned appearance before the Constitutional Committee, the Agency's Director specifically referred to the need of developing training activities for the protection of the

41 <http://www.datospersonales.org/> (08.01.2009).

42 https://www.agpd.es/portalweb/revista_prensa/revista_prensa/2008/notas_prensa/common/julio/NP_220708_YouTube.pdf (09.01.2009).

personal data of minors, especially in order to prevent the risks which the use of social networks on Internet, the increase of video-surveillance and the frequent abandon on the street of documents containing personal data, involve.

2. Data Protection Authority

2.1. Main features

[33]. As already mentioned, the Organic Law 15/1999 of 13 December on the Protection of Personal Data has been developed by Royal Decree 1720/2007 of 21 December, which enacts the Statutory Regulation on the Implementation of the mentioned Organic Law. The Spanish Data Protection Agency is regulated in Title VI of the Organic Law 15/1999 as a body under public law, which guarantees data protection in Spain.⁴³ Royal Decree 428/1993 of 26 March implemented the Organic Law providing the Agency with its own Statute.

[34]. As already mentioned (see Section 1.2.3 of this report), three **Autonomous Communities** out of the 17 existing in Spain have set up Data Protection Agencies by the following Laws:

- Law 5/2002 of 19 April of the Autonomous Community of Cataluña on *La Agencia Catalana de Protección de Datos* [Cataluña's Data Protection Agency].⁴⁴
- Law 8/2001 of 13 July on *Protección de Datos de Carácter Personal en la Comunidad de Madrid* [Protection of Personal Data in the Community of Madrid].⁴⁵ Decree 40/2004 of 18 March 2004 enacted the *Estatuto de la Agencia de Protección de Datos de la Comunidad de Madrid* [Regulation of the Madrid Data Protection Agency].⁴⁶ Decree 67/2003 of 22 May 2003 approved the *Reglamento de desarrollo de las funciones de la Agencia de Protección de Datos de la Comunidad de Madrid, de tutela de derechos y de control de ficheros de datos de carácter personal* [Regulation on the aims of the Madrid Data Protection Agency, the protection of rights and the control of personal data files].⁴⁷
- Law 2/2004 of 25 February of the País Vasco on *Ficheros de Datos de Carácter Personal de Titularidad Pública y de Creación de la Agencia Vasca de Protección de Datos* [Personal Data Files in Public Ownership and on the Basque Data Protection Agency] set up the independent authority of

43 <https://www.agpd.es>

44 Spain (Cataluña)/Ley 5/2002 (19.04.2002). Official website: www.apdcat.net (09.01.2009).

45 Spain (Madrid)/Ley 8/2001 (13.07.2001). Official website: www.madrid.org/apdcm (09.01.2009).

46 Spain (Madrid)/Decreto 40/2004 (18.03.2004). Official website: www.avpd.euskadi.net/s04-4319/es (09.01.2009).

47 Spain (Madrid)/Decreto 67/2003 (22.05.2003).

data protection in this Autonomous Community and regulated its activity in the autonomous territory.⁴⁸

[35]. The scope of the Autonomous Communities' Data Protection Agencies is restricted to the public administration and public bodies of the corresponding Autonomous Communities. When performing its functions, the Spanish Data Protection Agency relies on clear and effective mechanisms for coordinating and collaborating with the Data Protection Agencies of the Autonomous Communities of Catalonia, the Basque Country and Madrid, in order to ensure the equality of all citizens in terms of their right to protect their personal data. Thus, the Director of the Data Protection Agency may regularly meet the corresponding bodies in the Autonomous Communities for the purposes of institutional cooperation and coordination of the criteria or operating procedures. The Director of the Data Protection Agency and the corresponding bodies in the Autonomous Communities may ask each other for the information needed for the exercise of their functions (Article 41(3) of the Law 15/1999).

[36]. The **structure** of the Spanish Data Protection Agency is the following:

- **Director.** The Director manages and represents the Agency and his/her acts are regarded as the Agency's acts. The Director is appointed from amongst the members of the Consultative Council, by Royal Decree, for a period of four years. The Director exercises his functions fully independently and objectively and shall not be subject to any instructions thereby. The Director has to ensure data protection through resolutions which put an end to the administrative procedure and which can be subject to judicial review. The Director also has internal disciplinary functions, coordinates the Agency's activities with the Autonomous Communities Data Protections Agencies and manages the internal issues of the Agency.
- **Consultative Council.** The Director of the Data Protection Agency shall be assisted by a Consultative Council made up of the following members:
 - One member of the Congress of Deputies, proposed by the Congress.
 - One member of the *Senado* [Senate], proposed by the Senate.
 - One member of the central administration, proposed by the government.
 - One member of the local administration, proposed by the *Federación Española de Municipios y Provincias* [Spanish Federation of Municipalities and Provinces].
 - One member of the *Real Academia de la Historia* [Royal Academy of History], proposed by the Academy.

48 Spain (País Vasco)/Ley 2/2004 (25.02.2004).

- One expert in the field, proposed by the *Consejo Superior de Universidades* [Supreme Council of Universities].
- A representative of users and consumers, to be selected according to a method to be laid down by regulation.
- One representative of each Autonomous Community which has set up a data protection agency on its territory, to be proposed in accordance with the procedure laid down by the Autonomous Community concerned.
- One representative of the private file sector, to be proposed according to the procedure laid down by regulation.

The functions of the Consultative Council are to issue reports in all the questions required by the Director and to draw up proposals related to data protection.

- **The General Data Protection Register** is the general register of the Data Protection Agency, in which the files referred to in the Organic Law 15/1999 shall be entered. The Register keeps records of the registered data processing and of the authorisations for international data transfer.
- **Supervisory Authorities.** The supervisory authorities of the Agency may inspect the files referred to in the Law and obtain any information they require for the performance of their tasks. The supervisory authorities are in charge of protecting individual rights and of conducting disciplinary processes.
- **General Secretariat.** The Secretariat gives support to the Agency and collaborates with the rest of the departments of the Agency. The Secretariat has managing functions (only if delegated by the Director) and is responsible for the custody of the documentation and for the edition of catalogues, reports and publications. The Secretariat has an information service to answer the citizens' general enquiries about data protection.

2.2. Powers

- [37]. The powers given by the Law to the Spanish Data Protection Agency and also to the Autonomous Communities Data Protection Agencies fulfil the requirements of Article 28 of Directive 95/46/EC. The Data Protection Agencies in Spain act fully independently and are not subject to any instruction.
- [38]. The Spanish Data Protection Agency acts on its own initiative in the cases foreseen in the legislation and in its implementing provisions. Most of the times, the activity of the Agency starts after a complaint or request of the person concerned. However, in case the Agency obtains information on eventual infringements, especially through the

mass media, and when this information offers enough evidence, the Director orders an own initiative action. The Agency also periodically performs on its own initiative inspections of certain sectors to ensure compliance with the legislation on data protection and ensure its application, and, in case any deficiency is detected, to issue recommendations for improvement. The most recent example of such an inspection has been the *Plan Sectorial de Oficio sobre llamadas telefónicas y mensajes a telefonía móvil con fines comerciales y publicitarios* [Sectorial Inspection Plan on Mobile Phone Calls and Short Messages sent with commercial and advertising purposes] (November 2008).⁴⁹

[39]. The Spanish Data Protection Agency is consulted when drawing up statutory or administrative norms on data protection in the following cases:⁵⁰

- The Agency is consulted on the draft norms which develop the Organic Law on Data Protection.
- The Agency is consulted on the draft norms which deal with any aspect of data protection.
- The Agency gives instructions and makes recommendations to adapt the processing of personal data to the Organic Law.
- The Agency makes recommendations on security measures and access control to the files.

[40]. The supervisory authorities of the Agency (mentioned in Section 2.1 of the report) may inspect the files referred to in the Organic Law on Data Protection and obtain any information they require for the performance of their tasks. To this end, they may require the disclosure or transmission of documents and data and examine them at their place of storage, inspect the hardware and software used to process the data, and obtain access to the premises on which they are located. In the performance of their tasks, the officials carrying out the inspection shall be deemed to be a public authority.

[41]. The Spanish Data Protection Agency and the Autonomous Community Data Protection Agencies, within their scope of action,

49 This information is available on:
https://www.agpd.es/portalweb/canaldocumentacion/recomendaciones/common/pdfs/plan_sectorial_publicidad_telefonica_2008.pdf (07.01.2009).

https://www.agpd.es/portalweb/canaldocumentacion/recomendaciones/common/pdfs/recomendaciones_sms_llamadas_11_2008.pdf (07.01.2009).

