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Oliver Cuello, Rafael

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# The taxpayer's right to electronic communication with the tax authorities

Rafael Oliver Cuello

Associate Professor of the Faculty of Business and Communication Studies  
University of Vic - Central University of Catalonia

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## Abstract

Under Spanish legislation, Law 11/2007, of 22<sup>nd</sup> June, on citizens' electronic access to public services, establishes their relationship with the government through electronic means as a citizens' right and as a correlative duty for the public authorities to be equipped with the necessary electronic equipment and systems to enable this right to be exercised. The acknowledgement of this right and the corresponding duties are thus the cornerstone of this law. Law 58/2003, of 17<sup>th</sup> December, which approves the General Tax Law (the Spanish taxation code) does not acknowledge this right for taxpayers, thereby making this the main change introduced by Law 11/2007. However, it must also be noted that the General Tax Law did acknowledge most of the rights and guarantees now provided under Law 11/2007. Furthermore, some of those already acknowledged in the latter can be traced back to regulations stipulated in the former. In addition, it is clear that there is a supplementary application of Law 11/2007 for issues not governed by the General Tax Law.

## Keywords

taxation, electronic administration, taxpayers, rights, tax authorities

## Topic

taxation

## El derecho del contribuyente a la relación electrónica con la administración tributaria

### Resumen

*En la legislación española, la Ley 11/2007 de 22 de Junio, de acceso electrónico de los ciudadanos a los servicios públicos, prevé la relación de estos con la administración a través de los medios electrónicos como un derecho de los ciudadanos y como un deber para las Administraciones Públicas de estar provistas con el equipamiento necesario para que este se pueda ejercer. El reconocimiento de este derecho y sus deberes correspondientes son, por consiguiente, el fundamento de dicha ley. La Ley 58/2003, de 17 de diciembre, que aprueba la Ley General Tributaria (el código tributario español) no le reconoce este derecho a los contribuyentes y, por tanto, se convierte en el cambio principal que introduce la Ley 11/2007. Sin embargo, también hay que destacar que la Ley General Tributaria sí contemplaba gran parte de los derechos y garantías que en la actualidad reconoce la Ley 11/2007. Además, algunos de los que se incorporan en esta última se pueden relacionar con regulaciones que se prevén en la primera. Asimismo, es evidente que existe una aplicación supletoria de la Ley 11/2007 para asuntos que la Ley General Tributaria no regula.*

### Palabras clave

*fiscalidad, administración electrónica, contribuyentes, derechos, administración tributaria*

### Tema

*fiscalidad*

## Introduction

Recognition of the taxpayer's right to communicate with the Spanish tax authorities by electronic means, as a consequence of the provisions of Law 11/2007, of 22<sup>nd</sup> June, on citizens' electronic access to public services (*Ley de acceso electrónico de los ciudadanos a los servicios públicos* or LAECSP) is a landmark in the process of integrating information and communication technologies (ICTs) within tax collection.

The tax authorities in Spain, especially the Spanish Tax Agency (*Agencia Estatal de Administración Tributaria* or AEAT), stand out for the intensive use they make of ICTs. The use of these technologies has meant a significant change in the way the tax authority and the taxpayer communicate with each other. The addition of electronic channels in their relationship is facilitating an evolution in the system for collecting taxes, enabling the tax authority to develop its facilitator role by performing a considerable amount of work providing information and assistance without abandoning its role of ensuring that taxpayers fulfil their duties. It also lifts

some of the burden off the taxpayer's shoulders in terms of areas such as submitting self-assessments in certain cases or, for example, by performing the quantifying operations of taxation and the calculations for the taxpayers, so that all they have to do, if they so wish, is simply confirm the amounts, as in the case of drafting the personal income tax return.

There are three circumstances that facilitate this change in role of the Spanish tax authorities, in our opinion. Firstly, the existence of the duty to cooperate with the tax authority, which constitutes a key part in the mechanism of tax collection, given that it guarantees a constant flow of essential information for the system to work satisfactorily. In the same respect, there is also mutual cooperation among tax agencies.

Secondly, the use of powerful digitised and internet communication tools, which not only facilitate tasks by providing information and assistance to the taxpayer, but also monitoring tax collection, thereby benefiting from the huge amounts of information that is in the possession of the Spanish tax authorities.

Lastly, the development of the taxpayers' rights and guarantees with regard to their communications with the Spanish tax authorities. One key feature is the right to receive information and assistance which is adequate for the purpose of complying with one's tax duties and the exercise of one's rights in doing so.

