



Key changes of the new Basic Law on Data Protection and digital rights guarantees

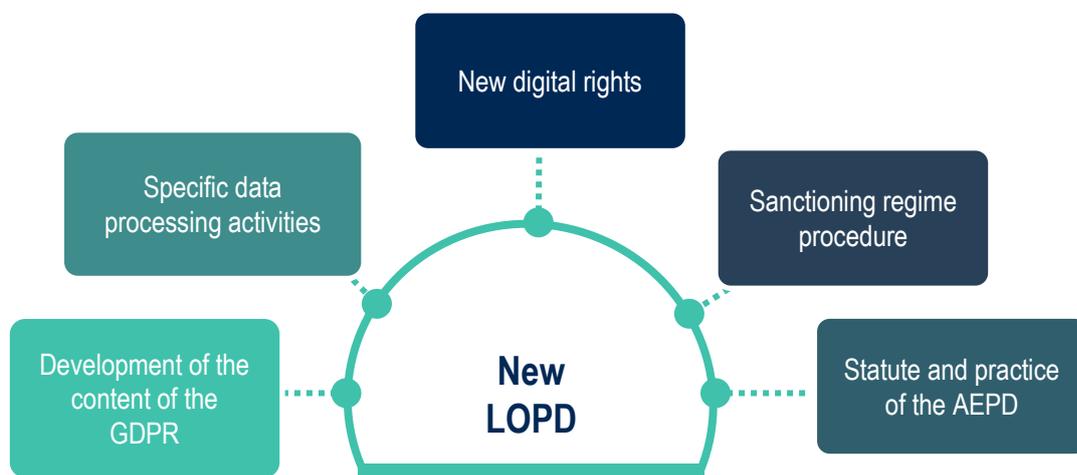
December 2018

[New Basic Law 3/2018 on Data Protection and digital rights guarantees](#) (“**New LOPD**” or “**Law**”) was published in Spain’s Official Gazette on 6 December 2018, entering into force immediately, the next day after its publication.

The New LOPD has not been enacted to transpose the [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016, the General Data Protection Regulation](#) (“**GDPR**”), which is directly applicable in Spain since 25 May 2018. Instead, it aims to harmonise Spanish law with the provisions of the GDPR and to provide specific data protection regulation in different fields that are not expressly included in the GDPR or that are included in the GDPR but with scope for more detailed regulation to be introduced by the Member States. Moreover, the New LOPD incorporates into the Spanish legal system a list of new rights of citizens in relation to new technologies, known as “digital rights”.

With the aim of becoming the national data protection regulation of reference, the New LOPD repeals Basic Law 15/1999 (“**LOPD**”), Royal Decree-Law 5/2018 enacted on 27 July (that temporarily incorporated some provisions of the GDPR into the Spanish legal system) and all the legal provisions of equal or inferior rank that contradict or that are incompatible with the GDPR. This repeal provides clarity to the data protection legal system in Spain, as the national regulation previous to the GDPR had not yet been formally repealed and the continued existence of incompatible regulations in numerous aspects (the GDPR and the former LOPD) undermined the principle of legal certainty.

The New LOPD is made up of 97 articles and numerous additional, transitory and final provisions. Therefore, in order to ease its analysis, we will separate and categorise its content into the following sections:



1. Development of the content of the GDPR

Several articles of the New LOPD reproduce or refer to articles and concepts already regulated in the GDPR, either reiterating their content or including interpretative criteria in addition to the GDPR's content. In some instances, it is the GDPR itself which enables the Member States to develop specific aspects of the GDPR in the national legislation. We highlight the following:

- the minimum age in order for **the minors to be able to give consent** has been set at 14, with exceptions;
- regarding the **special categories of data**, as a general rule, the data subject's consent is not sufficient in order to be able to lift the prohibition on processing personal data with the main purpose of identifying his or her ideology, trade union membership, religion, sexual orientation, beliefs, or racial or ethnic origin.
- the **legal obligations** which can entail the processing of personal data must be regulated by a rule with the rank of law (not being enough rules with a lower rank);
- the Law establishes the possibility of complying with the obligation to inform the data subjects through a **layered information** system from which the data subject will receive basic information (first layer) and an electronic address or other electronic means to easily and immediately access other information regarding the data processing (second layer);
- the New LOPD has excluded from its scope the processing of the **personal data of deceased individuals**, although it does include the possibility for heirs and relatives or others similarly associated with the deceased to request access to, and the rectification or erasure of, the deceased individual's personal data;
- certain scenarios are established whereby the data controller will not be responsible for the **inaccuracy of the personal data**;
- if the data processor establishes a relationship with the data subjects in its own name and without appearing to act on behalf of the data controller, even if a data processing agreement exists in accordance with Article 28 of the GDPR, the data processor will be considered the **data controller** in the relationship that it establishes with such data subjects (this provision does not apply to data processors in the public sector); and

- the cases in which it is mandatory to appoint a **data protection officer** (“DPO”) are increased and it is established that his or her appointment, designation and cessation must be communicated to the Spanish Data Protection Authority (“**AEPD**”) within ten days.

