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INCOMPATIBILITIES OF THE INTRODUCTION OF THE NEW DATA PROTECTION RULES APPLIED TO THE SPANISH ELECTORAL SYSTEM IN THE LIGHT OF STC 76/2019

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Abstract

Data protection is a particularly relevant subject for the protection of fundamental rights such as the privacy of individuals. This right must be especially protected in the field of electoral processes, where Spanish legislation has undergone some changes that are analysed in this article. In this sense, the focus of this paper is on the recent judgement of the Spanish Constitutional Court, which annuls article 58.1 bis LOREG for incompatibility with the constitutional ordination and with certain aspects of European and national legislation on the matter. As a result, this paper tries to contribute to the discussion about this recent judgement as well as to determinate the implications of this constitutional incompatibility in the matter of data protection applied to electoral processes.

Keyword: Electoral system; data protection; unconstitutionality; regulation; data protection agency; constitutional court.

Summary: 1. Introduction. – 2. The Spanish framework. – 3. Position of Spanish Constitutional Court (TC). – 4. Conclusions. – 5. References.

1. Introduction

The use and management of personal data are increasingly adapting to a new framework of European and national rules, as several previous papers have announced [1]. It is for this reason that legal doctrine and case law are beginning to

[1] García Mexía, P. (2016). La singular naturaleza jurídica del reglamento general de protección de datos de la UE, sus efectos en el acervo nacional sobre protección de datos. El Reglamen-

look closely at new developments in recently adopted data protection laws, namely Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), hereinafter RGPD, which has provoked the publication of the organic law 3/2018, of 5 December, on the protection of personal data and the guarantee of digital rights (hereinafter LOPD).

Because of this, it is interesting to emphasize that European and national rules are related to personal data procedures in order to introduce the purpose of this paper. As can be seen by the date LOPD, the adoption of the law is a fairly recent development, which has led to some doubts and debates on the application of certain parts of the text.

So, by way of introduction, the Spanish legislative landscape has had to adapt in recent months to new regulations on data protection, especially in order to harmonise its legislation with the European one. This need motivated the approval of the LOPD in 2018, repealing the previous law of 1999, and modifying related laws such as Organic Law 5/1985, of 19 June, on the General Electoral System (hereinafter LOREG), whose implications are analysed with the aim of contributing to solve the lack of previous research in this field.

2. The Spanish framework

The Final Provisions LOPD imposed the modification of some laws concerning data protection [2], and, in fact, we are able to announce the collaboration with Universidad de Santiago de Compostela to elaborate another research analysing the normative changes whose publication is in process at this moment. As far as we are concerned in this paper, LOREG had to be modified to adapt to the mandate of the Third Final Provision LOPD. This modification consisted in the reissue of article 39.3 LOREG and the adoption of a new article, 58 bis LOREG which reads as follows:

"*Article fifty-eight bis. Use of technological means and personal data in electoral activities.*

to General de Protección de Datos, hacia un nuevo modelo de privacidad de datos (págs. 23 y siguientes). Madrid. Editorial Reus.

[2] Arenas Ramiro, M., Ortega Giménez, A., *Comentarios a la Ley Orgánica de Protección de Datos y Garantía de Derechos Digitales (en relación con el RGPD)*, Editorial Sepín, Madrid, 2019, pág. 552.

1. The collection of personal data relating to the political opinions of persons carried out by political parties in the framework of their electoral activities shall be in the public interest only where adequate safeguards are provided.

2. Political parties, coalitions and electoral groupings may use personal data obtained from websites and other publicly accessible sources for the conduct of political activities during the electoral period.

3. The sending of electoral propaganda by electronic means or messaging systems and the contracting of electoral propaganda in social networks or equivalent media shall not be considered a commercial activity or communication.

4. The informative activities referred to above shall identify their electoral nature in a prominent manner.

5. The addressee shall be provided with a simple and free means of exercising the right of opposition".

This new article caused some expectation in the political and legal spheres because of the doubts raised about the scope, application and its consequences, which has been reflected in the public [3] opinion [4] … but the first section of the article 58 bis LOREG was particularly controversial because of the *"collection of personal data relating to the political opinions"* and the doubts about which were these *"adequate safeguards"*.

The legal answer to these doubts appeared really quickly, as the Spanish Data Protection Authority (hereinafter AEPD) issued a report in December 2018 stating that article 58 bis should "be subject to restrictive interpretation as it is an exception to the processing of special categories of personal data based on the public interest which would be covered by article 9.2 g) RGPD" [5]. This report confirmed the need to delimit the scope and specify the content of article 58 a), but did not resolve the legal doubts as demonstrated by the fact that AEPD had to publish another report (circular 1/19) to explain some of the elements of the law that would affect the electoral procedures that have taken place in Spain in spring 2019. Circular 1/19 explains some of the elements to com-

[3] Santi Cogolludo, Los partidos políticos "espiarán" los datos personales de los ciudadanos para captar votos, El Mundo, https://www.elmundo.es/espana/2018/11/20/5bf31b2d468aeb5e1e8b4648.html accesed 8 October 2019

[4] La Ley permitirá a los partidos rastrear opiniones políticas en redes sociales para personalizar la propaganda electoral, RTVE, http://www.rtve.es/noticias/20181120/ley-permitira-partidos-rastrear-opiniones-politicas-redes-sociales-para-personalizar-propaganda-electoral/1841082.shtml accesed 8 October 2019.