## 1. Electronic relationship with the Spanish tax authorities within the General Tax Law

Law 58/2003, of 17<sup>th</sup> December, which approves the General Tax Law, the Spanish taxation code (*Ley General Tributaria* or LGT) introduces the main regulations regarding the use of ICTs in Article 96. Indeed, a new development in comparison to the previous LGT, is the regulation within the tax law on the use of ICTs. In Title III of this law, in the part on tax collection, in which the most far-reaching changes are introduced, there is the addition of a section (number four) on ICTs in Chapter I, which deals with general principles. It has only one precept, Article 96 of the LGT, entitled "use of information and electronic technologies".

Systematically, the issue of using ICTs within the general principles of tax collection is brought up, along with regulations for other aspects that are closely connected to the topic of this study.

Article 96 of the LGT stipulates the application in the sphere of taxation the regulations established in Article 45 of Law 30/1992, of 26<sup>th</sup> November, on the legal system applicable to public administration and the common administrative procedure (*Ley de régimen jurídico de las administraciones públicas y de procedimiento administrativo común* or LRJPAC).

The basis for applying ICTs within the tax authority in its communications with taxpayers can be found in the principle of efficacy at the service of public interest, established in Article 103 of the Spanish Constitution. It should not be forgotten that technological means undoubtedly make it

possible to expedite proceedings. ICTs also allow for greater transparency in such operations, as they simplify the way in which taxpayers access and find out about what stage the proceedings are at.

In accordance with Subsection 2 of Article 96 of the LGT, "when compatible with the technical means available to the tax authority, citizens will be able to communicate with it to exercise their rights and fulfil their duties through electronic, computer or telematic means and techniques with all the guarantees and requirements established for each procedure".<sup>1</sup>

As some writers have rightly pointed out<sup>2</sup>, the use of the term "citizen" is questionable in its use in tax law, when those communicating with the tax authority will be taxpayers only. Indeed, in carrying over the contents of Article 54.2 of the LRJPAC to the LGT, legislators should have used the term "taxpayer" in our opinion, as it is technically more correct than "citizen", as well as the fact that the new LGT defines the term and uses it repeatedly.

From the literal wording of Article 96.2 of the LGT, it can be inferred that the use of ICTs in dealings between the tax authorities and taxpayers is an opportunity within reach of the latter. In other words, the use of ICTs is optional, so it is for the taxpayer to decide whether or not to choose such means, not the tax authorities. However, this regulation does not rule out the option of imposing a compulsory requirement of the use of electronic channels for some taxpayers in certain specific cases.<sup>3</sup>

Moreover, according to the provisions of Subsection 2 of Article 96 of the LGT, it is necessary to ask whether the said freedom of choice on the taxpayer's part exists in any event. In other words, have the taxpayers got the right to choose to use electronic means to deal with the tax authorities whenever they wish to? In addition, consequently, is there a duty on the tax authority's side to provide all of the necessary technical means required to enable such communication?

The answer, in our opinion, must be negative, since it must not be forgotten that the availability of such computerised

1. Precept related to the tenth final provision of the LGT, which allows the Finance Minister to develop a regulatory system for actions and procedures by electronic, computer and telematic means in relation to authentication.
2. See M. Fernández Junquera (2004, p. 402).
3. On this point, Julián Valero considers that we cannot conclude the existence of a right of the Tax Department to make it obligatory for the public to use advanced technical means, although an explicit prohibition is not envisaged either. See J. Valero Torrijos (2004, p. 33).

and electronic means is a discretionary policy within the tax authority's activity. Therefore, in order for taxpayers to be able to choose electronic means in their dealings with the tax authority, this possibility must be acknowledged in the corresponding regulations of taxation procedures. If this acknowledgement in the regulations does not exist, then the taxpayer cannot choose this electronic system when dealing with the tax authorities, since it is essential that it appear in the law, as stated in Article 96.2 of the LGT, "with all the guarantees and requirements established in each procedure".<sup>4</sup>

As we shall see below, this represents the main new development introduced by the LAECSP, which, in Article 6, acknowledges the right of citizens to deal with the tax authority by electronic means.

In addition, as stated above, Article 96.2 of the LGT does not prohibit a compulsory imposition of the use of ICTs with respect to certain taxpayers in specific cases.