2. Specific data processing activities

The New LOPD incorporates and comprehensively regulates data processing activities that are not expressly regulated in the GDPR. This is the case, for example, of data processing activities for video surveillance purposes, whistleblowing channels and creditworthiness data files. Some of these specific data processing activities were regulated in the former Spanish data protection regulation (e.g. creditworthiness data files) or were the subject matter of specific guidelines by the AEPD, in which case, in general, the New LOPD carries on in the same regard as those guidelines or previous national regulation.

(a) Data processing activities that could be based on a legitimate interest

The New LOPD establishes that certain personal data processing activities, provided they are carried out in compliance with a series of requirements, will be presumed to be based on the existence of a legitimate interest by the data controller. These data processing activities are the following:

VIDEO SURVEILLANCE

The data processing derived from the recording of images through CCTV systems is regulated in the Law, including certain elements that were previously regulated in the AEPD 1/2006 Instruction and some new provisions such as a maximum term to report to the authority the images where the commission of a criminal act is recorded.

BUSINESS OPERATIONS

Data processing—including prior communication—is recognised as being lawful in the context of structural changes in companies or the contribution or transfer of businesses or branches of businesses, when the processing is necessary for the successful conclusion of the transaction.

CONTACT DETAILS, INDIVIDUAL EMPLOYERS AND LIBERAL PROFESSIONALS

Traditionally in Spain some professional contact details were excluded from the scope of application of the previous data protection regulation. However, the GDPR does not exclude them from its scope of application. Therefore, as from May 2018 professional contact details are subject to this regulation.

On this subject, the New LOPD specifies that professional contact details are subject to these rules, even if their use is more flexible by stating that data can be processed based on a “legitimate interest” but only when the processed data is necessary to locate the data subject and the purpose is to contact the legal entity in which the data subject provides his or her services. This also applies to data regarding sole traders or liberal professionals, when the processing is not carried out to establish a relationship with them as natural persons.

CREDITWORTHINESS DATA FILES (CREDIT INFORMATION SYSTEMS)

Data processing is authorised and regulated with regard to the breach of monetary, financial and credit obligations by common credit information systems when certain requirements are met, such as that the data is related to certain, due and enforceable debts. The sixth additional provision of the Law states that debts of under EUR 50 cannot be included in these systems.

ADVERTISING EXCLUSION SYSTEMS (ROBINSON LIST)

The data processing carried out through advertising exclusion lists is regulated. Data controllers responsible for direct marketing activities must consult these lists before sending commercial communications to users.

WHISTLEBLOWING CHANNELS

The creation and maintenance of whistleblowing channels is regulated, expressly including the possibility of sending the communications through the channel anonymously.

(b) Processing of administrative infringements and sanctions

The GDPR includes a specific regime for the processing of data related to criminal convictions and offences. However, the processing of administrative infringements and sanctions is not regulated. Through a new provision, the New LOPD regulates the processing of administrative infringements and sanctions data by individuals or legal entities that are not the competent authority for the investigation, declaration and imposition of administrative sanctions within the exercise of their functions, and can only be carried out with the data subject's consent or if a legal regulation allows such processing.