50 Article 37 of the Organic Law 15/1999.

consider the applications and complaints from any person or association with regard to the processing of personal data.

- [42]. Data subjects may lodge an appeal before the *jurisdicción contencioso-administrativa* [administrative dispute jurisdiction] against the Agency's resolutions and decisions which have damaged their rights.⁵¹ In addition to this, data subjects who, as a result of failure to comply with the provisions of the Organic Law 15/1999 on the part of the controller or processor, suffer damage to their possessions or rights, have a right to damages. Where the files are in public ownership, liability shall be established in accordance with the legislation regulating the liability of public administrations. In the case of files in private ownership, the case shall be heard by the civil courts.⁵²
- [43]. The Spanish Data Protection Agency draws up an annual report and submits it to the *Ministerio de Justicia* [Ministry of Justice], which presents it to the *Cortes Generales* [Spanish Parliament]. Similarly, the Autonomous Community Data Protection Agencies draw up annual reports to be presented at the respective regional Parliaments. The annual reports are public.
- [44]. From the analysis of the Spanish legislation on data protection and of the four Data Protection Agencies in Spain, it can be concluded that their powers are sufficient to achieve effective data protection in Spain.

2.3. Remit

- [45]. The Organic Law 15/1999 applies to personal data recorded on a physical support which makes them capable of processing, and to any type of subsequent use of such data by the public and private sectors. The Organic Law governs any processing of personal data:
- When the processing is carried out on Spanish territory as part of the activities of an establishment belonging to the person responsible for the processing;
 - When the person responsible for the processing is not established on Spanish territory but is subject to Spanish law pursuant to the norms of public international law;

51 Article 18(4) of Organic Law 15/1999.

52 Article 19 of Organic Law 15/1999.

- When the person responsible for the processing is not established on the territory of the European Union and is using for the processing means situated on Spanish territory, unless such means are used solely for transit purposes.
- [46]. In relation to the issues excluded from the Organic Law on Personal Data Protection, Article 2(2) establishes that the system of protection of personal data laid down by the Organic Law shall not apply to:
- Files maintained by natural persons in the exercise of purely personal or household activities.
 - Files subject to the legislation on the protection of classified materials.
 - Files established for the investigation of terrorism and serious forms of organised crime. However, in such cases, the person responsible for the file shall previously inform the Data Protection Agency of its existence, its general characteristics and its purpose.
- [47]. On the other hand, as already detailed in Section 1.2.3.1 of this report, there are specific provisions for some personal data processing (for example, the Organic Law 5/1985 of 19 June on General Electoral Regime, which deals with files related to the elections).

2.4. Resources

- [48]. The posts in the bodies and services belonging to the Data Protection Agency are filled by officials of the public administrations and by staff recruited to this end, in accordance with the functions assigned to each post. The staff of the Data Protection Agencies is obliged to keep secret any information acquired in the exercise of its functions, even after having ceased to exercise them.⁵³ In 2005, 61 per cent of the officials and recruited staff working at the Spanish Data Protection Agency were women and 39 per cent were men; in 2006, 60 per cent were women and 40 per cent men.
- [49]. With regard to the resources allocated to the Spanish Data Protection Agency, the annual reports of the Spanish Data Protection Agency and of the Agencies of the Autonomous Communities show a constant increase of their activities, in the sphere of their respective competences. This fact obliges them to update every year the number of human and economic resources. This is done through the draft budget drawn up by every Agency and sent to the respective government for its incorporation into the national or regional annual budget.

⁵³ Article 40(2) of Organic Law 15/1999.

[50]. In concrete, for the performance of its tasks, the Spanish Data Protection Agency has the following budget:

- The annual appropriations from the *Presupuestos Generales del Estado* [General Government Budget];
- The goods and assets making up its resources, and any interest from them;
- Any other resources legally assigned to it.⁵⁴

The Agency's implementation of the budget is subject to internal control by the *Intervención General* [General Audit] and subject to external control by the *Tribunal de Cuentas* [Court of Auditors].

The budget of the Spanish Agency has been doubled in the last five years (see Annex 1).

2.5. Independence

[51]. According to Article 35(1) of the Organic Law 15/1999 of Data Protection, the Spanish Data Protection Agency is a body under public law, with its own legal personality and unlimited public and private legal capacity, which acts fully independently of the public administrations in the performance of its tasks. The Agency is governed by the provisions of the Organic Law and of its Statute, which has been approved by Royal Decree 428/1993 of 26 March by the Government. Article 1(2) of the Royal Decree insists on the independency of the Agency and states that the Ministry of Justice is the channel of communication between the Agency and the Government. The status of independency has also been expressly included in the laws establishing the Autonomous Communities Data Protection Agencies.⁵⁵ Furthermore, Article 36(2) of the Organic Law 15/1999 establishes that the Director of the Agencies exercises his/her functions fully independently and objectively and shall not be subject to any instructions thereby. The Director of the Spanish Data Protection Agency is appointed by the government from amongst the members of the Agency's Consultative Council. The Autonomous Communities' Agencies of Catalonia, Madrid and Basque Country apply a similar system. The Directors of the Agencies exercise their functions fully independently and have unlimited public and private

⁵⁴ Article 35(4) of Organic Law 15/1999.

⁵⁵ Article 1(2) of Decree 48/2003, of 20 February, of the Autonomous Community of Catalonia; Article 14 of Law 8/2001, of 13 July, of the Autonomous Community of Madrid and Article 10 of Law 2/2004, of 25 February of Autonomous Community of Basque Country.

legal capacity.⁵⁶ There is no appearance or evidence of partiality concerning the data protection authorities.

2.6. Own initiative

[52]. Since one of the main functions of the Spanish Data Protection Agency and of the Autonomous Community Agencies is to ensure data protection, the Agencies can become active on their own initiative to guarantee the protection of individual rights in this field. The Agency can act on the basis of the news appeared on the media or in any other source. It is not necessary to receive a complaint of the data subject concerned. In those cases in which the Agency acts on its own initiative, the Director shall take the initiative in the investigation procedure.

2.7. Monitoring role

[53]. The right of the subject to be informed before the data collection takes place is one of the main rights which can be found in Article 5(1) and (2) of the Organic Law 15/1999. The Spanish Data Protection Agency's website provides citizens information on this right.⁵⁷ The website explains that data subjects from who personal data are requested must previously be informed explicitly, precisely and unequivocally of the following:

- The existence of a file or personal data processing operation, the purpose of collecting the data, and the recipients of the information.
- The obligatory or voluntary nature of the reply to the questions put to them.
- The consequences of obtaining the data or of refusing to provide them.
- The possibility of exercising rights of access, rectification, erasure and objection.
- The identity and address of the controller or of his/her representative, if any.

[54]. The greater awareness among citizens of the right to data protection has contributed to an increase in the claims for alleged breaches of the

56 Article 14(1) of Decree 48/2003 of 20 of February of the Autonomous Community of Catalonia; Article 16 of Law 8/2001 of 13 July of the Autonomous Community of Madrid and Article 15 of Law 2/2004 of 25 February of the Autonomous Communities of the Basque Country.

57 https://www.agpd.es/portalweb/canalciudadano/derechosciudadano/derecho_informacion/index-ides-idphp.php (09.01.2009).

Organic Law on the Protection of Personal Data. Thus, in 2007, the procedures initiated as a result of complaints lodged by citizens or due to an initiative of the Director of the Agency rose by around 7 per cent to a total of 1,263. The largest number of inspections had to do with telecommunications companies and financial institutions, followed by videosurveillance, with an increase of over 400 per cent compared to the previous year.

Other sectors in which inspection procedures have been initiated are:

- Public administration.
- Electronic commercial communications – Spam.
- Associations, clubs, professional associations, political parties, non governmental organisations.
- Trade, transport and hotel trade.
- Human resources and labour field.
- Professionals.
- Internet services.
- Health system.
- Armed and security forces.
- Advertising and market research.
- Gas, electricity and water supply.
- Education.
- Commercial communications by fax.
- Insurance.
- Mass media.

Also during 2007, there has been a decrease of sanction procedures resolved in the following sectors:

- Health system.
- Insurance.
- Residents' associations and real estate agencies.
- Human resources and labour field.
- Commercial communications by fax.