Article 98.4 of the LGT provides legal cover for a possible decision by the Finance and Tax Ministry, within the scope of his responsibilities, regarding the cases and conditions in which the taxpayers have to submit their tax returns, self-assessments, communications, applications and any other document relevant to taxation.<sup>5</sup>

## 2. Electronic administration within the General Tax Law

The LGT does not mention the term "electronic administration". This is a pity as it is a concept which, although fairly recent, already has a profile that is roughly defined. It has even been the object of a specific law, known as the LAECSP. Therefore, an opportunity has been missed to make a specific reference to this concept in Spanish taxation laws.<sup>6</sup>

Although the term is not cited in the articles of the LGT, it cannot be said that the law is unaware of the phenomenon of electronic administration. On the contrary, it is precisely in the area of taxation where we find that electronic administration is most developed of all of the various Spanish public authorities. Moreover, the current LGT has provided for and regulated various manifestations of such electronic administration.

Apart from the provisions of Article 96.2 of the LGT concerning electronic dealings between the tax authority and the taxpayer, as mentioned above, electronic administration is regulated in other precepts of tax regulations. Thus, Article 96.1 of the LGT establishes that "the tax authorities will promote the use of these electronic, computer and telematic techniques and means as needed to carry out their activities and in exercising their responsibilities, within the limitations of the Constitution and the law".

The cited duty of the tax authority simply consists of promoting the use of ICTs.<sup>7</sup> It does not contain a mandate to add such means directly to its activities and in its dealings with the taxpayers. It is a duty configured generically. There are no specifications, firstly, regarding quantitative intensity with which it must be complied, nor, secondly, the qualitative intensity. In short, it does not determine in clear terms that the taxpayer has a subjective right to demand to deal with the tax authority electronically.

In turn, Article 96.3 of the LGT establishes that "the procedures and actions whereby electronic, computer or telematic means and techniques are used will guarantee the identification of the tax authority involved and in exercising its responsibilities. Furthermore, when the tax authority operates in automatic modes there will be a guarantee to identify the appropriate bodies for programming and supervising the information system and the appropriate bodies for solving any appeals that may be submitted".

This must be seen in connection to Article 100.2 of the LGT, which declares that "the answer given automatically

4. In this respect, Julián Valero says that, regardless of the cases where it might be obligatory to communicate by means of ICT, in submitting written documents, applications and communications, the faculty of the taxpayer to opt for the electronic or physical channel would only be admissible when this duality could be recognised in the legislation. See J. Valero Torrijos (2004, p. 44).
5. On this matter, see A. M. Delgado García (2009a, pp. 43 *et seq.*) and also R. Oliver Cuello (2014).
6. See a more detailed study of the regulations concerning electronic administration in my work (Oliver, 2009, pp. 19 *et seq.*). See also R. Oliver Cuello (2012a, pp. 102 *et seq.*).
7. An example of promoting the use of ICTs is the drive to encourage electronic invoicing in the public sector. On this matter, see A. M. Delgado García (2014).

by the tax authority will be regarded as a ruling in those procedures in which this form of termination is allowed". What is being approached as a possibility is the phenomenon of computerised decision-making or, in other words, substituting human intelligence for artificial intelligence (computer software) for reaching decisions concerning taxation.

Ultimately, Article 96.3 of the LGT establishes an additional guarantee to be applied in cases whereby computerised decision-making is used by the tax authorities. In such cases, the acting tax authority must not only identify itself and the exercise of its responsibilities, but also the appropriate bodies for programming and supervising the information system as well as the appropriate bodies for solving any appeals that might be submitted. This provision must be regarded in a positive light, inasmuch as it establishes a new right for taxpayers when a decision is reached by computerised means, as they will be more and more frequent in the sphere of electronic tax administration.<sup>8</sup>

Article 96.4 of the LGT also determines that "the electronic applications and software that are to be used by the tax authority for it to exercise its competences must be previously approved by that tax authority as stipulated in the regulations". It is a provision that seeks to provide transparency, however minimal, to the workings of the technical tools used by the tax authority in exercising its functions.

This initiative has a twofold consequence. It allows the taxpayers to defend themselves in the face of wrongful use of such techniques; and it also allows them to know the technical requirements that are needed to be able to deal with the tax authorities. In this respect, it must be pointed out that the counterpart Article 45.4 of the LRJPAC has been repealed by the LAECSP, while it is still in force in the area of taxation. In our opinion, this is a good thing.

It is also necessary to mention Article 96.5 of the LGT, which says that "documents issued, regardless of whether the format is electronic, computerised or telematic, by the tax authorities, or the ones issued by that authorities as copies of originals stored by the same means, as well as

electronic images of original documents or their copies, will have the same validity and effects as their original documents, provided that their authenticity is guaranteed, in addition to their completeness and state of conservation, and, accordingly, reception by the addressee, as well as the fulfilment of guarantees and requirements of the applicable laws and regulations".

