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Contents

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1. Litigation System

The Spanish legal system follows the so-called civil or codified law, even if, increasingly, it has been accepting and integrating different aspects of the common law system.

One of the main characteristics of European continental legal systems – of which the Spanish legal system is one – is the existence of a corpus iuris, a set of norms that includes substantive law rules as well as procedural law rules, which have to be applied and interpreted by judges and magistrates. Those rules can only be created and modified by the legislature, the judiciary having no such authority.

The judiciary – one of the three powers of the State – has exclusive jurisdictional power. The exercise of judicial authority in any kind of action, in both issuing and executing judgments, is the exclusive competence of the courts and tribunals established by law in the relevant rules of jurisdiction and procedure. The jurisdiction is unique and is exercised by the courts and tribunals stipulated by law and which are found throughout the whole Spanish territory.

In order to determine whether a specific case is going to be judged and resolved by a Spanish court, the first thing that has to be established is the competent Spanish jurisdiction. The dispute will be assigned to the relevant court according to the territory and matter (territorial and objective competence), within the competent jurisdictional order.

In the Spanish procedural system there are five jurisdictional regimes (civil, criminal, administrative, labour and military), each of which have their own substantive and procedural rules.

Nonetheless, the Spanish judicial system is not a multi-tiered one, such as the United States federal/local system. The Spanish judicial system is governed by the principle of unity and it is a law approved by the Spanish central government which regulates the creation and competence of the different judicial bodies.

2. Electronically Stored Information (ESI)

In the Spanish legal system, there is no specific law regulating Electronically Stored Information (ESI). This is due to the fact that the parties to proceedings are not obliged to present all the electronic evidence which they intend using before a court.

Nevertheless, under the different Spanish jurisdictional orders there are certain rules which regulate, in an isolated way, different aspects of electronic evidence. Some of these rules make reference to the possibility of carrying out certain procedural steps with the use of a digital device. Others make reference to the obtaining of electronic evidence during the course of proceedings, as well as to the presentation of and incorporation into proceedings of electronic documents by the different parties.

We must always bear in mind that parties to proceedings in any court of law have, by virtue of Section 230 of the *Ley Orgánica del Poder Judicial* (the Spanish Organic Law on Judicial Power, or SOLJP), the option of supporting their claims by technical, electronic, computerised and telematic means.

Criminal Jurisdiction

Following the implementation of the latest amendments to the Spanish Criminal Proceedings Act (SCrimPA) – which took place in 2015 through the entry into force of Organic Law 13/2015, of 5 October – new mechanisms for the acquisition of ESI are now regulated. Here we are referring to investigation and control measures which consist of:

- the interception of telephone and telematic communications;
- the capture and recording of oral communications through the use of electronic devices;
- the use of technical monitoring, localisation and capture of images;
- the registration of mass storage data devices; and
- remote registers on computer equipment (Sections 588 bis to 588 SCrimPA).

In relation to the different means of investigation which we have referred to above, it is common that the parties (including the Public Prosecutor) have to ask for prior judicial authorisation, should they want to make use of the means of investigation. This is due to the fact that such acts may directly affect the fundamental right established in Article 18 of the Spanish Constitution, which is the right to personal intimacy. Moreover, the judge may also order to carry out such measures ex officio, or at the request of the Judiciary Police.

It should be noted that the referred authorisation will only be given if the principles of specialty, adequacy, exceptionality, necessity and proportionality have been respected. In particular, the referred authorisation will only be given if any of the following circumstances concur:

- when the investigation, given its nature, does not have other measures available which are less onerous to the accused's fundamental rights; or
- when discovery or proof of the act investigated, verification of its perpetrator or perpetrators, ascertaining whereabouts, or location of the effects of the crime are seriously hampered.

Finally, it should be mentioned that, regarding criminal jurisdiction, Section 26 of the Spanish Criminal Code (SCC) defines a "document" as "every single digital information, regardless of its status, which is filed in an electronic device, following a specific format which is subject to identification and differentiated treatment" (Section 3.5 of the Law 59/2003, of Electronic Signature – LES).

Civil Jurisdiction
In civil proceedings, the Spanish Civil Procedural Act (SCPA) has opted for regulating "digital, multimedia or electronic documental devices", understood to be those devices which reproduce a specific reality through means which is not paper (for example, in a USB, CD, DVD, MP3, etc) in a title separate from that in which documentary and forensic evidence is regulated.

Specifically, Sections 382 to 384 of the SCPA establish the means by which parties to proceedings may use as evidence the reproduction of speech, sound and images recorded through instruments for filming, recording and other similar instruments.

In Spain the rules governing ESI do not diverge, in essence, from the rules governing written documents. It may be said that the SCPA has adapted the rules which already existed for "paper documents" to the regulation of "digital documents".

In those cases in which the ESI is printed and what the parties bring to the proceedings is just the printed document, we are dealing with a paper document which holds a copy of the original data that was contained in an electronic device. In these cases, the judge must treat the data as documentary evidence, and therefore the applicable rules will be those contained in sections 265-272 of the SCPA.

