

## UPDATE 1st QUARTER 2006

The following document is an approach to two different aspects that are increasingly affecting the companies in Spain and abroad: the obligation for companies to adapt to the law of personal data protection and the development of software through business association and cooperation.

### **THE OBLIGATION FOR COMPANIES TO ADAPT TO THE LAW OF PERSONAL DATA PROTECTION**

The Law 15/1999 issued by the Spanish Parliament of Personal Data Protection (OLDP) imposes some specific obligations upon companies and professionals having personal data recorded on a physical support that makes the data capable of being processed, and to any type of subsequent use of such data by the public and private sector.

The OLDP contains a strict system of sanctions in case of infringement of the legal obligations. A Governmental Body called the Data Protection Agency looks after the fulfilment of the legislation and imposes the requirement for all companies to adopt the obligations imposed by such a law.

#### **1.- OBLIGATIONS IMPOSED BY THE LAW**

1.1. To register at the Main Data Protection Registry all the files of private ownership, containing personal data (employees, clients, suppliers, candidates, etc.)

Not registering a file containing personal data at the Data Protection Agency might be punished by a minimum fine of 600 euros that can reach, depending on the cases, the amount of 60,000 Euros.

1.2. Regarding the International Transfers of Personal Data, the obligations are:

a) To obtain the Authorization from the Data Protection Agency for International Transfers of personal data to destination countries which do not provide a level of protection comparable to the one given by the OLDP (even those transfers between companies belonging to a same Group) or,

b) To notify the Data Protection Agency of any International personal data Transfers to destination countries which provide a protection level comparable to the one given by the OLDP.

1.3. To comply with the legal obligations regarding the collection, treatment and disclosure of the personal data.

1.4. To adopt the technical and organizational security measures necessary to guarantee the security of automated files contemplated by the Law, and specially by the Royal Decree 994/1999, of 11th June, which approves the Regulation on Mandatory Security Measures for the computer files which contain personal data. These measures will vary depending on the sensitivity of the personal data.

Not to adopt the security measures ordered by law is punished by a minimum fine of 60,000 Euros, that in some cases can reach the amount of 300,000 Euros.

1.5. To prepare and implement a security document containing all those measures that have been adopted. This document will be addressed to the staff that have access to automated personal data and information systems.

1.6. Drafting of agreements and application of the necessary clauses for the collection, treatment and disclosure of the data.

## **2. DIFFERENT SECURITY MEASURES DEPENDING ON THE NATURE OF THE INFORMATION TREATED:**

- Basic Level Measures: Files containing personal data as name, address, passport number, age, etc.
- Medium Level Measures: Files containing data relating to the commission of administrative or criminal infractions, Public Treasury, financial services and those files the operation of which is governed by the article 28 of the Law number 5/1992
- High Level Measures: Files containing data on persons' ideologies, religion, beliefs, racial origins, health, sex life and any file containing data obtained without the consent of the person concerned for police purposes.

Among all the measures legally established it is important to highlight the audit obligation referred to those files containing medium level and high level data. At least every two years the information systems and data processing installations shall

undergo an internal or external audit to check that the procedures and instructions in force regarding data security comply with the obligations imposed by the OLDP, by the Security Measures Regulation and the other applicable regulations.

At the moment there is a New Security Measures Regulation being drafted that should be approved in the next few months and that will introduce several changes in the personal data protection legislation.

The collaboration of both public and private institutions, such as AECEM (IT&E-commerce Spanish association) of which MILINERS Legal & Tax Counsels is member of the Legal Committee, has been very important in the preparation of this document.

The main objectives of this new regulation are:

1. The specific development of those legal aspects that were only contemplated in an abstract way by the OLDP.
2. Determining the organisational procedures and those technical measures to be implemented for both automated and non-automated files (that is paper files and those treated manually).

## **BUSINESS ASSOCIATION AND COOPERATION TO DEVELOP SOFTWARE**

In recent years these types of associations/cooperation or joint-ventures have become increasingly frequent, as they are an efficient way to optimize resources and obtain important profits.

The main characteristic of this association/cooperation is that a software application owned by a company that has created it is developed and commercialised by another company.

This association must be regulated by means of an agreement, the terms of which are required to be clearly established in order to avoid potential conflicts between the counterparties.

In this sense it is especially important to protect the intellectual property rights of the software's author considering the practical consequences that the infringement of these rights might bring.

User licence agreements are the most common way to organise the relationship between an IT company and the client that needs the software for its business purposes. This type of agreement may be adequate when dealing with standard "off the shelf" software, but not when it is tailored or customized software, or when the client is another IT company handling the development and commercialization of the software.

One of the best ways to establish the collaboration between two IT companies in order to guarantee that both companies can take advantage of the software development commercially is by means of a joint venture and call option contract that would be established in two phases:

1. Both IT companies agree that the development and commercialization of the software can be made by both of them exclusively;  
In order to prevent intellectual property rights' infringements it will be necessary to make very clear/ to identify the software's author.  
The exclusivity of the agreement means that the possibility of a third party participating in the development and commercialization of the software is forbidden.

2. Exercise of the call option;

The company that has created the software sells it to the other one for a price. Both parties will become co-owners of the software, always considering that the "moral rights" of the inventor will not be transferred, as this possibility is forbidden by Spanish law. Consequently the rights transferred are always economical rights, which often could imply distribution, development, or communication rights, in exclusivity or without it.

It is very important in all software development contracts, including the one we are analysing, to clearly define the object of the contract. This will require the collaboration of both parties.

Considering the object of the contract (software) it is advisable to include in the contract as many technical details as possible in order to avoid potential disagreements.

As always the core of the contract must focus on the delimitation of the rights and obligations of both parties, and moreover the establishment of their responsibilities in case of legal or extralegal action being exercised against one or both of them.

The contract should be submitted to the law of the place of business, which means the jurisdiction of the Estate where the development or investigation will take place. Given that these contracts imply a real cooperation in the development of the software, in the case of companies from different jurisdictions the potential risks have to be considered for the submission, duly analysing in each case the legislations before the final election of which jurisdiction will prevail.

As regards to the Court, an international arbitration Court is advisable in these sorts of contracts, but with a previous mediation process and giving consideration to the importance of the risks and amounts involved.

IT Law Department  
***Miliners Abogados y Asesores Tributarios***