[55]. The number of inspections and declarations of infringements has been reduced at the local level (city councils). However, this number has increased at the national and regional level. Some of the most common infringements deal with:

- Lack of inclusion of the information clause of Article 5 of the Organic Law 15/1999 in traffic fines or infractions forms.
- Lack of information in the data forms for visitors to public buildings.
- Undue access to personal data in public bodies' files.

2.8. Availability of the Agency's Resolutions

[56]. Article 37(2) of the Organic Law of Data Protection provides that resolutions of the Spanish Data Protection Agency shall be published, once they have been notified to the parties concerned. The resolutions shall be published preferably by means of computerised methods or on-line.⁵⁸ Instruction 1/2004 of 22 December of the Spanish Data Protection Agency on *Publicación de sus Resoluciones* [Publication of the Agency's Resolutions] regulates the methods and periods of publications. To fulfil this legal duty, the Spanish Data Protection Agency has set up a website in which all the Agency's resolutions and decisions have been published,⁵⁹ and in which one can also find wide information about the Agency, about how to protect data and how to guarantee and protect the public liberties and fundamental rights with regard to the processing of personal data.⁶⁰ As already mentioned (see Section 2.2. of the present report), the Organic Law establishes the obligation of the Agency to draw up an annual report which is made public.⁶¹ The annual report describes the Agency's activity during the year.

[57]. Also, the Catalanian, Madrid and Basque Data Protection Agencies have the legal obligation to publish their resolutions and have also created their respective websites, in which the respective Agencies' resolutions and decisions are published and in which one can find information on the regional Agency.⁶² Moreover, Autonomous

58 Amendment of Organic Law 15/1999 by Law 62/2003 of 30 December (Spain/Ley 62/2003 (30.12.2003).

59 <https://www.agpd.es/portalweb/resoluciones/index-ides-idphp.php> (09.01.2009).

60 <https://www.agpd.es/portalweb/index-ides-idphp.php> (09.01.2009).

61 Article 37 of the Organic Law 15/1999.

62 Catalonia: <http://www.apdcat.net/> (09.01.2009).

Communities Agencies also have the obligation to draw up and publish an annual report, which describes their activities.

2.9. Article 29 Working Party

[58]. As already said, the Spanish Data Protection Agency participates, as a representative of the Spanish Government, in the Working Party established under Article 29 of Directive 95/46/EC. All the documents issued by the Working Party are published in the Agency's website.⁶³ The Spanish Data Protection Agency refers to the Opinions of the Working Party both in the annual reports as in its legal reports and resolutions. In addition to this, the Opinions of the Working Party are frequently applied to concrete cases.⁶⁴

2.10. Advisory role

[59]. The Spanish Data Protection Agency is consulted when drawing up statutory or administrative norms on data protection in the following cases:⁶⁵

- The Agency is consulted on the draft norms which develop the Organic Law on Data Protection.
- The Agency is consulted on the draft norms which deal with any aspect of data protection.
- The Agency gives instructions and makes recommendations to adapt the processing of personal data to the Organic Law.
- The Agency makes recommendations on security measures and access control to the files.

Madrid:

http://www.madrid.org/cs/Satellite?c=Page&cid=1109179336864&idPage=1109179336864&language=es&pagename=APDCMper cent2FPager cent2FResoluciones_APDCM. (09.01.2009).

Basque Country: <http://www.avpd.euskadi.net/s04-5213/es/> (09.01.2009).

⁶³ https://www.agpd.es/portalweb/canaldocumentacion/docu_grupo_trabajo/wp29/index-ides-idphp.php (09.01.2009).

⁶⁴ For example, the Opinions of the Working Party are cited in the following Reports: 368/2006, 223/2007, 228/2007, 391/2007, 247/2008 and 314/2008. In addition to this, the Opinions of the Working Party have been applied to the following concrete cases: E/00100/2004, E/00833/2005, PS/00305/2005, E/01054/2006 and PS/00043/2008. The Opinions have also been applied to the following international data transfer cases: TI/00004/2007 and TI/00006/2008.

⁶⁵ Article 37(1)(h) of the Organic Law 15/1999.

- [60]. Thus, the Agency plays a key advisory role in the elaboration of norms which develop the main principles on data protection established by the Organic Law. The legal measures laid down in Article 37 are always respected and applied. For example, the Spanish Agency was consulted on the draft Statutory Regulation for the Implementation of the Organic Law on the Protection of Personal Data (Royal Decree 1720/2007 of 21 of December).

2.11. Awareness raising role

- [61]. The Spanish Agency of Data Protection and the Autonomous Communities Agencies in Cataluña, Madrid and País Vasco perform an important awareness raising role on data protection. Information campaigns organised by the Agencies are very frequent and are aimed at concrete citizens' groups to promote knowledge on their rights in relation to data protection. Information is regarded as a key element by the Agencies in fostering awareness among citizens of their right to the protection of personal data. With the purpose of satisfying the increasing demand for information and extending its public dissemination actions, the Spanish Agency has intensified its relations with the media, increasing its personnel and material means dedicated to dissemination. As a result of this strengthening, there has been an increase in the demand for information by different media and in the impact of such information. In this respect, in 2007, approximately 450 requests for interviews and information and about 850 impacts were counted in written and digital media.⁶⁶
- [62]. All Agencies have a section on their website, where citizens can find not only information on data protection, but also submit their queries to the Agencies, which answer and inform them. In this sense, it is important to highlight the initiative taken by the Spanish Data Protection Agency to organise an annual open session, with the objective of bringing together all kind of professionals, businessmen and women, social agents and citizens in order to discuss the most important current problems on data protection. There is free access to the meeting, which is also free of charge. More than 2,000 persons assisted to the first session, which took place on 22 April 2008. The second session will take place on 28 January 2009.⁶⁷

66 The Spanish Data Protection Agency. Overview. Brochure on the Agency in English language, available at: https://www.agpd.es/portalweb/canaldocumentacion/publicaciones/common/pdfs/AEPD_en.pdf (09.01.2009).

67 https://www.agpd.es/portalweb/jornadas/2_sesion_abierta/index-ides-idphp.php (09.01.2009).

- [63]. The Autonomous Communities Agencies are also very active in the dissemination of rights related to data protection, publishing for example journals on data protection.

3. Compliance

[53]. The Organic Law 15/1999 of 13 December on the Protection of Personal Data allows files in public and private ownership and regulates them separately.

3.1. Files in public ownership

[54]. Article 20 of the Organic Law provides that the files of the public administrations may only be created, modified or deleted by means of a general provision published in the *Boletín Oficial del Estado* [Official Journal of the State] or in the corresponding official gazette. The provisions on the deletion of files shall lay down the fate of the files or, where applicable, the timetables to be adopted for their destruction. Files in public ownership do not require any authorization from the Spanish Data Protection Agency, whereas files in private ownership do require it (see below). However, Article 55(1) of Royal Decree 1720/2007 of 21 of December on the Regulation that implements the Organic Law states that all publicly-owned personal data files shall be notified to the Spanish Data Protection Agency by the competent body of the Administration controlling the filing system for their registration in the General Data Protection Register.

[55]. The provisions for the creation or modification of files must indicate:

- The purpose of the file and its planned use.
- The persons or bodies on which it is planned to obtain personal data or which they are obliged to submit data.
- The procedure for collecting the personal data.
- The basic structure of the file and a description of the personal data included in it.
- The intended transfers of personal data and, where applicable, the intended transfers of data to third countries.
- The officials in the administrations responsible for the file.
- The services or units with which the rights of access, rectification, cancellation and objection may be exercised.
- The security measures, indicating the basic, medium or high level required.

[56]. With regard to the communication of data between public administrations, the personal data collected or drawn up by public administrations in the performance of their tasks shall not be

communicated to other public administrations for the exercise of different powers or powers relating to other matters unless the communication is for the purpose of subsequent processing for historical, statistical or scientific purposes. Personal data which a public administration obtains or draws up on behalf of another administration may be communicated. In these cases, the consent of the data subject shall not be required.⁶⁸ In practice, the public administrations strictly respect the duties established in the Organic Law in relation to the creation, modification and suspension of files. The provisions published in the corresponding official gazettes provide evidence of compliance with these legal duties.

