

General principles for the criminal prosecution of cybercrime: Spanish perspective

Abstract

The reform of October 2015 introduced into the Spanish legal system an important renewal of the measures available by criminal investigators for the prosecution of crimes committed through information and communication technologies. This study analyzes the general principles of this legislative innovation, the constitutional frame that directly influences them and how they will be applied in some particular investigation measures. It is noteworthy that the long-established criteria developed by jurisprudence to make the restrictions of fundamental rights are admitted by the legislator in this reform, including the need for close judicial control, which should ever take into account in a brief time a careful consideration of the proportionality in the limitations provided by the new articles.

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Introduction

The fact that in Spain a Criminal Procedure Code - whose official name is the Criminal Procedure Law (LECrím)- continues to be in force from 1882, in spite of its numerous modifications and additions, it is an important inconvenience to be able to affirm that in our system it has been an updated and orderly regulation of the procedural consequences of the cybercrime. For some time the Spanish norms of something so elementary, and even antiquated, as the intervention of telephone communications gave rise to unfavorable pronouncements of the ECHR, although the Organic Law 4/1988 tried to update minimally the article 579 of Title VIII of the Book II of the LECrím. For a long time it was the jurisprudence of the Supreme and the Constitutional Courts that offered criteria for the interception of telecommunications with the essential guarantees of constitutionality and adjusted to the requirements of conventionality, which entered in Spain through Article 10.2 of the Spanish Constitution (CE)¹, which allowed that in practice the violations of fundamental rights were scarce, although legal security was not a dominant value in the reality of criminal investigations. Along with this, technological advances are evident², always ahead of legal norms, but even more so given the circumstances that have just been summarized. If it is true that criminals -especially in organized crime, but not only in it- know the most recent intricacies of communication technologies and benefit ostensibly from them, the means available to public institutions for their persecution take longer in catching up the actual necessity. However, we should not disregard the legislative efforts that the legislator has managed to enact, especially in October 2015, with the Organic Law 13/2015, of modification of the LECrím for the strengthening of procedural guarantees and the regulation of the measures of technological research³, with which it has been possible to go much further⁴.

¹ Art. 10.2 CE: "The rules relating to fundamental rights and freedoms that the Constitution recognizes will be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements on the same matters ratified by Spain".

² Vid. VILLEGAS GARCÍA, M.A., y ENCINAR DEL POZO, M.A., "Validez de medios de prueba tecnológicos", *Diario La Ley*, núm. 9005, 21 de junio de 2017.¹

³ For a panoramic vision of the reform in the subject that occupies us, *vid.* BUENO DE MATA, F., "Comentarios sobre la Ley Orgánica 13/2015 de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica", *Diario La Ley*, núm. 8627, 19 de octubre de 2015.²

⁴ It is not trivial to refer to the last two attempts to approve a complete legislation on our criminal process, which, however, due to different circumstances, did

The reform of October 2015

Among the inclusions that the Organic Law 13/2015 introduced in the old text of the LECrím highlights a broad regulation of common provisions to the interception of communications and telematics, the capture and recording of oral communications through the use of electronic devices, the use of technical devices for tracking, locating and capturing the image, registering mass storage devices and remote registers on computer equipment (Chapter IV of Title VIII of Book II). These provisions will be the ones that will focus our comments, given the impossibility of a more exhaustive analysis.

But we must also point out the introduction of a new chapter V on the interception of telephone and telematic communications, which will merit some further comment, a new chapter VI on capturing and recording oral communications through the use of electronic devices, a new chapter VII on the use of technical devices for image capture, monitoring and tracking, a new VIII on the registration of massive information storage devices, a new IX on remote registers on computer equipment and a new chapter X, under the heading of "Assurance Measures" refers to the issuance of data conservation orders. To this must be added the forecast of a new interesting figure that is the so-called "Undercover Computer Agent", now envisaged in article 282 bis.6 LECrím. It is praiseworthy the attention of the legislator to so varied investigation measures that suppose a demanded update to reinforce the effectiveness of the security forces without underestimating the essential guarantees in a social and democratic State of Law, which imply -except certain assumptions of urgency- to give the first word about the restriction of fundamental rights to a jurisdictional body, due to the special constitutional characteristics of its function⁵. This is specified in a series of considerations that the judge must take into account when faced with the specific circumstances and with the doubt about whether or not to adopt certain measures and to what extent he can do so without causing infractions⁶. It is necessary to show that this modification, like all the others, has been carried out in a process scheme that is not only old but also chaotic. It is true that the original procedure of the LECrím persists, although