If the parties to proceedings decide to print the ESI, it must be taken into account that the document which is brought before the court must be authentic. Therefore, it is advisable that a notary publicly attests to the content of the document and declares that the information contained in the paper version corresponds to that contained in the digital device without having suffered any type of manipulation.

In any case, if the parties decide to bring to the proceedings computer and electronic devices or paper documents, all of them will be considered to be documentary proof and may be evaluated by a judge in accordance with the rules of fair criticism.

Labour Jurisdiction
First, it has to be pointed out that Section 4 of the SCPA establishes that in the absence of provisions in the laws which regulate criminal, contentious-administrative, employment and military proceedings, the provisions of the SCPA shall apply to all of these.

In terms of Law 36/2011, of 10 October, which regulates the labour jurisdiction (LLJ), it may be observed that, regarding the examination of evidence in advance and the seizure of evidence, the legislator has decided to regulate such matter in a similar fashion to the SCPA with the exception of certain specific types of labour proceedings, in particular:

- bonds;
- guarantees and compensation relating to specific injunctions;
- introducing injunctions in extinction processes at the employee's request; and
- the possibility of enforcing a ruling provisionally.

Thus, regarding the rules as to the discovery or disclosure of electronically stored information, it has to be concluded that the rules referred to in the above section which are regulated in the SCPA will be applicable in the labour jurisdiction.

Contentious-administrative jurisdiction
Section 60.4 of Law 29/1998, of 13 July, which regulates contentious-administrative jurisdiction (the LCAJ), establishes that evidence will be developed taking into account the general rules established for civil proceedings, there being a deadline of 30 days in order to take evidence. Nevertheless, parties may submit evidence after the 30-day deadline if the delay is not attributable to the party who submitted the evidence.

In addition, the LCAJ's First Final Provision determines that for any matter which has not been expressly regulated under this law, the SCPA will apply. Therefore, what the LCAJ is doing here is establishing the SCPA as a complementary law. For this reason, we may affirm that the submission of evidence in contentious-administrative proceeding is mainly regulated by the provisions of the SCPA. Under the LCAJ, only two sections are dedicated in a non-exhaustive manner to the bringing and taking of evidence in contentious-administrative proceedings, in contrast with the 105 sections which the SCPA dedicates to this subject.

It may therefore be concluded that the applicable rules in contentious-administrative proceedings relating to the discovery or disclosure of electronically stored information will be those contained in the SCPA.

3. Case Law or Rules Relating to ESI

See **2 Electronically Stored Information**, above, regarding the rules on disclosure/discovery of ESI.

On the other hand, regarding the application of case law on electronic evidence, there has been an interesting development, whereby some issues relating to the way in which ESI should be considered have been raised. The final decisions rendered in the analysed case law were that ESI should be considered as documentary evidence, and that, as such, it was subject to self-assessment by judges and courts according to the criteria of sound critique.

Once the possibility of submitting electronic evidence has been fully accepted by the legal system as a mean of evidence which the parties may bring to proceedings, an issue regarding the requirements which such evidence must comply with has been raised.

In most cases obtaining this type of evidence generates a tension between: (i) the right to file evidence – which is enshrined as a fundamental right in Article 24 of the Spanish Constitution; and (ii) the fundamental right to privacy established in Article 18 of the same legal text.

To the extent that electronic evidence is in an electronic/computerised support belonging to others, the right to personal privacy will be compromised, and should be assessed, on a case-by-case basis, when this right yields against the right of evidence.

It could be said that one of the most paradigmatic cases which may be brought to the present question is the one regarding the gathering of data by an employer, taking into consideration that the data is being stored in the computer of one of its employees and such data is going to be used in proceedings against the employee. Such factual situation may have a direct impact on the labour and criminal areas of the law as the employer may be committing an offence of discovery and disclosure of secrets regulated under Section 197 SCC.

Spanish case law has adopted a unanimous position in this kind of situation. Case law determines that in order for the obtaining of the evidence not to be declared null and void, certain conditions must be fulfilled, which are:

- that the employer previously informed the employee about the limitations and prohibitions to which he should be subject when using the company's computers which were made available to him;
- that the employer has informed the employee of his intention to subject these computers to periodic review;
- that there is no reasonable expectation of intimacy in the employee; and,
- that any interference in the employee's computer takes place while the employment relationship is still in force (see Ruling 81/2013, of 11 March, by Madrid's Provincial Court).

The Spanish Constitutional Court has also given the following opinion on the matter in Ruling 241/2012 of 17 December: "The mutual balances and limitations which derive for both parties to the employment contract – employer and employee – imply that the organisational business-related faculties are limited to the fundamental rights of the employee and the employer must respect such fundamental rights."

In such cases, the courts have relied on the existence of a reasonable expectation on the part of the employee to enjoy some privacy in the use of the computer applications provided by his employer.