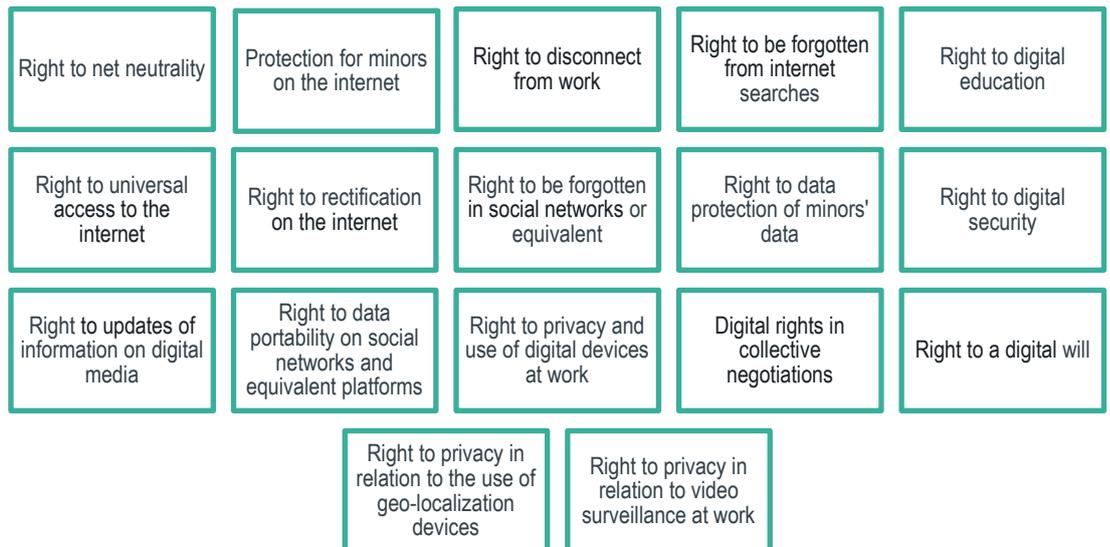
(c) Data blocking

The obligation to block data is set out in article 32 of the New LOPD, but this is not regulated in the GDPR, although it existed in previous national regulations. The New LOPD returns to this earlier position and establishes the obligation of the data controller to block the data when it must be rectified or erased, in order to prevent its processing unless it is processed to make the data available to judges and courts, the Public Prosecution Service (*Ministerio Fiscal*) or the competent public authorities (including the data protection authorities) in relation to possible liabilities derived from the processing and only during the applicable limitation period (*plazo de prescripción*). Once the blocking period has concluded, the data controller must delete the data.

3. Creation of the “Digital Rights”

Besides adapting the internal regulations to the GDPR; the New LOPD incorporates 17 new “digital rights” into the Spanish legal system, that are aimed at resolving issues arising from the incorporation of new technologies in the daily life of citizens.

These “digital rights” may be divided into two groups: general rights aimed at all citizens and specific rights closely related to the employment sector. With regard to the first ones, the incorporation of the right of rectification on the internet and the right to a digital will are worth highlighting. In relation to the second ones, the specific regulation on the right to privacy in the use of digital devices, of video surveillance and geo-localisation in the workplace is worth highlighting. These rights present some limitations and obligations for employers to inform employees about the access to the information which is allocated in the digital devices supplied by the employer to the employees and for the use of video surveillance systems and geo-localisation for the purposes of controlling employees. In addition, the novel “digital disconnection right” is included, which aims to guarantee workers’ and civil servants’ break time, leave and holidays.



4. Statute and practice of the AEPD and the data protection authorities of the autonomous regions

The New LOPD adapts to the GDPR the different functions and powers granted both to the AEPD and to the data protection authorities of the autonomous regions. In this regard, the New LOPD incorporates the unique window mechanism, which allows the AEPD —and the data protection authorities of the autonomous regions in certain circumstances— to participate in the cooperation and coherence procedures with the other European data protection authorities. These procedures establish that in the case of cross-border data processing, a main supervisory authority must be identified in order to control the procedure directed against the infringer. In order to guarantee that in these cases the main authority leads the procedure, the New LOPD has incorporated the obligation for the AEPD, before initiating any sanctioning or rights protection procedure, to analyse the internal or cross-border nature of the case and, in the case of a cross-border case, whether it is the main authority.

With regard to the internal organisation of the AEPD, worth highlighting is the new regulation of the director of the AEPD; a position which will now be called “*Presidente/a*”. The mandate is of five years (compared to four years under the previous regulations).

5. Sanctioning regime

One of the most controversial elements of the GDPR is the brief and generic classification of the sanctions and the noteworthy increase in the minimum amount of the economic fines. In order to adapt this generic framework to the national regulations, the New LOPD:

- classifies the infringing conducts in order to comply with the principle of classification in the administrative sanctioning procedures; and
- classifies infractions as very serious, serious and minor.

New criteria have been included to determine the amount of the sanctions as well as the limitation periods for both the infractions and the sanctions.

A novel element with regard to the stipulations of the GDPR is the express inclusion of the **joint and several liability of the representative of the data controllers and data processors located outside the European Union**. According to the New LOPD, the representatives are jointly and severally liable for both the measures imposed in a sanctioning procedure and damages caused to those affected.

Finally, the New LOPD reiterates that the public authorities cannot be sanctioned with monetary fines though they may be warned. However, it introduces the possibility for the AEPD to propose the initiation of disciplinary actions against the personnel that may have caused the infringement.

6. Modification of other laws by the final provisions

In addition to repealing the previous LOPD and other regulations which are incompatible with the GDPR, the New LOPD modifies other Spanish regulations, the most notable of which are the following:

Law 14/1986 of 25 April on health measures

Basic Law 5/1985 of 19 June on the general electoral system

The Statute of Workers

Basic Law 6/1985 of 1 July on the judiciary

Law 1/2000 of 7 January on civil procedure

Law 41/2002, of 14 November on patient autonomy and rights and obligations of information and clinical documentation

Law 39/2015 of 1 October on the standard administrative procedure of public authorities

Law 3/1991 of 10 January on unfair competition

The most significant and controversial modification relates to the General Electoral System Law, which regulated the lawfulness of the collection of people's political opinion data by political parties in the context of their electoral activities, including data collected through websites and other publicly available sources.

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