not even reach the entry procedure to the Congress of Deputies and, therefore, the parliamentary discussion: the Draft Bill of Criminal Procedure of 2011 and the Draft of Criminal Procedure Code of 2013. On the latter can be seen the collective volume led by V. MORENO CATENA, *Reflexiones sobre el nuevo proceso penal*, Valencia, 2015.³

⁵ Cfr. Sentence 60/1995, 17 March 1995.

⁶ On fundamental rights that may be affected by cybercrime, *vid.* DELGADO MARTÍN, J., *Investigación tecnológica y prueba digital en todas las jurisdicciones*, La Ley, Madrid, 2016, pp. 99-164.⁴

with some essential modifications, but with little use, if we compare it with others that have been added over time. Especially the so-called “abbreviated procedure”, which in Spain is applied according to the amount of the penalty and not, as in other contexts, based on the bargaining of the accused. Also the fast trial procedure, the procedure for minor offenses and even the procedure before the Jury Court for a few determined offenses. In all of them, however, with very specific exceptions -art. 773.2 LECrim⁷- who directs the investigation remains our inveterate Investigative Judge no matter how much his impartiality has been discussed. Therefore, the Prosecutors and other parties that our legal system permits are placed in the process as active parties that request investigative, preventive, and precautionary or imputation proceedings to the competent jurisdictional body. In addition, the reform reveals an inconsistency, which clearly appears when compared with civil procedural legislation. It is true that new means of investigation related to information and communication technologies have been introduced, but the legislator has not reflected the existence of these peculiar sources of evidence when dealing with the channels of entry into the oral trial of this volume of evidence. In other words, unlike the Civil Procedure Law, in the criminal procedure legislation no new legal means of proof have been provided that serve as a legal entry point to the plenary phase of the process, the oral trial, which is where we have all the essential guarantees for a genuine production of the truly probative activity, that is, with the possibility of validly distorting the presumption of innocence. In this, therefore, the reform has been halved and obliges us to continue resorting to broad interpretations of the concept of document, with the help of article 26 of the Penal Code⁸.

The guiding principles of research measures that restrict fundamental rights

As previously announced, from a panoramic point of view, it is of particular interest to analyze the common provisions that must be applied to this new regulation, always with the attention placed on the need for the investigating judge to adopt the pertinent decision, and therefore, apply the parameters that we are going to examine to the concrete circumstances that are submitted to his or her consideration, usually by the police. In this way a first guiding principle, which does not appear as such in legislation, but which is taken for granted, is the principle of jurisdictionality⁹: it corresponds to a jurisdictional body to decide on these restrictions.

Specialty

The second section of article 588 bis to LECrim has the function of avoiding the use of these measures in a generalized manner or for abstract investigations, which is often referred to as “general inquiries”¹⁰. That is why the Judge, when he has to adopt one of these measures, must always do so with respect to the investigation of a specific crime, therefore, of certain facts determined by specific

⁷The last paragraph is especially important: “The Prosecutor will cease in his investigative proceedings as soon as he becomes aware of the existence of a judicial proceeding on the same facts”.

⁸Art. 26 CP: “For the purposes of this Code, any material that expresses or incorporates data, facts or narrations with evidentiary value or any other type of legal relevance is considered a document”.