[5] Informe 210070/2018 Gabinete Jurídico de la Agencia Española de Protección de Datos. Available at https://www.aepd.es/prensa/2018-12-19.html and exactly at https://www.aepd.es/media/informes/2018-0181-tratamiento-datos-opiniones-politicas-por-partidos-polticos.pdf.

plete the article 58.1 bis LOREG such as subjects (political parties, federations, coalitions and groups of voters), the data than can be collected (the freely expressed political opinions of persons in the exercise of their rights to ideological freedom and freedom of expression) the time when these data can be collected (electoral period), et cetera. But it is especially interesting to emphasize the article 7 Circular 1/19, where "adequate safeguards" can be read.

These guarantees must have the following characteristics [6]:

- The principle of responsibility is established from the design and by default.
- It is mandatory to appoint a data protection officer in accordance with Article 37.1.c) of the RGPD.
- A register of processing activities should be kept according article 30 RGPD, and should be precise and clear, in accordance with the principles of fairness and transparency.
- Data protection impact assessment should be carried out when special categories of data are processed on a large scale according to article 35.3 RGPD.
- The AEPD should be consulted before processing according to article 36.1 RGPD in case of high risk processing.
- Security measures must be taken as provided for in article 32 RGPD.
- The data processor must be selected when it offers sufficient guarantees and a contract must be concluded with the content of article 28 RGPD
- The exercise of the rights of access, rectification, erasure, limitation of processing and objection shall be facilitated, in a simple and free of charge manner.
- The data protection officer must verify that the data were obtained lawfully and in compliance with all the requirements of the RGPD when data are obtained from third parties who do not act as data processors, and specially that the third party must have a standing to obtain and process these data and he also has to inform to subjects about the purpose of the data transfer to political parties.
- The person responsible must observe the content of article 22 RGPD if the persons concerned are subject of automated decisions.

Several commentaries can be drawn from this list of guarantees, but maybe the most relevant conclusion is to emphasize the constant reference to the

[6] Circular 1/2019, de 7 de marzo, de la AEPD, sobre el tratamiento de datos personales relativos a opiniones políticas y envío de propaganda electoral por medios electrónicos o sistemas de mensajería por parte de partidos políticos, federaciones, coaliciones y agrupaciones de electores al amparo del artículo 58 bis de la Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2019-3423.

RGPD, which means, firstly, that European legislation is a fundamental source of data protection in Spain, and secondly, that effectively both the LOPD and the LOREG could not complete the content of article 58.1 bis LOREG, which would explain why it was so necessary to observe the European regulation.

3. Position of the Spanish Constitutional Court (TC)

On the occasion of this dubious interpretation, the Spanish Ombudsman (hereinafter DP) asked TC about the constitutionality of the rule [7-8]. TC admitted the matter [9] for processing [10], collecting the background and formulating a list of very interesting legal considerations: TC recognized that political opinions are sensitive data, limiting the faculty to violate some aspects of this space of the privacy of the citizens by political parties.

For this purpose, TC explains the background of the case and summarizes one of the main concerns that caused the Spanish Ombudsman to bring the present appeal, such as the concurrence of numerous doubts that compromise the guarantees of protection of data as sensitive as political opinions. In this sense, according to STC 76/2019, "the Ombudsman argues that the legislator does not limit the processing of personal data that reveal political opinions by political parties in the framework of their electoral activities, and does not establish which guarantees are referred to in the contested provision, nor the criteria for determining them, nor the regulatory vehicle that must contain them, nor the authority or public power that must establish them, and does not even make any reference to the rights of data subjects or to the manner and conditions in which they may exercise them", which violates 18.4 CE, 9.3 CE, 14 CE, 16 CE, 20 CE, 23 CE.

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[7] Ignacio Gil, El Defensor del Pueblo recurre al Tribunal Constitucional el SPAM electoral, ABC, 6 March 2019 https://www.abc.es/tecnologia/redes/abci-defensor-pueblo-recurre-tribunalconstitucional-spam-electoral-201903051509_noticia.html accesed accesed 8 october 2019.

[8] El Defensor del Pueblo recurre la ley que permite a los partidos políticos recopilar datos de usuarios que opinan en la red, El País, 5 march 2019, https://elpais.com/politica/2019/03/05/actualidad/1551794515_204840.html accesed 8 october 2019.

[9] El Tribunal Constitucional admite a trámite el recurso del defensor del pueblo contra el SPAM electoral, AB, 15 March 2019, https://www.abc.es/tecnologia/redes/abci-tribunal-constitucional-admite-recurso-defensor-pueblo-contra-spam-electoral-201903121347_noticia.html.accesed 8 October 2019.