In other words, an electronic document can be defined as a tool by which concepts, ideas or wills are expressed and, to this end, computerised means and telecommunications are used as a support. For them to be legally valid they must comply with the requirements of authenticity, completeness, state of conservation and reception by the addressee. These are requirements that are due to the particular characteristics of digital support systems and (as far as authenticity and completeness are concerned) are not established, at least not explicitly, as with hard copies. However, obviously, they must also be respected in this type of support.

It is useful, at this point, to refer to the new development introduced by the LGT in relation to the LRJPAC, concerning the legal validity of "electronic images of original documents or their copies". This is of the utmost importance in relation to the potential use of an electronic file, as it facilitates the conversion of hard copies to digital and it makes it possible for a file that has started out in hard copy support to be digitised and thereby become an electronic file.

Lastly, in this brief account of regulations on electronic administration within the LGT, it is necessary to make a short reference to the protection of personal data.<sup>9</sup> According to Article 95.1 of the LGT, "the data, reports or records obtained by the tax authority during the performance of its responsibilities are confidential and will only be used for the purpose of taxation or resources within its remit and to establish penalties as required".

Such information, as relevant for taxation purposes, as a rule, cannot be forsaken or passed on to third parties. However, as an exception to this rule, it is allowed to disclose or communicate such information to third parties provided that the purpose is to cooperate with certain public bodies or institutions, to help them perform their duties.

8. On this point, see a comprehensive study entitled "*La actuación administrativa automatizada*", in A. M. Delgado García (2009b, pp. 119 et seq.).

9. On this matter, see R. Oliver Cuello (2012b, pp. 41 et seq.).



In the exceptional cases which allow the disclosure or communication of tax-related information to third parties, according to the provisions of Article 95.2 of the LGT, "tax-related information must be provided preferentially by electronic means". Moreover, "when public authorities can access information by these means, they cannot demand that the interested parties provide certificates from the tax authority concerning this information".

This LGT precept is pioneering within the Spanish legal system and is a real step forward towards protecting personal data and citizens' rights and guarantees in the field of ICTs, and it has been taken as a model when adding it to the LAECSP.

Furthermore, when personal data is being handled, it is essential to respect the confidential nature of this kind of information and it must be used properly. Article 95.3 of the LGT establishes, on this point, that "tax authorities will take the necessary steps to guarantee the confidentiality of tax-related information and its proper use".

The control of the taxpayers over their own personal data is specified in the so-called "informative self-determination", a prototype of a last-generation fundamental right (Article 18.4 of the Spanish Constitution), in connection with the right to privacy, but with certain features that bring it closer to the right to privacy that exists in the UK and the USA. These rights have procedural channels for their practice, in what is known as *habeas data*, which translates into the right to access, oppose, amend, and, if applicable, cancel errors and falsehoods that may be found in the tax authority's databases.

This is an issue involving the individual's right to control (by knowing, correcting, deleting or adding) personal data organised on physical means that can be processed. The rights of the individual stipulated in Organic Law 15/1999, of 13<sup>th</sup> December, on the protection of personal data (*Ley orgánica de protección de datos de carácter personal* or LOPD) transcend by far the rights of citizens to access their files and records, regulated in Article 37 of the LRJPAC and Article 99.5 of the LGT.

### 3. Law 11/2007, of 22<sup>nd</sup> June, on Citizens' Electronic Access to Public Services

The LAECSP is designed to promote the use of ICTs in dealings between citizens and the public authorities. The grounds for

this regulation are to be found in the principle of efficacy of administrative action (Article 103 of the Spanish Constitution).

Regarding the ground for its power, the LAECSP is basic in its nature, according to what is established in the 1st final provision. Its articles are based on the State's responsibilities acknowledged in Article 149.1.18 of the Spanish Constitution: bases of the legal system for public administrations and the common administrative procedure.

With respect to its scope of application (Article 2 of the LAECSP), the law is applied in public administration, that is, the general administration of the Spanish State, the administration of each regional government (in Spanish, *comunidad autónoma*), and the local governments, as well as entities of public law that are related or dependent. Moreover, it also applies to citizens in their dealings with the public authorities and between the various public authorities in their dealings with each other.

As for the application of the LAECSP in the sphere of taxation, according to Article 97 of the LGT, the general provisions for administrative procedure result from the supplementary application in the regulations for taxation. Thus, in matters of electronic administration, what is established in the tax law prevails or, in other words, the provisions contained in the LGT (within the procedural foundation), as well as what is stipulated in the tax law, as it enacts the regulations of the LGT. The LAECSP will be applied through the supplement and the LRJPAC will be the supplementary law for the latter.