⁹Vid. GONZÁLEZ CUÉLLAR, N., *El principio de proporcionalidad y las medidas limitativas de derechos fundamentales en el proceso penal*, Colex, Madrid, 1990.³

¹⁰AGUILERA MORALES, M., *Proceso penal y causa general en el Derecho español*, Aranzadi-Civitas-Thomson Reuters, Madrid, 2008.⁶

space-temporal coordinates. In order to avoid extensive interpretations -possible in a criminal procedure rule, although proscribed in material criminal law-, it is added that technological research measures that aim to prevent or discover crimes or to clear suspicions without objective basis cannot be authorized. The key, of course, is to understand in a strict way that indeterminate legal concept of the “objective basis”; let us not forget that we are facing the restriction of fundamental rights, therefore foreseen in the most protected section of our Constitution, and they cannot be limited except when it is strictly necessary and to the extent that they are. In this way we see that the interpretation of these criteria is not possible separately and independently, but involve an integral reasoning that can only be separated for logical and pedagogical purposes, which is what the legislator has followed

Suitability

The LECrim does not define the principle of suitability, but merely sets its purpose: the delimitation of the objective and subjective scope and the duration of the measure by virtue of its usefulness. The key is in this last word: the measure must be adequate¹¹ to obtain data related to the verification of the facts and/or for the investigation of the delinquents (Article 299 LECrim), but the specific facts and the suspects involved in them, that is why it is important to determine to whom and to whom the diligence that is adopted refers.

Exceptionality

Exceptionality and necessity are regulated jointly and placed in relation to the existence or not of other measures less burdensome for the fundamental rights of the person submit to the investigation and equally useful for the clarification of the fact or, when without the application of the measure in question, the discovery or verification of the specific fact, the determination of the author or authors, the investigation of his whereabouts or the obtention of the effects of the crime is expected to be “seriously” hindered. We are talking about a “serious” difficulty. Even so, for greater clarity, in this brief statement it seems useful to show their separation, because each of these principles, despite their joint application in practice, affect different aspects, because the exception is the opposite of the generality. Therefore, these proceedings cannot be considered as being of general application, but only in exceptional cases that merit the rational weightings to which we are referring in all these pages¹².

Necessity

The necessity highlights a comparison: Given the exceptional situation in which the investigating judge is, can only decide to adopt any of these measures, if there are no other equally effective ways, but less restrictive of the rights involved. It is, then, a criterion that puts attention on the requirement of the right choice among the measures that may be suitable or appropriate: among them it is essential to choose the least restrictive, because the priority always has the safety

¹¹Based on the jurisprudence of the German Constitutional Court, PEDRAZ PENALVA, E., y ORTEGA BENITO, V., “El principio de proporcionalidad y su configuración en la jurisprudencia del Tribunal Constitucional y literatura especializada alemanas”, *Constitución, Jurisdicción y Proceso*, Akal, Madrid, 1990, p. 294, speak of “the principle of adequacy to what is required” and implies that “a means is considered appropriate at the end” when it significantly contributes to obtaining the *desired result*”.

¹²As says VELASCO NÚÑEZ, E., *Delitos tecnológicos: definición, investigación y prueba en el proceso penal*, Sepin, Madrid, 2016, pp. 20 y ss., “not be located continuously is a right” or “geolocation is an interference in privacy.”⁷

of the right human or fundamental freedom affected.

Proportionality

As pointed out by PEDRAZ PENALVA and ORTEGA BENITO¹³, “the requirement of proportionality in the criminal procedural order -as a fundamental legal guarantee- reinforces the intimate connection that constitutional law and procedural law have, in general, and particularly criminal procedural law”.⁸ Indeed, what happens in the field of criminal investigation is the reasonable limitation of fundamental rights, within what is permissible for a democratic society - if we want to use the common expression in the European system of protection of human rights and fundamental freedoms.