- [57]. Duties in the Organic Law are clearly described and in practice there is a high level of compliance with the legislation. In spite of this, the Spanish Data Protection Agency and the Autonomous Communities Agencies, in the scope of their powers, prosecute and impose penalties in case of breach of the law. There is no further evidence regarding compliance or lack of compliance with data protection legislation in practice.
- [58]. The **files of the security forces** constitute a further interesting issue. Collection and processing, for police purposes, of personal data by the security forces without the consent of the data subjects shall be limited to those cases and categories of data necessary for the prevention of a genuine threat to public safety or for the suppression of crime; such data shall be stored in special files established for the purpose, which must be classified according to their degree of reliability.⁶⁹ The security forces can also obtain specially protected data under certain requirements. The data may be collected and processed only in cases in which it is absolutely essential for the purposes of a specific investigation, without prejudice to checks on the legality of the administrative action or the obligation to consider any applications made by the data subjects falling within the remit of the bodies responsible for the administration of justice. Personal data stored for police purposes shall be cancelled when they are not necessary for the investigations for the purposes of which they were stored. The Spanish Data Protection Agency periodically reviews the security forces' files to assess compliance with these duties.

68 Article 21 of Organic Law 15/1999.

69 Article 22 of Organic Law 15/1999.

3.2. Files in private ownership

- [59]. Files in private ownership containing personal data may be created when it is necessary for the success of the legitimate activity and purpose of the person, undertaking or body owning them and the guarantees laid down by Organic Law 15/1999 for the protection of persons are respected.⁷⁰ Any person or body creating files of personal data shall notify the Data Protection Agency prior to the creation of the files. Notification shall indicate the identification of the data controller, the identification of the filing system, its purposes and planned usage, the processing system used in their organisation, the group of persons about whom data are obtained, the procedure and origin of the data, the categories of data, the service or unit of access, indication of the basic-, medium- or high-level security measures that are applicable and, if appropriate, the identification of the data processor where the filing system is located and the recipients of assignments and international data transfers.⁷¹
- [60]. The Data Protection Agency must be informed of any changes in the purpose of the computer file, the controller and the address of its location. The General Data Protection Register shall enter the file if the notification meets the requirements. If this is not the case, it may ask for the missing data to be provided or take remedial action. If one month has passed since submitting the application for entry without the Data Protection Agency responding, the computer file shall, for all accounts and purposes, be considered entered in the Register. There is no further evidence regarding compliance or lack of compliance with data protection legislation in practice.

3.3. Sensitive data processing operations

- [61]. With regard to data specially protected, the general rule is that they can only be processed if the data subject has given his/her consent. Specially, personal data which reveal the ideology, trade union membership, religion and beliefs may be processed only with the explicit and written consent of the data subject. Exceptions shall be files maintained by political parties, trade unions, churches, religious confessions or communities, and associations, foundations and other non-profit-seeking bodies with a political, philosophical, religious or trade-union aim, as regards the data relating to their associates or members. On the other hand, personal data which refer to racial

⁷⁰ Article 25 of Organic Law 15/1999.

⁷¹ Article 55(2) of Royal Decree 1720/2007.

origin, health or sex life may be collected, processed and assigned only when, for reasons of general interest, this is so provided for by law or the data subject has given his/her explicit consent. Files created for the sole purpose of storing personal data which reveal the ideology, trade union membership, religion, beliefs, racial or ethnic origin or sex life remain prohibited.⁷²

3.4. Officers

[62]. As already explained (see Section 2.4 of the present study), the posts in the bodies and services belonging to the Data Protection Agency shall be filled by officials of the public administrations and by staff recruited to that end. The Organic Law does not expressly provide that the Director of the Agency shall be an official, though it is always so in practice.

⁷² Article 7 of Organic Law 15/1999.

4. Sanctions, Compensation and Legal Consequences

4.1. Infringements

- [63]. Controllers and processors shall be subject to the penalties set out in Organic Law 15/1999 both for files in public and private ownership.
- [64]. The Organic Law of Data Protection sets out three types of penalties: minor, serious and very serious.⁷³

The following shall be minor infringements:

- Failure to respond, for formal reasons, to a request by a data subject for the rectification or cancellation of personal data subject to processing, when that request is justified in law.
- Failure to provide the information requested by the Data Protection Agency in the exercise of the functions assigned to it by law, with regard to non-substantive aspects of data protection.
- Failure to request the entry of the file of personal data in the General Data Protection Register, where this does not amount to a serious infringement.
- Collection of personal data on data subjects without providing them with the information set out in Article 5 of the Organic Law on Data Protection.
- Failure to respect the duty of secrecy set out in Article 10 of this Law, where this does amount to a serious infringement.

The following shall be serious infringements:

- Creating files in public ownership, or initiating the collection of personal data for such files, without the authorisation published in the Official Journal of the State or the corresponding official gazette.
- Creating files in private ownership, or initiating the collection of data for such files, for purposes other than the legitimate purposes of the undertaking or body.

⁷³ Article 44 of Organic Law 15/1999.

- Collecting personal data without obtaining the explicit consent of the data subjects, where this has to be obtained.
- Processing personal data or subsequently using them in infringement of the principles and guarantees laid down in this Law, and failure to respect the protection laid down by the implementing provisions, where this does not amount to a very serious infringement.
- Preventing or hindering the exercise of the rights of access and objection, and refusing to provide the information asked for.
- Maintaining incorrect personal data or failure to rectify or cancel such data when legally obliged if the citizens' rights protected by this Law are affected
- Breach of the duty of secrecy for personal data incorporated into files containing data on the commission of administrative or criminal offences, public finance, financial services, provision of creditworthiness and credit services, as well as other files containing a set of personal data sufficient to obtain an assessment of the personality of the individual.
- Maintaining files, premises, programs or hardware containing personal data without the security required by regulations.
- Failure to send the Data Protection Agency the notifications laid down in this Law or in its implementing provisions, and not providing it, on time, with any documents and information due to it or which it may require to that end.
- Impeding inspections.
- Failure to enter a file of personal data in the General Data Protection Register when this has been required by the Director of the Data Protection Agency.
- Failure to comply with the duty of information when the data have been obtained from a person other than the data subject.

The following shall be very serious infringements:

- The misleading or fraudulent collection of data.
- Communication or transfer of personal data other than in cases where these are allowed.
- Obtaining and processing personal data with special protection (referred to in Article 7(2) of Organic Law 15/1999) without the explicit consent of the data subject; obtaining and processing data on racial origin, health or sex life (referred to in Article 7(3) of Organic Law 15/1999) when not covered by a law or when the data subject has not given his/her explicit consent, or breaching the prohibition of files created for the sole purpose of storing personal data which reveal the ideology, trade union membership, religion, beliefs, racial or ethnic origin or sex life (Article 7(4) of Organic Law 15/1999).

- Failure to cease the illegitimate use of personal data processing operations when required to do so by the Director of the Data Protection Agency or by the persons owning the rights of access.
- The temporary or final transfer of personal data which have been subjected to processing, or which have been collected for such processing, to countries which do not provide a comparable level of protection, without the authorisation of the Director of the Data Protection Agency.
- Processing personal data illegally or in breach of the principles and guarantees applying to them, when this prevents or infringes the exercise of fundamental rights.
- Breach of the duty to maintain the secrecy of the personal data with regard to personal data with special protection as well as of data obtained for police purposes without the consent of the data subjects.
- Systematically impeding or failing to comply with the exercise of the rights of access, rectification, cancellation or objection.
- Systematic failure to comply with the duty to notify the inclusion of personal data in a file.

[65]. The Organic Law on Data Protection includes specific provisions on infringements by public administrations.⁷⁴ In these cases, the Director of the Data Protection Agency shall issue a decision setting out the measures to be adopted to terminate or correct the effects of the infringement. This decision shall be notified to the data controller, the body to which he/she is responsible, and to the data subjects, if any.

The Director of the Agency may also propose that disciplinary proceedings be initiated. The procedure and penalties to be applied shall be those laid down in the legislation on disciplinary proceedings in public administrations. Decisions on the measures and proceedings shall be communicated to the Agency. The Director of the Agency shall communicate to the Ombudsman the proceedings and decisions taken which concern public administrations.

4.2. Penalties

[66]. Minor infringements shall be punished by a fine of 100,000 (601,01 euros) to 10,000,000 *pesetas* (60.101,21 euros) [*pesetas*: former

⁷⁴ Article 46 of Organic Law 15/1999.