In this regard, the Grand Chamber of European Court of Humans Rights in its recent ruling on case Barbulescu v Romania, of 5 September 2017 (Application No 61496/08), found that, in accordance with Article 8 of the Convention, Romanian courts had struck a fair balance between the employee's right to respect for his privacy and the employer's disciplinary faculties and interests to monitor the use of IT workplace equipment. The court considered that an employer "cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary" and therefore the employee's right to privacy had been violated. In fact, it deemed that the monitoring of employees' electronic communications was not sufficiently justified because there was no suggestion he had exposed his company to risk in case of illegal activities. Finally, as regards the principle of proportionality, the employer could have used less intrusive means.

Finally, we must mention the cases in which it is a court which authorises the use of electronic devices in order to obtain evidence. In this case, inside the criminal jurisdiction order, the court must issue a motivated resolution (" *Auto*") justifying the necessary adoption of the measure, based on the principles of specialty, suitability, exceptionality, necessity and proportionality. Breach of these principles could render evidence obtained by these means null and void as it infringes the fundamental right to privacy.

4. Discovery/Disclosure of ESI

Procedurally speaking, electronic evidence is treated as documentary evidence. Therefore, it should comply with legal provisions regarding documentary evidence in all matters relating to the timing of its submission in proceedings.

It is necessary to distinguish between the rules contained under the SCrimPA, SCPA, LLJ and LCAJ in order to determine during which stages of the proceedings the evidence may be submitted by the parties.

Criminal jurisdiction
During criminal proceedings, and, when dealing with a 'fast-track procedure' (*procedimiento abreviado*) the parties may propose and submit electronic evidence from the commencement of the proceedings until the moment in which the trial begins.

When talking about an 'ordinary procedure' (*procedimiento ordinario*), the possibility of submitting evidence finishes when the indictments and defence briefs are filed. Specifically, and taking as an example the summary or fast-track procedure regulated by Title II of Book IV of the SCrimPA, a distinction may be drawn between the following procedural phases in which documentary evidence may be provided.

Instruction phase
Any of the parties, whether defence or prosecution, may submit as many documents in electronic format as they deem appropriate, it being the investigating judge who, according to criteria of relevance, usefulness and necessity of the test, will admit them or not.

Intermediate phase
During the intermediate stage, the parties to the proceedings may propose the electronic evidence they intend to use in oral proceedings in their respective briefs for provisional conclusions, indictments and defence briefs (Sections 781 and 784 of the SCrimPA). Each one of them will propose the electronic and/or computer evidence as documentary evidence, including, expressly, the request to the judicial body competent for the judgment that has the necessary technical means so that, on the day of the judgment, such proof can be seen or heard.

The Oral Trial phase
Before the trial sessions start, in the process called 'prior issues' (*cuestiones previas*), the parties may propose new evidence provided that it can be considered at that time.

Against the decision to refuse the consideration of the evidence by the competent court, it is possible to record an objection for the purposes of appeal. The evidence will be considered in the oral trial abiding by the principles of immediacy, orality and publicity, the documentary evidence being considered after the personal evidence (interrogation of the accused, witness statement and expert evidence).

Civil Jurisdiction
The rules contained in the SCPA will be explained below in **12 Form of Production of ESI**.The SCPA does not specifically regulate the timing for the production of ESI. Therefore, sections: (i) 265 SCPA, regarding the documents and other writs and objects relating to the grounds of the case; (ii) 270 SCPA, as to the submission of documents after the commencement of proceedings; and, (iii) 399.3 SCPA, regarding the claim and its content, should be applied.

Labour Jurisdiction
As already mentioned above, labour procedure is regulated under the LLJ. The LLJ dedicates a set of procedural rules regarding documentary evidence and its practice during proceedings.

The following is a brief description of how parties to labour proceedings should submit evidence.

Initiation of the procedure: filing for settlement document and statement of claim
The plaintiff can submit, together with the claim, any documents or other written documents he/she considers appropriate (Section 80 LJJ), although the usual practice is that the plaintiff does not provide with the claim any document as long as they are not considered essential and necessary – for example, the dismissal letter or the certificate act of conciliation.

Nevertheless, there is an exception to this rule. A party to the proceedings may submit a request to the judge that, prior to the hearing, certain documents which the counter-party possess may be brought to the proceedings.

The taking of evidence during the hearing
Once the hearing has commenced, plaintiff and defendant exchange the documents that constitute their documentary evidence. Once they are in possession of the documentation of the counter-party, they review it and have the opportunity to raise any arguments regarding the evidence brought and, also, challenge it.

Once the parties to the proceedings finish raising their arguments, the judge will accept or reject the evidence submitted (paragraph 2 of Section 87.2 of the LJJ).

As already mentioned, in relation to all those aspects of the means of evidence which are not expressly regulated under the LJJ, Section 87.2 of the LJJ refers to Section 299 of the SCPA.

Nevertheless, it has to be said that Section 90 of the LJJ refers to the possibility that the parties have to submit electronic evidence in proceedings. The means established under this section to submit evidence are those which allow the recording of words, sounds and images. In such cases, it is essential that the party bringing the evidence using such means provides the court with the appropriate technical support – for example, a laptop, a tape recorder or a mobile phone.