Therefore, although the rest of the criteria are given, a stricter assessment of the specific case is required, so that the individual restriction is acceptable to the affected party, which requires a specific weighting of advantages and disadvantages for the general interest and for the subjective position of the individual that prevents overloading the latter¹⁴. In this sense, in order to consider the proceedings proportionate, it is necessary, according to the fifth paragraph of article 588 bis, to take into consideration all the concurrent circumstances and assess the sacrifice of the rights and interests affected, so that the latter does not exceed the benefit that can contribute to the public interest and to third parties. It is also interesting to offer criteria for this weighting, which changes a long tendency of the legislator, which unduly transferred to the judge the setting of the main bases for limitations. Such criteria are, expressly, the seriousness of the event, the social transcendence or the technological scope of production, the intensity of the existing evidence and the relevance of the result pursued with the restriction of the right. This means reasoning globally about the restriction¹⁵.

Jurisdictional control

Prerequisites

Out of the regulation of common provisions, and therefore in the forecast of some-not all- of the investigative measures that are included in the chapters that we are considering, certain specific prerequisites are exposed, which must therefore be added to the general considerations that we have just expressed. It is my turn here, above all, to give an account of the existence of these particular additions which, even with good judgment, further restrict the applicability of these measures. Thus, with respect to the interception of telephone and telematic communications¹⁶, a specification is established not so much of proportionality, which would be reasonable from a constitutional perspective of the criminal investigation, but of

material affinity. In other words, it is not the seriousness of the facts -at least exclusively-¹⁷, nor even a more delicate criterion such as the dangerousness of the researcher, which must be taken into account as a basis for the application of these measures. It refers, on the one hand, to article 579.1 LECrim, which refers to intentional crimes punishable by a penalty with a maximum limit of at least three years in prison; crimes committed within a group or criminal organization or terrorism offenses. And on the other, that they have been committed through computer tools or any other information technology or communication or communication service. What has its obvious logic: it is about intercepting those that are being transmitted in a criminal manner. But at the same time it has its risks, because they are not cumulative criteria -the disjunctive conjunctions would prevent this interpretation from the literal point of view- and, therefore, interdictions could be ordered for minor crimes simply because they are being committed through ICTs, which *a priori* could suppose an overreach of all this regulation, and therefore I would be in favor of a cumulative interpretation, that helps to concretize the reasoning of proportionality to those that before I have referred extensively¹⁸.

There is also a limitation when it comes to capturing and recording oral communications through the use of electronic devices. Here it does seem that there are cumulative circumstances, because on the one hand the tenor of the enumeration of article 579.1 is copied - in my opinion it should also have been copied in article 588 ter, which I have previously considered -, and on the other hand it seems that concur also the rational foresight that the capture and recording will provide essential data and evidentiary relevance for the clarification of the facts and the identification of the author. With this, the specialty requirement is reinforced, since it must start from concrete indications, as corroborated by article 588 quater c, when it refers to the content of the judicial resolution. Expressly do not establish specific prerequisites when it comes to the capture of the image, or use of technical tracking devices and location, or regarding the registration of mass storage devices information, another thing is that Article 588 quinquies to require specific material bases, or article 588 sexies a establishes the “need for an individualized motivation”. These prerequisites are explicitly foreseen when regulating the possibility of remote registration of computer equipment and limited to five categories of crimes, some of which were not foreseen in the previous cases: crimes committed in criminal organizations, crimes of terrorism¹⁹, crimes committed against minors or persons with judicially modified capacity, offenses against the Constitution, of treason and related to national defense and, finally, the already well-known logic of crimes committed through computer tools or any other information technology or the telecommunication or communication service.

Request

It establishes the possibility that the adoption of the measures we

¹³PEDRAZ PENALVA, E., y ORTEGA BENITO, V., “El principio de proporcionalidad...”, *op.cit.*, p. 306.⁸

¹⁴*Vid.*, profusely, BERNAL PULIDO, C., *El principio de proporcionalidad y los derechos fundamentales*, Centro de Estudios Políticos y Constitucionales, Madrid, 2003, pp. 757 y ss.⁹

¹⁵I think it is a dangerous element to contribute to this reasoning to pay attention to the social significance of the measure, if that means its effects on social opinion, and I think that is the case, especially if we take into account that the social mass is handled by abundant sensationalist media, with what the criterion of reasonableness could be diverted to courses alien to the constitutionalized purposes.