Spanish currency].⁷⁵ Serious infringements shall be punished by a fine of 10,000,000 (60.101,21 euros) to 50,000,000 *pesetas* (300.506,05 euros) Very serious infringements shall be punished by a fine of 50,000,000 (300.506,05 euros) to 100,000,000 *pesetas* (601.012,10 euros)⁷⁶

The time limits for pursuing infringements shall be three years for very serious infringements, two years for serious infringements and one year for minor infringements.⁷⁷

- [67]. The amount of the penalties shall be graded taking account of the nature of the personal rights involved, the volume of the processing operations carried out, the profits gained, the degree of intentionality, repetition, the damage caused to the data subjects and to third parties, and any other considerations of relevance in determining the degree of illegality and culpability of the specific infringement. In no case shall a penalty be imposed which is higher than that laid down in the Law for the category covering the infringement to be punished.
- [68]. Penalties imposed for very serious infringements expire after three years, those imposed for serious infringements after two years, and those imposed for minor infringements after one year.
- [69]. The Organic Law on Data Protection takes into account the existence of circumstances that may reduce the responsibility. In this sense, if, in the light of the circumstances, there is a qualified diminution of the culpability of the offender or of the illegality of the action, the body applying the penalties shall determine the amount of the penalty by applying the scale for the category of penalties immediately below that for the actual case in question.
- [70]. In addition to this, in cases of very serious infringement, involving the use or illicit transfer of personal data in which the exercise of the rights of citizens and the free development of the personality guaranteed by the Constitution and the laws are seriously impeded or otherwise affected, the Director of the Data Protection Agency may, in addition to imposing a penalty, require the controllers of personal data files in both public and private ownership to terminate the use or illicit transfer of the data.⁷⁸ If there is no response to this requirement, the Data Protection Agency may, on the basis of a reasoned decision,

⁷⁵ The Law refers to the former Spanish currency. Nowadays, these quantities have to be calculated to its equivalent in euros.

The Government shall regularly update the amount of the penalties in accordance with changes in the price indices.

⁷⁶ Article 45 of Organic Law 15/1999.

⁷⁷ Article 47 of Organic Law 15/1999.

⁷⁸ Article 49 of Organic Law 15/1999.

immobilise such files for the sole purpose of restoring the rights of the data subjects.

4.3. Appeals

- [71]. The decisions of the Data Protection Agency or the corresponding body in the Autonomous Community put an end to the administrative procedure. The interested party may appeal against the decisions of the Agencies to the *contencioso-administrativo* [contentious-administrative] courts.

4.4. Follow up activities

- [72]. The Director of the Spanish National Agency and the Directors of the Autonomous Communities Agencies have follow up competences on open procedures and can periodically inspect, on their own initiative, certain files to check if their recommendations or decisions have been applied.
- [73]. The legal basis for the follow up activities derives from the functions of the Agency established in the Organic Law. According to Article 37, the Agency ensures compliance with the legislation on data protection and ensures its application, in particular as regards the rights of information, access, rectification, objection and cancellation of data. The Agency also requires controllers and processors, after having heard them, to take the measures necessary to bring the processing operations into line with the Law and, where applicable, to order the cessation of the processing operation and the cancellation of the files, when the operation does not comply with the provisions of the Law.
- [74]. Sometimes the detection of an infringement reveals a bad common practice in a certain sector or type of body. In this case, the Agency usually sends letters to the companies of that sector to prevent them from committing the same type of infringement. Thus, the companies have a chance to take the measures to prevent the infringement.
- [75]. As already mentioned (see Section 4.1), in case of infringements by public administrations there is an additional control by the Spanish

Ombudsman, since the Director of the Agency shall communicate to the Ombudsman the proceedings and decisions taken in such cases.⁷⁹

4.5. Initiative

[76]. As a general rule, the enforcement of data protection legislation through sanctions and compensation payments depends mainly on the personal initiative of the data subjects. Data subjects can exercise their right of objection, access, rectification and cancellation. A data subject who is denied, either wholly or partially, the exercise of the mentioned rights, may bring this to the attention of the Data Protection Agency or, where applicable, to the competent body in each Autonomous Community, which must decide on the admissibility or inadmissibility of the denial. As just mentioned (see Section 4.3), the data subject may also lodge an appeal against the decisions of the Agencies to the contentious-administrative courts. Notwithstanding this, the Director of the Spanish Data Protection Agency and the Directors of the Agencies of the Autonomous Communities can initiate review procedures which may lead to a penalty procedure.⁸⁰

4.6. Data protection in the labour sphere

[77]. Data protection in the context of employment constitutes one of the sectors in which the Agency has made a special effort during the last years. As already exposed in Section 1.2.3.2 of this report, the main legal norms which expressly refer to the national legislation on data protection are:

- Organic Law 11/1985 of 2 August on the Freedom of Trade Union Activities.
- Law 9/1987 of 12 June on Representation, Working Conditions and Participation of the Public Administration Staff.
- Law 54/2003 of 12 December on Reform of the Legal Framework on Work Risks.
- Law 31/1995 of 8 November on Prevention of Work Risks.
- Royal Legislative Decree 1/1995 of 24 March on the Consolidated Text of the Law on the Statute of Workers.

⁷⁹ Article 46(4) of Organic Law 15/1999.

⁸⁰ Articles 16-18 of Organic Law 15/1999.

- Royal Decree 1844/1994 of 9 September which enacts the Regulation on workers' representative bodies within the companies.

[78]. The Data Protection Agency monitors that the employees' personal data, which the company requires and collects for the development of its functions, receive an adequate protection. The Agency monitors with special care the personal data of the employees who are members of trade unions or who represent the workforce interests in the work councils. In 2007, the Agency has resolved several procedures concerning personal data in the labour sphere: for example, a case on an e-mail sent from the workplace; the use of personal data to dismiss an employee; the access given to the mass media on the curricula vitae of other companies' employees; or the advertising campaign on training activities and different courses sent by fax to companies and workers).⁸¹

81 Spanish Data Protection Agency, *Memoria* [Annual Report] 2007, available at: https://www.agpd.es/portalweb/canaldocumentacion/publicaciones/common/pdfs/memoria_AEPD_2007.pdf (09.01.2009).

5. Rights Awareness

[79]. Both the national and the autonomous Data Protection Agencies develop a highly remarkable awareness rising activity to convince processors of files in public and private ownership of the importance of an adequate compliance with the legislation on data protection, to inform them of their duties and to help them to comply with them. In addition to this, the Agencies undertake actions specifically aimed at enhancing citizens' awareness of their right to data protection and citizens' capacity to effectively contribute to that protection. Following studies on awareness regarding data protection can be mentioned:

- *Estudio sobre el grado de adaptación de las Pequeñas y Medianas Empresas españolas a la Ley Orgánica de Protección de Datos y el nuevo Reglamento de Desarrollo* [Study on the Level of Compliance of Small and Medium Size Spanish Companies with the Organic Law on Personal Data Protection and with the new Statutory Regulation].⁸² This Study affirms that 96 per cent of the small and medium size Spanish companies have files containing personal data, and 78 per cent have them in electronic files, so that all of them fall under the scope of the data protection legislation. Small and medium size Spanish companies show a positive attitude towards data protection: 82 per cent of the studied companies affirmed that they were aware of the need of compliance with the organic Law on Personal Data Protection and with the Statutory Regulation, whereas 79 per cent confirmed their intention to assign economic and/or human resources to accomplish with the legislation on data protection.
- There is also an important study of the Basque Agency on *La protección de datos personales* [Personal Data Protection], which deals with the social perception on data protection in País Vasco (June 2008).⁸³ This study states that only a 37 per cent of the population of this Autonomous Community is very or quite concerned about how the public bodies and the private companies are using the citizens' personal data they have. This level of concern is quite low compared to the European Union average of 64 per cent.

82 Instituto Nacional de Tecnologías de la Comunicación [National Institute of Communication Technologies], July 2008, available at: http://www.inteco.es/Seguridad/Observatorio/Estudios_e_Informes/Estudios_e_Informes_1/estudio_lopd_pymes (08.01.2009).

83 This study is available at: http://www.avpd.euskadi.net/s04-5249/es/contenidos/informacion/estudio/es_cuali/adjuntos/informe.pdf (08.01.2009).