Contentious-administrative jurisdiction
Regarding contentious-administrative proceedings, under the abbreviated procedure, evidence should be submitted at the hearing. Parties may submit evidence up to the beginning of the concluding stage (*fase de conclusiones*), according to paragraphs 10 and 18 of Section 78 of the LCAJ.

In the ordinary procedure, evidence must be submitted in the statement of claim, statement of defence or in complementary pleadings (*alegaciones complementarias*), except in those circumstances contemplated in the LCAJ (see paragraphs 1, 2 and 4 of Section 60 of the LCAJ and paragraph 4 of Section 56 of the LCAJ).

Applications for admission of evidence may be made only in the statement of claims, statement of defence or complementary pleadings. Such documents must contain an orderly account of the points of fact to which the evidence refers and the means of proof proposed.

If new facts of material relevance to the ruling on the case are revealed by the statement of defence, the claimant may request the admission of evidence and specify the means of proof proposed within five days of service thereon of the statement of defence, without prejudice to the claimant's entitlement to exercise the right to furnish documents under paragraph 4 of Section 56. Evidence shall be handled under the general rules established for civil proceedings, and shall be examined within 30 days. Nevertheless, evidence examined after that deadline for reasons not attributable to the party submitting it may be considered (paragraphs 1, 2 and 4 of Section 60 of the LCAJ).

After the statement of claim and the statement of defence, no more documents will be allowed to be submitted by the parties other than in those cases regulated for in civil proceedings. However, the plaintiff may also submit documents which look for distorting allegations contained in the statement of defence and which bring to light disagreement in the facts, before the summons or conclusions (Section 56.4 of the LCAJ)

5. Obligations to Preserve ESI

The Spanish legal system, in the context of civil litigation, does not impose upon the parties to proceedings an obligation to preserve ESI beyond the general legal provisions relating to the duty of preservation of certain documents.

In the Spanish legal system, there are some provisions and regulations that impose upon companies and certain professionals the obligation to preserve specific categories of documents, but these obligations have time limitations.

As an example of this, Section 30 of Spanish Commercial Code regulates the general duty imposed on the businessman (applicable to companies), to keep the books, correspondence, and documents for six years.

Similarly, Law 22/2015 concerning audits, imposes on auditors and audit firms the duty to save, store and preserve all the documents referred to each accounts audit they perform for a period of five years from the date of issue of the audit report.

Another example of this is found in Law 25/2007, by which the legislator obliges telecommunication operators and telecommunication services suppliers, in the framework of the provision of their services, the duty to save all data collected from electronic communications and the data from public communications networks.

In addition, under taxation laws, taxpayers are required to save all documents, programmes and electronic files required by tax legislation, during the period in which the tax authorities are entitled to investigate and settle the tax debt.

Likewise, the Employment Law contains some provisions that provide for data storage for four years which may demonstrate the fulfillment of the labour obligations of affiliation, such as registration in the Social Security System or proof of salary payments.

Although the Spanish legal system does not provide for discovery and any special obligation to preserve ESI in the context of civil litigation, beyond the general provisions as previously mentioned, there is a similar procedure to discovery in the Spanish legal system called "preliminary proceedings" (*Diligencias Preliminares).* This procedure allows one party before filing his complaint (thus, prior to the initiation of litigation), to submit an application to the court to force the other party or a third party to exhibit some documents that the applicant does not have, information that could be stored electronically.

This procedure is regulated by the court, and courts will only accept justified requests of information and needed documents to draft the complaints and support the rights of the party. The court will reject all requests with signs of unjustified searches. One of the differences between the two procedures is that in Spain preliminary proceedings are not usually used as compared to the ordinary character of discovery in the US civil proceedings.

Moreover, once the civil procedure has begun, the parties may submit this application at the evidentiary phase as long as the documents required are related to the object of the proceedings or the effectiveness of means of evidence. When the application is made at the evidentiary phase, the applicant must provide a simple copy of the documents, and if the copy is not available, the applicant must give the most accurate description of its content.

Regardless of the above, the procedures discussed do not contemplate the parties' duty to preserve documents including ESI in the context of civil litigation, but their non-preservation may lead to negative consequences for them.

6. Sanctions and Penalties

The parties in the context of civil litigation, may not be sanctioned or penalised for failure to preserve ESI due to the lack of an obligation to store it. Despite that, the same rules or provisions that impose duties of storage of information on companies, employers or professionals regulate penalties for non-compliance to such rules, but these possible sanctions are extraneous to civil procedural provisions.

Nevertheless, the lack of preservation of ESI can lead to negative consequences under civil litigation. For example, in the preliminary proceedings described above, if the party refuses to exhibit documents relating to the subject matter of the procedure, the court may give evidentiary value to the copy provided by the applicant.

Moreover, in some cases, the court may issue an order so that the requested documents are included in the records of the proceedings. The court, if it deems it necessary, may even issue an order to enter and register the requested party's premises, and, if the documents are found, proceed to occupy them and make them available to the petitioner at the seat of the tribunal.