¹⁶About the email intervention, *vid.* ALONSO SALGADO, C., “Algunos elementos problemáticos de la intervención del correo electrónico como diligencia de investigación en el sistema español: un camino de claroscuros”, en (Dir. J.M. ASENCIO MELLADO), *Justicia penal y nuevas formas de delincuencia*, Tirant lo Blanch, Valencia, 2017, pp. 126-147.¹⁰

¹⁷In general, about cybercrime and the seriousness of the crime, *vid.* ORTIZ PRADILLO, J.C., *Problemas procesales de la ciberdelincuencia*, Colex, Madrid, 2013, pp. 227-244.¹¹

¹⁸*Vid.* also RODRÍGUEZ ÁLVAREZ, A., “Intervención de las comunicaciones telefónicas y telemáticas y *smartphones*. Un primer estudio a propósito de la Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal”, in (Dir. J.M. ASENCIO MELLADO), *Justicia penal y nuevas formas de delincuencia*, Tirant lo Blanch, Valencia, 2017, pp.157-159.¹²

¹⁹We must to be careful because the seriousness of them is variable, and some judicial interpretations perfectly exceeded. It has come to initiate anti-terrorist processes for the prosecution of street theater representations, which is dubiously permitted by the Constitution.

are considering will be done *ex officio* -when the judge himself has the initiative to consider that the abundant circumstances required concur- or at the request of the Public Prosecutor -who is a party in Spanish criminal procedure-or the Judicial Police - which cannot be so-. It is logical that it is not said at the request of a party, since in these cases the secret of the investigation will be a general characteristic, otherwise it would render all these investigative measures ineffective. In fact, what this provision does is to directly reflect what a practical reality is already. It is also worth highlighting the concern that the application contains a series of data that will be necessary for the legally required assessments²⁰

Resolution

Once the Public Prosecutor has been heard, as a defender of legality (Article 124 CE), the Judge will decide by order if he or she authorizes and denies the request, and must do so within a very short period of twenty-four hours, in accordance with the concrete circumstances that are going to underlie these proceedings, because it is about controlling events that are occurring or are about to occur, and therefore the delay could render such measures ineffective²¹. It is true that excessive rapidity is the enemy of a fair consideration of the demands already examined. But it is about combining, once again the effectiveness with a sufficient guarantee in the adoption of the corresponding decision according to the concretion of the evaluations that the Judge makes about the factual bases that he has to decide²².

²⁰The petition must contain:

1. The description of the fact under investigation and the identity of the researcher or any other affected by the measure, provided that such data are known.
2. The detailed explanation of the reasons that justify the need for the measure in accordance with the guiding principles established in article 588 bis a, as well as the evidence of criminality that has been revealed during the investigation prior to the request for authorization of the act of interference.
3. The identification data of the person being investigated or prosecuted and, where appropriate, the means of communication used to enable the execution of the measure.
4. The extension of the measure with specification of its content.
5. The investigative unit of the Judicial Police that will be in charge of the intervention.
6. The form of execution of the measure.
7. The duration of the measure requested.
8. The obliged subject who will carry out the measure, if known."

²¹In any case, the legislator himself has introduced a reasonable forecast of suspension of that short term in case of needing data expansion or clarification of the terms of the request.

²²The legislator is also cautious when channeling the content of the judicial resolution, since according to the third paragraph of article 588 bis c) he must determine:

- a) The punishable act object of investigation and its legal qualification, with expression of the rational indications on which the measure merges.
- b) The identity of those investigated and of any other affected by the measure, if known.
- c) The extension of the measure of interference, specifying its scope as well as the motivation relative to compliance with the guiding principles established in article 588 bis a.