In this respect, it must be noted that the LAECSP is a special law with regard to its purpose, given that it regulates a specific matter, electronic administration, within the common regulations of administrative procedure, for which the LRJPAC is the general law. As such, the speciality of the LAECSP by virtue of its topic implies two important consequences. The first is that, in the event of a conflict between this law and the general law, the specific law prevails. Thus, what is established by the LAECSP involves the non-application of the precepts of the LRJPAC when they are in regulatory conflict or antinomy. Moreover, the second consequence is that the LRJPAC is the general law and supplementary to the LAECSP, as the latter is a special law for the area of matters concerning electronic administration.

This system of sources, as described, only changes order when the particular sectoral procedure contains, in turn, specific provisions in matters of electronic administration. In

such cases, as far as electronic administration is concerned, the LAECSP constitutes the general law in relation to the specific sectoral law, which means that the first provision to be considered in the preference of sources will be the specific regulations of the electronic administration contained in the sectoral law. As a supplementary law, the first law to be applied will be the LAECSP, followed in second place by the LRJPAC.<sup>10</sup>

This is precisely what happens in the area of taxation. Therefore, in matters of electronic administration, what is established in the tax law prevails or, in other words, the provisions contained in the LGT (within the procedural foundation), as well as what is stipulated in these matters in the taxation laws that enact the regulations of the LGT, where LAECSP is the supplementary application and the LRJPAC, in turn, constitutes the supplementary law for the latter.<sup>11</sup> In any case, there are likely to be legal contradictions between the LGT and the LAECSP, given that the latter broadens the rights and guarantees regulated by the former, without contravening what is stipulated in the tax law. As for the development regulations of the LGT, they have already been subject to a process of adaptation, in the latest provisions passed, to the precepts of the LAECSP, which is the case, for example, of Royal Decree 1065/2007, of 27<sup>th</sup> July, which approves the general regulations on tax inspection and tax management activities and procedures (*Reglamento general de gestión e inspección tributaria* or RGGIT).

It must also be noted that the sole repeal provision of the LAECSP establishes the repeal of a number of precepts from the LRJPAC: Article 38.9 (internet registers) Article 45.2 (compatibility with the public authority's technical means), Article 45.3 (identification of the public bodies), Article 45.4 (approval of the software and applications), Article 59.3 (internet notices) and the eighteenth additional stipulation (compulsory use of the internet).

Finally, with respect to when the law takes effect, the third final stipulation of the LAECSP establishes that, within the

scope of the general administration of the State, the rights granted in Article 6 of the law can be exercised as of 31<sup>st</sup> December 2009. In turn, it establishes the same for regional governments (*comunidades autónomas*) and local authorities, "provided their budgets allow it", thus considerably diluting the effectiveness of the law in regional and local areas.

Law 2/2011, of 4<sup>th</sup> March, adds a fifth paragraph to the third final stipulation of the LAECSP, which establishes that the regional governments and local authorities in which the rights recognised in Article 6 of the LAECSP cannot be exercised from 31<sup>st</sup> December 2009, regarding all the procedures of their competence, the programmes and the schedules required for this must be approved and published. They should specify the budget estimates and mention the phases in which the various rights are enforceable by citizens.

In conclusion, given that it does not make sense to establish a taxation speciality in this matter, in our opinion, it would be desirable to change Article 96 of the LGT in order to adapt it to the contents of the LAECSP, especially regarding the acknowledgement of the taxpayer's right to deal with the tax authorities by electronic means. Furthermore, it would even be useful to defend the suppression of this Article 96 of the LGT and a block reference to the common administrative law, given that, as has been pointed out, there is no tax speciality in this area.

#### 4. The taxpayer's right to communicate with the Spanish tax authorities by electronic means

Article 6 of the LAECSP refers to citizens' rights on electronic access to public services. The first part of this precept acknowledges the principal right provided for by this law, whereas Point 2 of this Article deals with the acknowledgement of a number of rights associated to it and of lesser legal transcendence.

10. See E. Gamero Casado (2008, pp. 83-88).

11. On the contrary, Maximino Linares understands that "the LAECSP is intended to be applied throughout the administration and its activities", and therefore its fourth additional provision "contemplates only two special rules. The first one to establish that the procedural norms of the new law (contained solely in Title III) will be applicable to procedures in taxation matters in agreement with what is established in the fifth additional provision in Law 30/1992, ie, it will result from supplementary application. The second speciality consists of stipulating that in applying the LAECSP the specifications that will have to be taken into account are the ones in matters of public hiring" (See M. Linares Gil 2009, p. 26). As already noted, in our opinion, the regulations governing electronic administration within the LGT has its grounds in procedural base, in the first two chapters of Title III, which deals with taxation. Therefore, the system of sources must be as stipulated in Article 97 of the LGT, and consequently, the LAECSP in its entirety (and not only Title III) results from the supplementary application in matters of electronic tax administration.