[10] El Constitucional admite el recurso del Defensor del Pueblo contra el rastreo de opiniones políticas con fines electoralistas, Público, 12 March 2019, https://www.publico.es/sociedad/proteccion-datos-constitucional-admite-recurso-defensor-pueblo-rastreo-opiniones-politicas-fines-electoralistas.html accedes 8 October 2019.

These articles protect fundamental rights such as data protection, legal certainty, freedom of expression, ideology, equality, and even the content of Article 9.1 of the European Regulation, concerning the special category of data relating to political opinion.

Despite this previous background, Spanish State Attorney considers there is "an undoubted public interest" and adequate guarantees are given by the Law, giving as an example the case of "*Cambridge analytica*" and calling on the need to regulate the sector. In addition, the Spanish State Attorney considers that data collection limits are already set out in recital 56 of RGPD, LOPD and AEPD reports.

In this way, TC resolved this dispute. With that in mind, TC remembered its own doctrine to state his position on the matter:

Firstly, TC exposed in the legal basis 5-9 in STC 292/2000 [11], to fix its position about the **violated data protection**, as the right to consent to the collection of, access to, storage and processing of personal data and to their possible use or uses by a third party such as the State or an individual. It implies the right to know at all times who has such personal data and what use is subjecting them, as well as to be able to oppose such possession and uses.

Secondly, TC remembers STC 120/1992, in order to fix his position about **violated ideological freedom**, which "is not limited to adopting a certain intellectual position with regard to life and all that concerns it and to representing or judging reality according to personal convictions, in an internal dimension. This freedom also includes an external dimension of *agere licere*, in accordance with one's own ideas, without suffering sanction or demerit for it, nor suffering compulsion or interference from public authorities" (STC 120/1992, 27 June , eigth legal basis); so TC imposes two requirements: on the one hand, ideological freedom can only be intervened by rule with the rank of law, and on the other hand, this law must concentrate all the appropriate guarantees that provide legal certainty exposed at several judgments as STC 49/1999 (at his fourth legal basis)

In this sense, TC requires adequate technical, organizational and procedural guarantees to prevent risks of varying probability and severity and mitigate their effects, because just in this way the essential content of the fundamental right can be protected [12].

Furthermore, TC analyses European case law to complete judgment according the complements of the European legal sources. TC exposes on paragraph

[11] STC 292/2000, de 30 de noviembre. BOE núm. 4, de 4 de enero de 2001, páginas 104 a 118 (15 págs.).

[12] STC 76/2019, de 22 de mayo de 2019. Recurso de inconstitucionalidad 1405-2019. BOE núm. 151, de 25 de junio de 2019, págs. 67678 a 67700.

54 of Judgment of the Court (Grand Chamber), 8 April 2014, which reads as follow: "Consequently, the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *Liberty and Others v. the United Kingdom*, 1 July 2008, no. 58243/00, § 62 and 63; *Rotaru v. Romania*, § 57 to 59, and *S. and Marper v. the United Kingdom*, § 99)". [13]

TC does not appreciate the guarantees required for the protection of data on political opinion in the rules of data protection or electoral regulation, and therefore considers that there is a high degree of legal uncertainty. This demand for extra security is due to the fact that the freedoms violated are fundamental rights, and TC considers that the content of art. 58.1 bis LOREG is insufficient to determine whether the operations that political parties may carry out will be "the foreseeable result of the reasonable application of what was decided by the legislator" or not. So, definitely, the purpose or the legal good is not justified by the legislator, so this restriction of the right to the protection of personal data cannot be allowed. TC neither understands the conditions which may limit this right, what does not provide legal certainty.

Finally, TC concludes that "political opinions are sensitive personal data whose need for protection is, greater than other personal data. Adequate and specific protection against processing is, in short, a constitutional requirement, without prejudice to the fact that, as we have seen, it also represents a requirement deriving from European Union law. Therefore, the legislator is constitutionally obliged to adapt the protection afforded to such personal data, where appropriate, by imposing greater requirements so that they may be processed and providing specific guarantees in their processing, in addition to those that may be common or general".

4. Conclusion

As a conclusion, we are able to consider that the irruption of the technological innovations that allow a better and greater use of data have brought with

[13] STJUE (Gran Sala) de 8 de abril de 2014. Digital Rights Ireland Ltd contra Minister for Communications, Marine and Natural Resources y otros y Kärntner Landesregierung y otros. ECLI identifier: ECLI:EU:C:2014:238. Available at: https://eur-lex.europa.eu/legal-content/es/TXT/?uri=CELEX%3A62012CJ0293

them a new legal framework that must be studied and implemented.

These laws have to regulate a technical reality that develops faster than the legislator's capacity to assimilate and manage these novelties. Therefore, some aspects of these standards have to find their pacific place in the constitutional ordination in accordance with the standards of internal and, of course, European rules that the Spanish constitution assumes as its own.

That is why the TC is based on national and European rules to resolve the incompatibility of article 58.1 bis due to the lack of guarantee in the protection of a sensitive right as the political opinions of individuals, deciding to expel it from the Spanish legal system.