Secrecy

The provision of article 588 bis d LECrim is interesting, relative to the obviousness that these measures will be substantiated in a separate and secret part. Obviously, because if the affected party was notified and allowed to argue about it prior to its adoption, any benefit that could be obtained from the research through these means would be lost. The novelty is that it is not necessary that the secret of the investigation has been declared in accordance with article 302 LECrim (not so much for the first of the purposes envisaged in this precept - to avoid a serious risk to the life, liberty or physical integrity of another person-, but rather by the second one that refers to "preventing a situation that could seriously compromise the outcome of the investigation or the process").

Actually, we are in the second of the possibilities provided in Article 302 LECrim, but what comes to do the 588 bis d is to avoid the formality of the declaration of secrecy of the entire investigation. Secret, no need to remember, concerning the parties, and not the public in general, for which research in theory is secret in all cases, which is obviously false in practice.

Duration

Article 588 bis refers to the specific regulation of the limits established in the following chapters, but as it occurs with deprivation of liberty, here is also an interesting general principle that should be interpreted strictly: the duration should be limited to the time strictly required for the clarification of the facts. The vagueness of the expression may give rise to interpretations in the opposite direction, but the exceptionality and priority of fundamental rights, which offer a clear interpretive criterion, must not be forgotten.

These investigative measures, so closely linked to the actuality of the commission of the criminal acts, share with the precautionary measures the trait of their dependence on the circumstances that served as the basis for their adoption: modified the circumstances of reality it is probable that there must be a change in the restriction of rights, which I do not tire of reiterating, it must be exceptional. Therefore, article 588 bis j LECrim establishes that the cessation of the measure must be agreed "when the circumstances that justified its adoption disappear or it becomes evident that through it the desired results are not being obtained". Of course, the mere passing of the time included in the authorization resolution is added to it

Extension

It should be noted that behaviors are being investigated at the time they are occurring, so the time period initially set may fall short. This allows the extension of the measure, always with a reasoned order in which it is explained the subsistence of the causes that led to its

- d) The investigative unit of the Judicial Police that will be in charge of the intervention.
- e) The duration of the measure.
- f) The form and periodicity with which the applicant will inform the judge about the results of the measure.
- g) The purpose pursued with the measure.
- h) The obliged party that will carry out the measure, if known, with express mention of the duty of collaboration and secrecy, when appropriate, under penalty of incurring in a crime of disobedience".

adoption. The request²³, as is usually the case, must be submitted in time before the competent judge, that is, before the initial deadline is determined. But, in addition, the law pretends that the decision on the extension may be prior to the end of that first term. For this, however, it uses another legally indeterminate concept that could give problems, since it speaks only of “sufficient advance”. In practice, however, difficulties are not foreseeable because we are facing measures in which the relationship of the subjects involved in their adoption is close: competent judge, prosecutor and judicial police.

Information to the judge

With few exceptions, such as the capture of images in places or public spaces, we are facing judicialized measures. Not investigative measures that the Police carries out as first steps after (or during) the commission of a criminal infraction. In any of the cases, the jurisdictional control of the measure is fundamental and requires that the Judicial Police inform the competent investigating judge of the development and of the results obtained. For this, the resolution of authorization must establish the form and periodicity of this communication. And, of course, the information obtained is intended for the investigation directed to the verification of the facts and the investigation of the delinquents, for that reason when the intervention ends, whatever the cause of this finalization, the results must be transmitted to the body in charge of such research²⁴.

Possible affectation to third parties

Given the nature of these measures in all of them will be able to be third parties whose fundamental rights are affected, because it is either interception of communications, tracking that may involve accompanying, registration of devices in which there is information transmitted by people not involved in any criminal activity. In most cases this circumstance will be inevitable. And if priority were given to the absolute safety of their fundamental rights, this would prevent the adoption of most of the measures we are talking about. The legal solution is not therefore to prevent its adoption, but to take into account this possibility when carrying out the quick but exhaustive assessment that should serve as the basis for its authorization and applying the various general criteria already examined.

Article 588 bis h LECrim establishes a generic rule by which these investigation measures are allowed “even when they affect third parties” and refers to the conditions that are specifically regulated in the chapters dedicated to each one of them²⁵.