In a new regulation introduced last year by the Spanish legislator relating to claims for damages for breaches of competition law, if the requested parties refuse to exhibit documents, they may be sanctioned with a daily penalty of between EUR600 and EUR60,000 for delay in complying with the measure. As in the case of the court orders described above, a party which fails to comply with the court order may commit the offence of contempt of court.

In conclusion, the Spanish legal system in the context of civil litigation does not provide specific sanctions or penalties for not preserving ESI or other documents, but their non-preservation can lead to several negative consequences during the proceedings.

7. Timing and Extent of Sanctions

Please refer to **6 Sanctions and Penalties**, above.

8. Costs of Discovery/Disclosure of ESI

The Spanish legal system does not provide costs for discovery. Nevertheless, as indicated in the previous sections, one party, even before filing the complaint, may submit an application to the other party to exhibit certain and specific documents that the applicant does not have. In this situation, the applicant shall bear the costs of the procedure, as well as any damages that may arise while executing the measure.

However, if the application is made at the evidentiary phase, the cost is governed by the general rules on costs. In these cases, we could face two options: (i) that the procedure ends without a decision on the appraisal of costs; or (ii) that the procedure ends with a decision on the appraisal of costs.

On the first case, if the civil proceedings end without a decision on the appraisal of costs, each party will bear its own legal costs and expenses, and the costs of the proceedings will be paid by both parties in equal parts.

On the other hand, if the civil proceedings end with a judicial decision on the appraisal of costs, the losing party must bear all costs of the proceeding and reimburse all expenses which the winning party may have incurred.

9. Obligations of Parties to Meet and Confer

The Spanish legal system does not impose any obligations on parties to meet and confer in the context of disclosure/discovery of ESI similar to the requirements of US Federal Rule of Civil Procedure 26(f).

The only similarities that the Spanish legal system contemplates are the preliminary proceedings whereby if the submission lodged by one party is accepted by the court, the requested party is forced to exhibit specific information or documents.

The information or documents that may be requested by one of the parties to the court so that the counter-party finally exhibits such documents are the following:

- the documents and accounts of the company or condominium directed to the latter or to the consortium or joint owner who has such documents in his possession;
- an insurance policy so as to determine another possible responsible party accounted by the injuries that may have happened;
- a medical record from one party so as to clarify past issues relating to the matter; and
- the documents that could establish and determine the members of an affected group in order to start litigation concerning matters relating to consumer and user protection.

Since the parties have control over civil proceedings, they may, at any time, unless it is prohibited by law, submit their dispute to alternative and extrajudicial resolution procedures.

As an example, when the court notifies the parties of the date of the hearing, the court should advise them of the possibility of negotiation, in order to try and resolve the dispute,

including recourse to mediation, even if it is not an obligation. In the event of an established contractual clause by the potential parties, and if they have to submit any controversy to mediation, they are requested to attempt mediation, but there is not a gathering duty such as established by the US Federal Rule of Civil Procedure 26 (f).

10. Scope of Party's Obligation Regarding Electronic Documents

The parties to civil proceedings are only obliged to search for and disclose electronic documents, if they exist, when the court issues an order to that effect, in the terms previously described.

11. Requirement to Certify that Search Carried Out

As the Spanish legal system does not provide for discovery per se, there are no rules which require a party to certify as to the scope or completeness that a search for electronic documents has been carried out.

12. Form of Production of ESI

Form of production of ESI: related provisions found in the Spanish Civil Procedural Act
The SCPA allows, under Section 299.2, the parties to bring ESI into proceedings.

Regarding the form of production of ESI, sections 382, 383 and 384 of the SCPA should be considered.

Section 382.1 of the SCPA establishes that in court the parties may propose the reproduction of speech, images and sounds recorded through instruments for filming, recording and other similar instruments as means of evidence. On proposing this evidence, the party may, as appropriate, attach a written transcript of the words contained in the media in question which are relevant to the case.

The party which proposes this means of evidence may provide the opinions and instrumental means of evidence it considers to be advisable. The other parties may also provide opinions and means of evidence when they question the authenticity and precision of what has been reproduced. The court shall evaluate the reproductions referred to in Section 382 of the SCPA in accordance with the rules of fair criticism.

Regarding the certificate of the reproduction and custody of the relevant materials, Section 383 of the SCPA should be considered. An appropriate certificate shall be drafted of the acts carried out, in application of the previous section, and this shall contain all that is necessary for the identification of the filming, recording and reproductions made, and, as appropriate, the justifications and opinions provided or the evidence examined.

The material which contains the speech, image or sound reproduced relating to the court records must be kept by the court clerk so that it does not undergo any alterations.

Finally, Section 384 of the SCPA establishes that the electronic instruments which are relevant to the proceedings must be admitted as evidence and shall be examined by the court using means which the parties to the proceedings provide or to which the court has access. The examination will have to be carried out in such a way that all parties to the proceedings may allege and propose what they consider necessary for the presentation of their case.

The documentation in the records shall be kept in the manner most appropriate to the nature of the instrument, in the care of the court clerk, who, as appropriate, shall also adopt the measures required for their custody.

It is interesting how the parties may bring ESI into proceedings guaranteeing the custody chain.