6. Analysis of deficiencies

- [80]. The current Spanish data protection system is efficient and does not show any important deficiency, except for the need of updating the budget every year to attain the increasing demand of data protection and dissemination. Taking into account that data protection is a very important and vulnerable field, it is necessary to further improve the public administrations' involvement in the citizens' data protection. In addition to this, it is also important to make the data processors aware of the need of knowing and respecting the legislation on data protection, since sometimes this legislation is perceived as complex and difficult to apply. A great part of the content of the Agencies' official websites is dedicated to provide data subjects and processors with appropriate information to facilitate the respect of their rights and the fulfilment of their duties.
- [81]. Although it cannot be regarded as a deficiency of the system, it is necessary to insist on how Internet makes data protection extremely difficult. Frequently, a website is created outside of the European Union or the European Economic Space territory, what creates doubts about the applicable law.
- [82]. As already said (see Section 2.3 of this report), Article 2(2) of the Organic Law 15/1999 of 13 December on the Protection of Personal Data establishes that the system of protection of personal data laid down by the Organic Law shall not apply to certain types of files:
- Files maintained by natural persons in the exercise of purely personal or household activities.
 - Files subject to the legislation on the protection of classified materials.
 - Files established for the investigation of terrorism and serious forms of organised crime.
- [83]. These exclusions cannot be regarded as deficiencies of the system but as a particular choice of the legislator, who has taken into account reasons of national and public security that justify the lack of application of the common law on data protection to these matters. As explained in Section 1.2.2 of this report, Spain ratified the Treaty of Prüm together with six other European Union countries. The aim of the Treaty is to combat terrorism, cross border crimes and illegal migration by means of the creation of an information and data network.

- [84]. In relation to files maintained by natural persons, its exclusion from the legislation on data protection also seems to be justified, since data processing takes place in a private context without consequences to other persons.

7. Good practices

- [85]. The Organic Law on Data Protection does not include amongst the competences of the Director of the Spanish Data Protection Agency or of the Directors of the Autonomous Communities Agencies the power to issue binding reports in relation to citizens' queries. However, the Spanish Data Protection Agency issues non-binding reports on very different queries submitted by the citizens. These reports are published in the Agency website and constitute a very useful source of information for all citizens.⁸⁴ From 2006 to 2008, the Spanish Data Protection Agency has issued 140 non-binding reports on very different matters (labour activities, trade union membership, work contracts, health assistance, education, confidentiality of data, etc.).
- [86]. The Spanish Data Protection Agency, among other activities to inform citizens about a problem which can seriously affect personal data protection, has created a *Guía para la lucha contra el spam* [Information guide to combat spam], which is available on the Agency's website.⁸⁵ With regard to spam, on the Internet Day in Spain in 2005, the Spanish Data Protection Agency presented a *Decálogo con recomendaciones para combatir el spam* [Decalogue of recommendations to combat spam], which tries to help Internet users to better protect their personal data.⁸⁶
- [87]. The Spanish Data Protection Agency has also created a *Sistema de Notificaciones Telemáticas a la Agencia Española de Protección de Datos (NOTA)* [Telematic System for Notifications to the Spanish Data Protection Agency (NOTE)], which allows the notification of files via Internet.⁸⁷
- [88]. Also, the Agency has published several information guides to contribute to the dissemination of the right to data protection and of its enforcement methods:

84 Available at:

https://www.agpd.es/portalweb/canaldocumentacion/informes_juridicos/index-ides-idphp.php (09.01.2009).

85 https://www.agpd.es/portalweb/canaldocumentacion/lucha_contra_spam/common/pdfs/INFORMACI-OO-N-SPAM--ap-V.-30-mayo-cp-.pdf (09.01.2009).

86 https://212.170.242.196/portalweb/canaldocumentacion/lucha_contra_spam/common/pdfs/CONSEJOS-para-prevenir-el-Spam_guia.pdf (09.01.2009).

87 https://212.170.242.196/portalweb/canalresponsable/inscripcion_ficheros/Notificaciones_tele/que_es/index-ides-idphp.php

- *Guía de Recomendaciones sobre Derechos de niños y niñas y deberes de padres y madres* [Guide of Recommendations on the Rights of the children and the duties of the parents] (2008);⁸⁸
- *Guía de Seguridad de Datos* [Guide on Data Security Measures] (2008);⁸⁹
- *Guía del responsable del fichero* [Guide for the files' controller];⁹⁰
- *Guía del derecho fundamental a la protección de datos de carácter personal* [Guide on the fundamental right to the protection of personal data] (2004).⁹¹

[89]. The Madrid Data Protection Agency has also published information guides on different topics of special interest. These guides are available on the Agency's website.⁹²

- *Guía de protección de datos personales para Ayuntamientos* [Guide on the Protection of Personal Data for City Councils];
- *Guía de protección de datos personales para Centros Educativos Públicos* [Guide on the Protection of Personal Data for State Schools];
- *Guía de protección de datos personales para Colegios Profesionales* [Guide on the Protection of Personal Data for Professional Associations];
- *Guía de protección de datos personales para Servicios Sanitarios Públicos* [Guide on the Protection of Personal Data for the Public Health Services];
- *Guía de protección de datos personales para Servicios Sociales Públicos* [Guide on the Protection of Personal Data for the Public Social Services];
- *Guía de protección de datos personales para Universidades Públicas* [Guide on the Protection of Personal Data for State Universities].

88 Available at: https://www.agpd.es/portalweb/canal_joven/common/pdfs/recomendaciones_menores_2008.pdf (09.01.2009).

89 Available at: https://www.agpd.es/portalweb/canaldocumentacion/publicaciones/common/pdfs/guia_seguridad_datos_2008.pdf (09.01.2009).

90 Available at: https://212.170.242.196/portalweb/canaldocumentacion/publicaciones/common/pdfs/guia_responsable_ficheros.pdf (09.01.2009).

91 Available at: https://212.170.242.196/portalweb/canal_joven/common/pdfs/FOLLETO.pdf (09.01.2009).

92 http://www.madrid.org/cs/Satellite?c=Page&cid=1109266885968&idPage=1109266885968&language=es&pageName=APDCMper cent2FPaper cent2FPublicaciones_APDCM (09.01.2009).

- [90]. The Spanish Data Agency Protection has also published the guide Spanish Data Protection Agency – Overview, which contains information about the Agency and its functions in English. This publication is available on the website.⁹³ A glossary of terms related to data protection, and a glossary of Internet and spam terms are also available on the website.⁹⁴
- [91]. The registered files (both in public and private ownership) are available on the Spanish Data Protection Agency' website.⁹⁵ This practice notably enhances and facilitates the right to consult and the right of access of all citizens, and it is fast and easy. Also the Autonomous Communities Data Protection Agencies offer this possibility.⁹⁶
- [92]. The Agency's website also represents a basic instrument of communication between the Agency and the citizens. In 2007 there was also an important increase (47 per cent) in the number of hits on the Spanish Agency's website, totalling 2,230,120. The website offers a great amount of information related to data protection, structured indifferent sections depending on the type of addressees. The website is updated daily.
- [93]. The Madrid Data Protection Agency organises relevant activities with the purpose of extending its public dissemination actions on the right to data protection. Among them, the annual *Premio a las Mejores Prácticas de las Administraciones Públicas Europeas en materia de Protección de Datos* [Prize to Data Protection Best Practices in European public services] can be mentioned. The aim of the Prize is to expand the awareness and reproduction of best practices in data protection, currently in use by any governmental body or institution in any of the States party to the Convention of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data. (The fifth edition of the Prize has taken place in 2008).⁹⁷
- [94]. The most important decisions of the Spanish Constitutional Court on personal data protection are Decisions 290/2000 of 30 November

93 https://www.agpd.es/portalweb/canaldocumentacion/publicaciones/common/pdfs/AEPD_en.pdf (09.01.2009).

94 <https://www.agpd.es/portalweb/glosario/index-ides-idphp.php> (09.01.2009).

95 https://www.agpd.es/portalweb/ficheros_inscritos/index-ides-idphp.php (09.01.2009).

96

http://www.madrid.org/cs/Satellite?c=Page&cid=1109266885392&idPage=1109266885392&language=es&pageName=APDCMper cent2FPageper cent2FRegistroFicheros_APDCM (09.01.2009).

97

http://www.madrid.org/cs/Satellite?c=CM_Texto_FA&cid=1142464250392&idPage=110926688515&language=es&pageName=APDCMper cent2FCM_Texto_FAper cent2FmuestraTextoFA_APDCM (09.01.2009)

2000, which resolved the appeal for unconstitutionality against some articles of the Organic Law 5/1992 of 29 October on the *Tratamiento automatizado de datos de carácter personal* [Automated processing of personal data] (already abolished),⁹⁸ and the Decision 292/2000 of 30 November 2000, which resolved the appeal for unconstitutionality against Articles 21(1) and 24(1) and (2) of the Organic Law 15/1999 of 13 December. These decisions incorporate a fundamental right to data protection into the Spanish legal system, distinguishing it from the right to privacy guaranteed in Article 18 of the Spanish Constitution (see Section 1.2.1 of this report).