²³The request for the extension must contain at least:

- a) A detailed report of the result of the measure.
- b) The reasons that justify the continuation of it.

It is positive that an assessment of the results obtained so far is required, in addition to the reasons that serve as a basis for extending the measure. It is true that these resolutions are dictated in secret, but in any case, before the termination of the investigation the researched must be able to have knowledge of all of it and, consequently, may argue against these decisions, their result and, in your case, request others in your defense.

²⁴On the control *ex post*, *vid.* DELGADO MARTÍN, J., *Investigación tecnológica...*, *op. cit.*, pp. 355-356.⁴

²⁵ An example of this is article 588 ter c LECrim:

“The judicial intervention of the communications issued from terminals or telematic communication means belonging to a third party may be agreed provided that:

1. There is evidence that the researched subject uses that to transmit or receive information, or

Use of information of other processes

The information obtained can be of great value for other processes, and can also lead to the accidental discovery of other criminal offenses. For the regulation of these issues article 588 bis i LECrim refers to article 579 bis of the same legal text, also introduced by the same Organic Law 13/2015 of October 5, relating these same questions, but referred to the obtained in the detention and opening of written and telegraphic correspondence.

It deals with regulating an issue that had already arisen with some controversy in the jurisprudence and that had led to one of those agreements of the jurisdictional panels of the Supreme Court by which to offer a unified legal solution to the existence of different positions. It comes dangerously close to the function of legislating, especially when -as has happened in other matters- the decision was significantly different from the letter, and even the spirit, of the written law²⁶. It was not like that in the area that we are considering, precisely because it was about filling a legal gap²⁷. However, the criticism that sometimes the Supreme Court does the work that would correspond to the Parliament is not refuted, and this is demonstrated by the fact that now it will be necessary to comply with the provisions of this article 579 bis, in preference to what was agreed by the Plenary session of the Criminal Chamber of the Supreme Court. It is expressly permitted that what is obtained in these investigations may be used as a “means of investigation or evidence in another criminal proceeding” and for this, testimony of the individuals necessary to prove the legitimacy of the interference shall be deducted. The competent judge for the new process must authorize or not the continuation of the measure on the new crime discovered after the assessment of the factual circumstances, with an express decision on the secrecy of the proceedings

Data propagation

The research activity produces numerous data. The European Union itself promulgated on November 27, 2008 a Directive that has been replaced by Directive 2016/680 of April 27, 2016 on this matter in the criminal procedure field²⁸. For its part, the Spanish Parliament, through the Organic Law 7/2015, introduced a new chapter in the Organic Law of the Judiciary on the “protection of personal data in the field of the Administration of Justice” (articles 236 bis aa 236 decies).

This is the framework in which the specific regulation of article 588 bis k has been registered, which provides for the destruction of the records once there is a final decision that ends the criminal process. In particular it is said that the jurisdictional organs will give the appropriate orders to the Judicial Police for the “erasure and elimination of the original records that may appear in the electronic

2. The owner cooperates with the person investigated in their illicit purposes or benefits from their activity.

Such intervention may also be authorized when the device under investigation is maliciously used by third parties via telematics, without the knowledge of its owner. ”

²⁶ I refer to the discussed agreements of the Civil Chamber of the Supreme Court on the interpretation of the rules of the civil appeal of December 12, 2000, December 30, 2011 and January 27, 2017 on criteria for admission of Appeals and extraordinary remedies for procedural infringements.

²⁷This is the Agreement of May 26, 2009 on the authorization of wiretapping from proceedings other than those that correspond to the trial.

²⁸Concerning the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of such data.

and computer systems used in the execution of the measure". A copy must be kept, which must be destroyed when five years have elapsed since the sentence was executed or when the offense or punishment has prescribed or a dismissal has been ordered or a final acquittal has been handed down. But it is not an absolute rule, because the Court can decide that in the interest of the administration of Justice its preservation is necessary.

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Conflict of interest

The author declares no conflict of interest.

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