A Spanish Supreme Court Ruling, issued on 19 May 2015, established how evidence which has been extracted from instant messaging applications (eg, Whatsapp) should be treated. The Spanish Supreme Court recognised the ease with which such means of evidence may be manipulated. In order to avoid such evidence to be challenged, the Supreme Court recommends bringing in expert testimony which affirms that the content of the conversations have not been manipulated and that the custody chain has been preserved.

Timing
The SCPA does not specifically regulate the timing in which production of ESI must be completed. Nevertheless, we may apply the general rules contained under the SCPA concerning the bringing of evidence by the parties into proceedings.

Section 399.3 of the SCPA states that the complaint should contain – among other requirements – all the documents, means and instruments which are provided in relation to the facts on which the claims are based. Therefore, documentary evidence should be brought at the initial stages of proceedings. Such documentary evidence will include public and private documents but also – in general terms – any expert testimony which may provide the judge with any specific knowledge which the case requires.

Regarding Section 265 of the SCPA, all claims and responses shall be accompanied by: (i) the documents on which the parties base their right to the judicial protection they claim;

(ii) the means and instruments referred to in paragraph 2 of Section 299 if they are the basis for the claims for protection formulated by the parties; (iii) the certifications and notes concerning any registry entries or the content of the register books, procedures or proceedings of any nature whatsoever; (iv) the expert opinions on which the parties base their claims, notwithstanding the provisions of sections 337 and 339 of the SCPA; and (v) the reports, worded by legally qualified private investigation professionals, concerning relevant facts on which the parties base their claims. If such facts are not acknowledged as true, oral evidence shall be taken.

Paragraph 2 of Section 265 of the SCPA continues by saying that only where the parties, when submitting their claim or response, do not have the documents, means and instruments referred to in points (i), (ii) and (iii) referred to above, they may designate the file, protocol or place where they are to be found or the registry, register book, acts or proceedings from which a certification is intended to be obtained. If what the parties intend to present at the hearing is contained in a file, protocol, proceedings or registry from which they may request and obtain authentic copies, the plaintiff shall be deemed to have them at its disposal and shall be bound to attach them to the claim and cannot confine itself to the designation referred to in the preceding paragraph.

Notwithstanding the above, the plaintiff may, at the prior hearing, submit the documents, means, instruments, opinions and reports relating to the grounds of the case, whose interest or relevance has only become evident as a result of the allegations made by the defendant in its response to the claim.

Regarding the submission of documents after the commencement of proceedings, Section 270 of the SCPA establishes in its first paragraph that after the claim and the response to the pre-trial hearing – or whenever it is appropriate – the documents, resources and instruments relating to the merits of the case presented by the claimant or the defendant shall only be admitted in the following cases:

- they are dated subsequent to the claim or the response or, possibly, subsequent to the pre-trial hearing, on condition that it was not possible to draft or obtain them prior to the proceedings;
- they are documents, means or instruments prior to the claim or response or, as appropriate, to the pre-trial hearing, when the party which submits them proves that they did not know of their existence before;
- it was not possible to obtain the documents, means or instruments due to reasons which are not attributable to the party, providing the designation referred to in Section 2 of Article 265 was duly made or, as appropriate, the announcement referred to number 4 in paragraph 1 of Section 265 herein.

Paragraph 2 of Section 270 establishes that when a document, means or instrument regarding facts relating to the merits of the case are presented once the acts referred to in the previous section have concluded, the other parties may allege the inadmissibility of taking these into consideration in the proceedings or hearing as they do not come under any of the cases referred to in the previous section. The court shall decide immediately and, if it considers that there is an intention to delay or procedural bad faith in the presentation of the document, it may also impose a fine of between EUR180 and EUR1,200 on the guilty party.

13. Advance Analytical Tools

Although the Spanish legal system does not provide any specific rules regarding the use of any advanced analytical tools for the processing, review or production of ESI, there are certain practices which are being used in order to leave a record of the information which has been electronically stored in specific devices.

To take an example: an employee ("A") from company "B" has been extracting confidential information from his company's computer, which he only has access to as an employee of company B. Employee A uses such information in order to create a new company named "C" whose purpose is exactly the same as company B's and which is going to compete in the market with company B. Finally, company B decides to lodge a claim against employee A based on an unfair competition offence. Company B wants to examine the computer in order to see if he effectively took advantage of the information contained in the emails and if employee A extracted certain information – which belonged to company B – from the computer with external devices such as a USB, etc.

As company B wants the computer to be analysed in order to prepare an expert testimony which will later be brought into the judicial proceedings as evidence, it is common practice that the parties normally take the following steps.

- In order to seize the electronic device – in this example a computer – where the information is being stored, it will be necessary to make a copy of the hard disc before a notary. This way the notary will be able to approve a notarial deed in which the notary states that a copy from the original hard disc has been taken and that there is no proof that it has been altered.
- The original device will be left in the notary's office and the expert – who will later prepare a testimony on the movements which occurred in the computer – will work over the copy of the hard disc. Like this, the original device will become unaltered and the custody chain will also be guaranteed.
- It is also advisable that the day on which the electronic device is seized from company B's office there is a witness

who will acknowledge that he or she saw how the computer was seized from company B's offices.