Article 6.1 of the LAECSP determines that “it acknowledges the right of every citizen to deal with public authorities by electronic means for the exercise of their rights established in Article 35 of the Law 30/1992, as well as their right to obtain information, ask for information and make allegations, submit applications, give their consent, make claims, make payments and transfers and challenge rulings and administrative acts”.<sup>12</sup>

The LAECSP enshrines relationships with public authorities by electronic means as a right of the people and as a correlative obligation for these authorities to become equipped with the electronic means and systems that can make this right exercisable. The acknowledgement of such a right and its corresponding obligation thus become a cornerstone of the LAECSP.

Acknowledgement of this new right constitutes the main new development of the LAECSP compared to the rules of the LGT on taxpayers' rights and guarantees with respect to electronic administration, given that, as mentioned, this right is not now recognised by the LGT.

As far as its implications for the LAECSP are concerned, the term “citizens” is defined in its annex, under Point h), establishing that the term refers to “any natural persons or legal entities and entities without legal personality, who deal with or might deal with the public authorities”.

Therefore, these rights affect both individuals and corporations as well as any entity without legal personality, whether or not they have Spanish nationality, and regardless of whether or not they are residents in Spanish territory.<sup>13</sup>

Fortunately, the legislator is very clear and categorical when it comes to recognising most of the rights included in Article 6 of the LAECSP, which do not require a systematic interpretation to ascertain their scope of application.

As for the legal consequences of a possible failure to comply by a part of the public authority under obligation, due to inaction causing an infringement of the law, there are two ways to respond in the event of such a failure: the pecuniary liability of the public authority and the complaint for inaction on the part of the public authority.

With regard to the former of these alternatives, it must be said that it constitutes one way of responding to the public authority's lack of response, according to the regulations in Articles 139 and onwards of the LRJPAC regarding the pecuniary liability of the public authorities. Here, we would be in a case of inaction in the establishment, delivery and development of public services to which the public authority is bound, giving rise to a claim for compensation for damages caused against the exercise of a given right, as dealing with the authority electronically might be.<sup>14</sup>

12. In the explanatory memorandum of the LAECSP, there is a justification of the acknowledgement of this right indicating that the development of electronic administration is still insufficient today. “The reason in good measure is due to the optional nature of Articles 38, 45, and 59 of Law 30/1992, of 26<sup>th</sup> November, on the legal system applicable to public administration and the common administrative procedure. In other words, it is up to the public authorities themselves to decide whether or not citizens are going to be able to deal with them effectively or otherwise by means of electronic systems, depending on whether these authorities wish to provide the necessary tools for such dealings with the public administration”. Moreover, the legislator goes on to state that “the service to the citizens requires consecrating their right to deal with the various public authorities by electronic means. The counterpart of this right is the authorities' obligation to provide themselves with electronic means and systems so that the right can be exercised. That is one of the significant new developments in the law. There is a shift from declaring a boost for electronic and computer means (which translates in practical terms in the simple possibility that some public authorities or some of their bodies enable communications by electronic means) and that they be obliged to do so because the law acknowledges citizens' right to establish electronic relationships”.
13. Evidently, it must be noted that this broad reference in Article 6.1 of the LAECSP to the holders of the rights acknowledged in this law does not prevent some other precept in the same law from recognising rights or establishing duties to do with those directly affected legitimately or those affected by the specific legal stipulation. In such cases, logically, there will be the corresponding legal right established by law. For example, Article 6.2.d of the LAECSP refers to the interested parties when it establishes the right to know what stage the processing is at.
14. In this case, in general terms, the attribution of responsibility would be an abnormal functioning of the public authority caused by a total or partial lack of action on the part of said authority, and that would be the cause of the wrongful damages which a citizen is not obliged to tolerate. Depending on each specific case and on how the liability is approached and the damages caused, it will be very difficult to determine, given that the circumstances may vary considerably, depending on who the citizen is, whether it involves a specific interaction or a more general impossibility in the exercise of one's rights, a more specific sort of damages within a procedure or application, a case of defencelessness, that the failure to perform has forced the citizen to obtain means, systems or tools, etc. On this matter in greater detail, see L. Cotino Hueso (2008, pp. 138-140).