- [95]. The Agency on Data Protection of the Autonomous Community of Madrid has published its Recommendation 1/2008 of 14 April on the *Tratamiento de datos personales en los Servicios Sociales de la Administración de la Comunidad de Madrid y en los Servicios Sociales de los Entes Locales de la Comunidad de Madrid* [Treatment of personal data in the Social Services of the Administration of the Community of Madrid and in the Social Services of the Local Entities of the Community of Madrid]. The Recommendation of the Agency on Data Protection includes specific criteria for the data protection of citizens in such sensitive matters as health or disabilities.⁹⁹

98 Spain/Tribunal Constitucional 290/2000 (30.11.2000).

Spain/Ley Orgánica 5/1992 (29.10.1992).

99

http://www.madrid.org/cs/Satellite?c=CM_Texto_FA&cid=1142455921037&idPage=1109266883768&language=es&pagina me=APDCMper cent2FCM_Texto_FAper cent2FmuestraTextoFA_APDCM (09.01.2009).

8. Miscellaneous

- [96]. The Director of the Spanish Data Protection Agency appears before the Parliament. Since the year 2005, the Director has appeared every year before the Parliament to present and explain the annual report of activities of the Agency. The Director has also appeared upon request of the Congress of Deputies and of the Senate to give his/her qualified opinion on the following issues:
- On 6 June 2006, appearance before the Committee of Education and Science of the Congress of Deputies on the draft Organic Law on *Protección de la Salud y Lucha contra el Dopaje en el Deporte* [Health Protection and Performance-enhancing drugs in Sports].¹⁰⁰
 - On 1 December of 2005, appearance before the Senate to inform on the electronic national identity card.
- [97]. The data protection authorities have made a special effort to intensify their relations with citizens. Thus, there was a 30 per cent increase in 2007 in the number of queries submitted to the Spanish Agency's citizen assistance service. In total, there were 47,741 queries in 2007.¹⁰¹
- [98]. The Data Protection Agency of the Autonomous Community of Madrid edits a very important number of publications and audios to disseminate information on the right to data protection and the overseeing activities of the Agency. These materials are available on the Agency website.¹⁰²
- [99]. The Madrid Data Protection Agency also publishes two digital magazines. One of these magazines is the online *Revista de la Agencia de Protección de Datos de la Comunidad de Madrid* [Journal of the Madrid Data Protection Agency], in which scientific articles, legal news, activities of the Agency and news on data protection are published.¹⁰³ This magazine is published every two months. Until now 38 numbers have been published. The second magazine is the also

100 Spain/Ley Orgánica 7/2006 (21.11.2006).

101 The Spanish Data Protection Agency. Overview. Brochure on the Agency in English language, p. 2, available at: https://www.agpd.es/portalweb/canaldocumentacion/publicaciones/common/pdfs/AEPD_en.pdf (09.01.2009).

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<http://www.madrid.org/cs/Satellite?c=Page&cid=1109266885968&idPage=1109266885968&language=es&pagenome=APD>
CMper cent2FPager cent2FPublicaciones_APDCM (09.01.2009).

103 Available on line: <http://www.datospersonales.org/> (07.01.2009).

online Data Protection Review, published in English language.¹⁰⁴ This magazine has a structure similar to the first one, but is mainly dedicated to European and international information. Both magazines seek to promote knowledge on the right to data protection and on how to make this right effective, being at the same time online forums for specialists on this matter.

- [100]. The Madrid Data Protection Agency organises the annual *Premio al Mejor Artículo Científico en materia de Protección de Datos* [Prize to the Best Scientific Article on Data Protection]. This Prize aims at promoting awareness among citizens of their right to the protection of personal data, by means of the diffusion of knowledge based in scientific, technical or legal articles on this topic.¹⁰⁵
- [101]. Being conscious of the importance of the dissemination and spreading of the fundamental right to data protection, data control authorities maintain fluent relationships with the mass media.

104 <http://www.dataprotectionreview.eu/> (09.01.2009).

105 http://www.madrid.org/cs/Satellite?c=Page&cid=1142459737156&idPage=1142459737156&language=es&pagename=APDCMper cent2FPagper cent2FLaAgencia_APDCM (09.01.2009)

Annexes

Annex 1 – Tables and Statistics

	2000	2001	2002	2003	2004	2005	2006	2007
Budget of data protection authority			4,571,867.38	4,938,895.67	5,602,840.10	7,390,736.37	9,776,418.58	10,552,556.11
Staff of data protection authority			68	92	109	98	113	103
Number of procedures (investigations, audits etc.)						85		

initiated by data protection authority at own initiative ¹⁰⁶								
Number of data protection registrations	27,209	36,968	77,029	107,137	99,879	192,570	233,796	251,349
Number of data protection approval procedures								
Number of complaints received by data protection authority						2,190	2,530	3,136
Number of complaints upheld by data protection authority						664	826	1,017

¹⁰⁶ Only the Annual Report 2005 of the Spanish Data Protection Agency includes the number of procedures initiated by the Data Protection Agency at own initiative.

<p>Follow up activities of data protection authority, once problems were established (please disaggregate according to type of follow up activity: settlement, warning issued, opinion issued, sanction issued etc.)¹⁰⁷</p>								
<p>Sanctions and/or compensation payments in data protection cases (please disaggregate between court, data protection authority, other authorities or tribunals etc.) in your country (if possible, please disaggregate between sectors of society and economy)¹⁰⁸</p>		<p>90,149.65</p>	<p>1,299,130</p>	<p>1,509,520</p>	<p>1,858,120</p>	<p>2,000,000</p>	<p>2,200,000</p>	<p>19,674,480.03</p>

¹⁰⁷ There is no data available.

¹⁰⁸ There is no disaggregated data available.

Range of sanctions and/or compensation in your country (Please disaggregate according to type of sanction/compensation)							117* 177** 32***	211* 171** 14***
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* Sanctions between 600 and 60,000 euros

** Sanctions between 60,101.21 and 180,101.21 euros

*** Sanctions between 300,506.05 and 602,214.12 euros

Any other tables or statistics relevant for assessment of effectiveness of data protection, where available

TOTAL NUMBER OF DATA PROTECTION REGISTRATIONS				
NUMBER OF REGISTRATIONS ACCUMULATED IN YEAR:				
2003	2004	2005	2006	2007
405,649	505,528	650,733	815,093	1,017,266

Annex 2 – Case Law

Please present at least 5 cases on data protection from courts, tribunals, data protection authorities etc. (criteria of choice: publicity, citation in media, citation in commentaries and legal literature, important sanctions) in your country, if available (please state it clearly, if less than 5 cases are available)

Case title	<i>Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección Tercera), de 5 de febrero de 2008</i>
Decision date	05.02.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Appeal number 69/2005 <i>Tribunal Supremo</i> [Supreme Court] Decision of the Supreme Court (Administrative Dispute Jurisdiction, Section three)
Key facts of the case (max. 500 chars)	The <i>Asociación de Internautas</i> [Association of Internet Users] presented an appeal against Chapter II (Articles 83-101) of Part V of the Royal Decree 424/2005 of 15 April on the adoption of the <i>Reglamento sobre las condiciones para la prestación de servicios de comunicaciones electrónicas, el servicio universal y la protección de los usuarios</i> [Regulation of the conditions for the granting of electronic communication services, universal service and

	users' protection]. The appellants alleged against Articles 88 (1),(2) and (3), Article 89 and Articles 95, 96 and 97 breach of the fundamental right to the secret of communications (guaranteed in Article 18(3) of the Spanish Constitution) and of the fundamental right to obtain effective protection from the judges and the courts (Article 24(1) of the Constitution).
Main reasoning/argumentation (max. 500 chars)	The Supreme Court dismissed the appeal, because it considered that the provisions of the Royal Decree on interception of communications do not violate the fundamental right to the secret of communications. The Court based its Decision in the Resolution of the Council of the European Union of 17 January 1995 on the lawful interception of telecommunications. In this Resolution, the Council considers that certain requirements (annexed to the Resolution) should be taken into account in the definition and implementation of measures which may affect the legally authorized interception of telecommunications and requests Member States to implement the requirements in relation to network operators and service providers.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The requirements established by the Resolution of the Council of the European Union were implemented by the Royal Decree 424/2005 in Spain. For this reason, the Supreme Court dismisses the appeal, since the Spanish Regulation applies the measures laid down by the Law of the European Union.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was rejected. The Decision did not condemn the appellants to pay the costs of the proceedings because the appellants were acting in good faith.
Proposal of key words for data base	<ul style="list-style-type: none"> - Fundamental right to the secret of communications - Fundamental right to obtain effective protection from the judges and the courts - Lawful interception of communications