The expert testimony which is prepared once the computer is completely analysed will contain specific data sheets which refer, among other things, to:

- the type of evidence which has been analysed;
- the analysed device;
- the device's manufacturer;
- name, model and serial number of the analysed device;
- the place from which the analysed device has been seized;
- the name of the user of the computer – in our example the name of employee A; and
- the hash number.

14. Production or Withholding Production of Privileged ESI

General Provisions

Article 18 of the Spanish Constitution establishes that secrecy of communications shall be guaranteed, particularly regarding postal, telegraphic and telephone communications, except in the event of a court order.

In addition, the fact that attorneys are obliged to keep secret any type of information which they have acknowledged by means of their professional performance has been included under paragraph 3 of Section 542 of the SOLJP.

Section 5 of the Deontological Code of Spanish Advocacy (the DCSA) refers to and develops some aspects of the secrecy of communications with which an attorney must comply.

For attorneys, secrecy of communications is a legal, contractual and ethical principle with which they have to comply. Attorneys are obliged to keep all information, facts and issues known due to their professional activity secret, and they cannot be forced to testify about them. In fact, if an attorney revealed any of the information known due to his professional activity, he would be committing a criminal offence regulated under Section 199 of the SCC.

Paragraph 4 of Section 5 of the DCSA continues to state that conversations held with clients, counter-parties or their attorneys – physically or by telephone or telematic means – will not be able to be recorded without a previous warning and consent from all its participants. In most cases, such conversations will be protected by professional secrecy.

Additionally, Section 118.4 of the SCrimPA establishes that any communication held between the accused person and their attorney will be treated confidentially. It continues to state that if these conversations or communications had been intercepted during the execution of any of the procedural acts established under the SCrimPA, the judge must order the elimination of such conversation. Nevertheless, this will not be applied when there are objective indications that the attorney has participated together with the accused person in the criminal offence which is being investigated.

Regarding the tapping of conversations held between the accused and their attorneys, we must also make mention of what the SCrimPA establishes as common rules relating to the interception of telephone and telematic communications, the reception and recording of oral communications through the use of electronic devices, the use of technical devices which track, locate and capture images, the registration of mass information storage devices and remote access to computer equipment. This became extremely controversial in Spain due to the fact that a reputable Spanish judge was removed from the court bench due to the fact that he was convicted of breaching his duties and violating the constitutional rights of several public corruption defendants by ordering phone taps of their conversations in prison in 2009.

Secrecy of Communications and the Approval of Law 10/2010

Since 2010, an attorney must put aside their avowed professional duty when they provide certain assessment in the scope of operations that may be connected with a possible money-laundering. This is due to the fact that on 30 April 2010 a new law entered into force in the Spanish legal system, namely Law 10/2010, of 28 April, regarding the prevention of money laundering and terrorism financing.

By virtue of this law, attorneys are obliged to assume a series of reporting rules when they act, have acted or are acting in certain transactions representing or advising their clients. These transactions are limited to:

- the conception of, execution of or advice in relation to transactions by clients regarding corporate or real estate sale and purchase agreements;
- fund or securities management;
- the organisation of the necessary contributions in order to create, set up or manage corporations, trusts, corporations or similar structures; and
- when attorneys act on behalf of their clients in any financial or real estate transactions.

Such reporting rules may include (i) facilitating essential data from their clients and the real purpose of the transactions on which the attorney has advised and (ii) reporting the suspicious transaction to the SEPBLAC (*Servicio Ejecutivo de la Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetariasor* – the Anti Money Laundering Authority).

European Court of Justice's Ruling
In addition, within the European context, after the Akzo Nobel Chemicals Ltd and Akcros Chemicals Limited v European Commission case, it should be mentioned that in-house attorneys are not protected by legal professional privilege in the EU competition context. Therefore, if the advice given by an in-house attorney could relate to a competition issue, then the attorney must note the real risk that his communications – though containing legal advice – can be seized and used by European competition authorities in any subsequent investigation (see C-550/07 P – Akzo Nobel Chemicals and Akcros Chemicals against European Commission).

15. Privacy Statutes & Rules or Regulations

Organic Law 15/1999, of 13 December, on the Protection of Personal Data (the OLPPD) entered into force on 14 January 2000. This law was subsequently developed by Royal Decree 1720/2007, of 21 December, by which the Regulation developing the OLPPD was approved.

The OLPPD's main targets are the following: (i) to regulate the processing of the information and the files which contain personal data, independently of the form in which such data is stored, physically or electronically; (ii) to establish the rights which the data subjects have over the personal data they provide to public and private entities or individuals; and (iii) to determine the obligations which the people who generate and/or deal with such data have to comply with.

Therefore, such legislation should be now connected with the provision of personal data as means of evidence in judicial proceedings. Here certain fundamental rights should be taken into consideration – for example, the right enshrined in Article 24 of the Spanish Constitution which deals with the right to use evidence appropriate to a person's defence.