The second alternative response described above involves a claim due to the public authority's failure to respond, which, in essence, is the typical procedure to obtain an effective compliance of rights acknowledged by law. This option would involve a prior formal claim through the authority on the basis of failure to act leading to a violation of a given right under the LAECSP, according to the provisions of Article 29.1 of Law 29/1998, of 13<sup>th</sup> July, on administrative jurisdiction (*Ley de la jurisdicción contencioso-administrativa* or LJCA).

The reason for this claim of inaction and the ensuing judicial litigation is that the public authority "is obliged to perform a specific provision of services in favour of one or more people, who are entitled to it", according to the given precept. When the service is not provided, therefore, there is an infringement of the law, according to the provisions of Article 70.2 of the LJCA.

According to the explanatory memorandum of the LJCA, the complaint filed previously "simply aims to give the public authority the chance to resolve the conflict and avoid litigation". If, in three months, the authority is not capable of responding to the request or an agreement is not reached with the interested parties, then the road to litigation is open, according to the said Article 29.1 of the LJCA.

Consequently, as indicated by the explanatory memorandum of the LJCA, it is an instrument designed "to combat administrative passivity and procrastination", given that "the claimant may request that the jurisdictional body order the public authority to fulfil its obligations in the specific terms in which they are established" (Article 32.1 of the LJCA). Furthermore, damages can be claimed for inability to exercise recognised rights.<sup>15</sup>

As for the specific configuration of the right recognised in Article 6.1 of the LAECSP, it must be understood that "by electronic means", according to the definitions in the annex of the LAECSP, refers to the "mechanism, installation, equipment, or system that makes it possible to introduce, store or transmit documents, data and information; including

any network of communications open or restricted, such as internet, landline, mobile telephone or others".

On the other hand, the exceptions to the right to interact electronically must be based on law, given that Article 27.1 of the LAECSP establishes that a law can stipulate that the use of electronic means is not possible, or such a conclusion may be inferred, regardless of whether the regional governments and local entities are not fully obliged to provide for the exercise of that right, by virtue of the third final provision of the LAECSP.

It is also noteworthy that the law demands, in general, an explicit consent for electronic communication in Article 27.2 of the LAECSP, just as it also recognises a possible withdrawal of the initial consent. This does not preclude the possibility of establishing compulsory electronic communication with public authorities through regulations, under the terms provided by Article 27.6 of the LAECSP.

Another matter in relation to the right recognised in Article 6.1 of the LAECSP is the obligation, or otherwise, to use standardised models in electronic interaction. In Article 35, the LAECSP obliges the public authority to provide the corresponding models or electronic systems of applications on the electronic site for the interested parties, but it does not stipulate that the citizen must use them. This is to be criticised, since it might be supposed that the citizen's option when deciding to start a procedure by electronic means already entails the burden of using the necessary tools, for strictly technical reasons.

Indeed, the demand to use the standardised electronic models or systems can be justified by the interconnection of the databases, more efficient processing of the necessary information for carrying out the procedure, a significant shortening of the time needed, and the possibility of this right offers to avoid submitting documents that the authority already has, among others. Nevertheless, despite the existence of all of these technical reasons, the legislator has not expressly regulated the obligation to use standardised electronic models or systems in electronic interaction.

15. However, the problem is that exact compliance with the law in the case of administrative actions is occasionally problematic. In this respect, it helps to remember that a guilty sentence cannot impose the contents of a piece of legislation or another law that were necessary to enforce the right of the LAECSP in question. Although the judge's ruling could not determine how to guarantee the rights that call for positive action from the public authority, it can enforce practical recognition, and in the event of noncompliance by the authority, it could call on the various instruments for executing the sentence, especially those of Article 108 of the LJCA on guilty rulings to be enforced. See L. Cotino Hueso (*op. cit.*, pp. 141-142).

Rather, on the contrary, Article 24.2 of the LAECSP states that "all electronic registers will admit any application, written document or communication" and Article 24.3 of the same law states that "there must exist at least one register system that can admit every kind of application, written document and communication addressed to the public authority". Thus, a rejection for not using the pre-established models or systems would be contrary to the general right to access, in Article 6.1 of the LAECSP, an argument that is also supported by the provisions of Article 24 of the same law. In our opinion, this solution could be totally unsatisfactory for the public authority, generating quite a number of malfunctions and impeding the use of ICTs.<sup>16</sup>

This issue has a better solution in the area of taxation, where the use of standardised models is particularly important. Article 98.3 of the LGT has a similar wording to Article 35 of the LAECSP.<sup>17</sup> However, Royal Decree 1065/2007, of 27<sup>th</sup> July, which approves the general regulations on tax inspection and tax management activities and procedures, does rightly impose the use of electronic models and forms in telematic dealings with tax authorities (Articles 88 and 89 of the RGGIT).<sup>18</sup>

In the area of taxation, not using the approved model for electronic submissions of a tax return gives rise to the corresponding requirement for rectification. Indeed, in

actual fact, the computer system itself issues an error warning for the taxpayer to proceed to rectify the formal anomaly detected in the process of electronic transmission of the tax return.