Case title	<i>Sentencia de la Audiencia Nacional (Sala de lo Contencioso-Administrativo. Sección Primera), de 5 de mayo de 2008</i>
Decision date	09.05.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Appeal number 211/2007 <i>Audiencia Nacional</i> [National Court] Decision of the National Court (Administrative Dispute Jurisdiction, Section one)
Key facts of the case (max. 500 chars)	A city council had published on its notice board the formal complaint presented by a number of citizens of the village to the <i>Delegación Provincial de Sanidad y Consumo de Cuenca</i> [Office of Health and Consume in the Province of Cuenca]. The document on the notice board contained personal data of the citizens. On 14 March 2007, the Spanish Agency of Data Protection sanctioned the city council. The Agency considered that the city council had committed a minor infringement, breaching the duty of secrecy laid down in Article 10 of the Organic Law 15/1999. The Agency stated that the aim of the duty of secrecy is to guarantee that neither the controller of a file nor any persons in contact with personal data files make public any data without the data subject' consent.
Main reasoning/argumentation (max. 500 chars)	The National Court confirmed that the city council had made public, without the data subjects' consent personal data such as their name or their identity card number. The National Court considered that the public administration is not only obliged to respect Article 10 of the Organic Law, but it also has a special qualified duty of secrecy.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Decision confirms the need of respecting the right to the protection of personal data by both private and public persons. The public administration cannot allege the need of making public a formal complaint to justify the violation of the right to personal data protection. The city council did not take the necessary measures to protect the right of the citizens concerned to data protection.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Decision of the National Court confirmed the decision of the Spanish Data Protection Agency. The Court considered that the city council had violated the right to the protection of personal data. The Decision did not condemn the city council to pay the costs of the proceedings because it appealed without bad faith.
Proposal of key words for data base	<ul style="list-style-type: none"> - Fundamental right to data protection - Responsibility of the public administrations with regard to data protection

Case title	<i>Sentencia de la Audiencia Nacional (Sala de lo Contencioso-Administrativo. Sección primera), de 4 de enero de 2008</i>
Decision date	04.01.2008
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Appeal number 346/2006 <i>Audiencia Nacional</i> [National Court] Decision of the National Court (Administrative Dispute Jurisdiction, Section one)
Key facts of the case (max. 500 chars)	The Spanish Data Protection Agency sanctioned a trade union for publishing in its intranet an informative note on the action for defamation presented by the trade union against one of the trade union members. The note had been published without the data subject's consent. The Agency appreciated breach of Article 6(1) of the Organic Law on the Personal Data Protection (consent of the data subject) by the trade union. However, the final amount of the fine

	was reduced, because the trade union had acted without bad faith, so that, in the light of the circumstances, there was a qualified diminution of the culpability of the offender (Article 45(5) of the Organic Law).
Main reasoning/argumentation (max. 500 chars)	The National Court balances the fundamental rights concerned: the right to freedom of trade union activities, which requires the diffusion of information among the trade union members, and the right to personal data protection. The National Court considered that the right to information in the sane of the trade union should prevail, since it constitutes a fundamental part of the right to freedom of trade union activities, and the right to information cannot be fulfilled if the personal data of the worker concerned are not included.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The National Court applies the Constitutional Court's doctrine, confirming that, in case of conflict between two or more fundamental rights, the Court has to balance the rights concerned and decide which of the rights prevails in the light of the circumstances of that concrete case. In the current case, the right to freedom of trade union activities demands that all members of the trade union are informed of the name of the worker responsible of the action for defamation. Otherwise, the information would not be complete. For this reason, in this case the right to freedom of trade union activities shall prevail.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Annulment of the 3,000 euros fine imposed to the trade union by the Spanish data Protection Agency. No procedure costs.
Proposal of key words for data base	<ul style="list-style-type: none"> - Fundamental rights concerned: personal data protection and freedom of trade union activities. - Freedom of trade union activities prevails.

Case title	<i>Sentencia de la Audiencia Nacional (Sala de lo Contencioso-Administrativo. Sección primera), de 19 de mayo de 2004</i>
Decision date	19.04.2004
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Appeal number 754/2002 <i>Audiencia Nacional</i> [National Court] Decision of the National Court (Administrative Dispute Jurisdiction, Section one)
Key facts of the case (max. 500 chars)	The Spanish Data Protection Agency sanctioned a company for violating the duty of secrecy laid down in Article 10 of the Organic Law 15/1999 of Personal Data Protection. The company had given, without the data subject's consent, personal data concerning his economic situation to another company dedicated to make slow payers pay. This type of action is regarded as a serious infringement by the Organic Law 15/1999. A fine of 120,202.42 euros was imposed to the company.
Main reasoning/argumentation (max. 500 chars)	The National Court confirmed the sanction imposed, since the company was not allowed to disclose the personal data of the subject without his consent. The company argued that non computerised files and proceedings did not have to comply with the Organic Law on Personal Data Protection. This argument was rejected by the National Court. The company argued that the disclosure of personal data had been a mistake, but the Court did not accept this argument either. Besides, the National Court confirmed that the company had broken its duty of secrecy for personal data incorporated into files containing data on the commission of administrative or criminal offences, public finance, financial services, provision of creditworthiness and credit services (Article 44(3)(g) of the Organic Law).

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The National Court confirmed the breach of the duty of secrecy, since personal data on the economic situation of the subject had been disclosed without his consent. Data were communicated by fax, what even allowed third persons to know the personal data disclosed.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The National Court confirmed the 120,202.42 euros fine imposed by the Spanish Data Protection Agency for a serious infringement. No procedure costs.
Proposal of key words for data base	<ul style="list-style-type: none"> - Disclosure of personal data between private companies without the data subject's consent. - Application of the Organic Law on Personal Data Protection to non computerised files and operations. - Duty of secrecy.

Case title	<i>Sentencia 292/2000, de 30 de noviembre de 2000, del Tribunal Constitucional</i>
Decision date	30.11.2000
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Appeal for unconstitutionality <i>Tribunal Constitucional</i> [Constitutional Court] Decision of the Constitutional Court
Key facts of the case (max. 500 chars)	An unconstitutionality appeal was lodged by the <i>Defensor del Pueblo</i> [Spanish Ombudsman] against Articles 21(1), 24(1) and (2) of the Organic Law on the Protection of Personal Data. The Ombudsman regarded unconstitutional that:

	<ul style="list-style-type: none"> • The Organic Law referred to a norm of lower hierarchy than a law the regulation of personal data transfers between public administrations (Article 21(1) of the Organic Law). • The right of access, rectification and cancellation of personal data should not apply to the collection of data when informing the data subject would affect “the public interest or interests of third parties of greater importance” (Article 24 (1) and (2)).
Main reasoning/argumentation (max. 500 chars)	<p>The Constitutional Court upheld the Ombudsman’s unconstitutionality appeal for the following reasons:</p> <ul style="list-style-type: none"> • Personal data transfers between public administrations shall not be regulated by a norm of lower hierarchy than a law. Personal data transfers between public administrations shall not be done for purposes other than the purpose which was the cause of their collection. • The fundamental rights of the data subject can be restricted. But these restrictions have to be proportional to the constitutional principles, and have to respect the fundamental rights.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ul style="list-style-type: none"> • The hierarchy of the norms has to be respected when regulating rights. • Fundamental rights can be limited, but these limits have to be justified and proportional to the constitutional principles. • There cannot be general exceptions to the right to the protection of personal data.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The Court upheld the appeal. A part of Article 21(1), a part of Article 24(1) and the whole (2) of the Organic Law on Personal Data Protection were declared unconstitutional (and therefore null and void) by the Constitutional Court.</p>
Proposal of key words for data base	<ul style="list-style-type: none"> - Right to personal data protection. - Right of access, rectification and cancellation of personal data. - Data transfers between public administrations.

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