Additionally, it is now essential to mention that Section 11 of the OLPPD establishes that the use of certain personal data will not require the consent of the data subject who has handed over his personal data, when the transfer of personal data which has to be carried out has as its addressee a judge or a court. As a consequence, three possible scenarios may exist:

- where the controller transfers personal data due to the fact that a judicial body has requested him to do so;
- where the controller assigns personal data to one of the parties (or the party's attorney) in the proceedings with the aim that the party uses such data in the context of the proceedings in order to defend his/her interests; and,
- where one of the parties in the proceedings brings personal data of the counter-party which are at his/her disposal.

Regarding the first scenario, it is common practice that Spanish institutions, such as the *Agencia Española de Protección de Datos* (Spanish Data Protection Agency) and the Spanish courts, exonerate public and/or private entities which provide the court with personal data from one of the parties to the proceedings. Such exoneration is justified by the fact that it is the court which has required such information (see Section 11.2.d of the OLLPD and the Spanish Data Protection Agency legal reports 479/2005 and 1753/2017).

Regarding the second scenario, courts have been punishing the party which has carried out such performances due to the fact that in these types of situations the controller was required by a third person, and not by the court.

As to the third scenario, it has to be said that, in most of these cases, Spanish courts and the Spanish Data Protection Agency have preferred to defend the right to an effective legal remedy than to uphold the right of the data subject to allow or consent to the use of his personal data (see Spanish Data Protection Agency legal reports 1555/2007 and 2360/2017).

Likewise, Regulation of the General Council of Judiciary 1/2005, of 15 September on Auxiliary Aspects of Judicial Proceedings provides for the regulation of and distinction between jurisdictional data and non-jurisdictional data. Jurisdictional data include those processing of personal data directly related with the judicial capacity of the courts which are the competence of the General Council of the Spanish judicial authority, as the OLLPD remarks in Section 236 nonies, in order to guarantee the independence of the processing of personal data when the court exercises its judicial function. On the other hand, non-jurisdictional processing of personal data fall within the competence of the Spanish Data Protection Agency, making necessary the agreement between the General Council of the Spanish judicial authority and the Spanish Data Protection Agency in order to investigate any breach in the data protection regulation.

The GDPR will also affect the right of access to public information included in Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (the LT). Section 12 of the LT, together with Article 105.b of the Spanish Constitution, grants freedom of access to public information. The GDPR considers access to public information to be a legitimate interest based on the public interest and therefore data protection legislation cannot act so as to block access. In order to comply with Section 37.1.a of the GDPR, the public bodies in charge of ensuring access to public information must designate a Data Protection Officer (DPO).

16. Transfer of ESI Outside Jurisdictional Boundaries

Two main bodies of law regulate the transfer of means of evidence outside Spanish jurisdictional boundaries. These are: (i) the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters; and (ii) Council Regulation (EC) No 1206/2001, of 28 May 2001, on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.

The 1970 Hague Convention
On the one hand, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the 1970 HC) was signed by Spain on 21 October 1976.

As its title duly states, the 1970 HC provides minimum standards regarding the taking of evidence abroad, and with which contracting states agree to comply.

Nevertheless, it is essential to point out that Spain made specific reservations regarding sections 4 and 23 of the 1970 HC.

Regarding Section 4, Spain announced that international letters rogatory would not be admitted if they were not written in Spanish or duly translated into Spanish. Such reservation was made due to the fact that the 1970 HC establishes that a contracting state shall accept a letter rogatory in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Section 33.

Another reservation was also made by Spain, but, this time regarding Section 23 of the 1970 HC. This last declaration established that Spain would not accept international letters rogatory which derived from pre-trial discovery of documents. This is due to the fact that for civil law countries discovery generates certain distrust due to the fact that no previous control over the evidence's pertinence and relevance exists.

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Council Regulation (EC) No 1206/2001
On the other hand, the entry into force of Council Regulation (EC) No 1206/200,1 of 28 May 2001, on Co-operation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters (the CR 1206/2001), represented the first time in Europe's history that that there was a binding legal act on the taking of evidence abroad for its Member States.

The request for the taking of evidence must be made by a judicial body. Consequently, the request for the taking of evidence initiated by an administrative body or by an arbitral body shall have no effect.

A court from any of the European Member States may request a Spanish judicial body any means of evidence which are listed in Section 299.1 SCPA. These are:

- examination of the parties;
- witness interrogation;
- documentary evidence;
- expert's testimony; and
- inspection of evidence by the judge.

Section 1.2 of the CR 1206/2001 determines that a request shall not be made to obtain evidence which is not intended to be used in judicial proceedings. In Spain's case, courts may ask the advanced examination of evidence regulated under Sections 293 until 296 SCPA, as well as the adoption of measures for the seizure of evidence established under sections 297 and 298 SCPA.

Another general principle regarding the execution of the request is that the examination of the evidence will take place according to the procedural rules of the country where the judicial proceedings are being carried out. This means that the examination of the evidence will take place according to the laws of the state where the evidentiary procedures are being practiced (lex fori regit processum).