Following the analysis of Article 6.1 of the LAECSP, it is noteworthy that this precept is closely related to Article 8 of the same law, which constitutes a specific projection of the principle of material equality included in Article 6.1, taking on a service dimension. Article 8.1 of the LAECSP stipulates that "the public authorities must provide various channels or means, guaranteeing in any case access to them by every citizen, regardless of their personal circumstances, capabilities or knowledge, in the form that they consider appropriate".

Although the guarantee is for every citizen, the same law is particularly aware of the barriers that might appear in actual access and that right is guaranteed. It is a matter, therefore, of a lack of knowledge, also known as digital illiteracy, a lack of means, or financial and personal circumstances, such as certain physical or psychological impairments that the citizen might face.<sup>19</sup>

Finally, it is necessary to mention that the obligation to have electronic sites and registers is contained in the LAECSP, which, no doubt, is closely related to the right included in Article 6.1 of this law. In line with the general proclamation

16. See L. Cotino Hueso (op. cit., p. 155).

17. Article 98.3 of the LGT establishes that "the tax authority can approve standardised models and systems for self-assessments, tax returns, communications, applications or any other means indicated in the tax law for cases where there is a massive processing of actions and tax procedures. The tax authority will provide the mentioned models to the taxpayers in the conditions stated by the tax law".

18. Article 88.7 of the RGGIT provides that "when the interested party submits the documents that are referred to in the above sections (self-assessments, tax returns, communications of personal information, applications or any other documents) through computer, electronic or telematic means, it will be necessary to ensure the information demanded by the tax authority to start the procedure". In these cases, the receipt will be issued in accordance with the characteristics of the format, medium or application used. Furthermore, this legislative precept stipulates that "when annex information is added to the submission through computer, electronic or telematic means and the system does not allow for direct delivery, the taxpayer will have to submit it in any of the administrative register offices as stated by law within 10 days, starting from the day of submission, without a prior administrative requirement to that end, unless the specific law establishes a different place or deadline. This documentation will duly identify the application or communication submitted by electronic, computer or telematic means or techniques". Moreover, in relation to corrections, it is established in Article 89.2 of the RGGIT that "all submissions by electronic, computer or telematic means and procedures will be provisional pending their processing. In the event that they do not conform to the design and other specifications established by the applicable law, the taxpayers will be required to amend the defects that have appeared, within ten days, starting from the day after being notified. After this deadline, if the requirement has not been resolved, if the anomalies still remain preventing the tax authority from ascertaining the information, they will be regarded as having forsaken the request or as not having fulfilled the corresponding obligation and it will be recorded on file with no further procedure". Moreover, in the following part of the same precept of the law, it adds that "when the requirements to amend information referred to in the previous subsection have been addressed before the deadline but the defects found are not deemed to be adequately resolved, notice will be given that the file has been shelved".

19. On these matters, see I. Rovira Ferrer (2008, pp. 39 *et seq.*).

of the right to access electronically, there is no longer the limitation previously imposed by the abolished Article 38.9 of the LRJPAC, whereby the telematic registers were only designed to deal with applications, written documents and communications regarding the processes and procedures specified in the law that created them.

Now, the regulation contained in Articles 24 to 26 of the LAECSP can be regarded as quite advanced, given that they go beyond the typical speciality of this type of registers and enables them to be multifunctional and inter-operational, and this constitutes a right for every citizen, which is highly significant when they are dealing with electronic administration.

The LAECSP establishes the possibility of receiving documents that are not previously assessed by the law that created the register, clearly with greater faith in the principle of multifunctionality. However, the subjective limitation with regard to the addressee of the document remains, since the documents must be addressed to some body or entity within the public authority holding the register.

Furthermore, for the purposes of ensuring interoperability, through partnership agreements, the public authorities can activate their respective registers to receive applications, written documents and communications that fall within the domain of another public authority, as determined by the corresponding agreement.<sup>20</sup>

## 5. Other taxpayer's rights within the context of electronic Administration

The second subsection of Article 6 of the LAECSP brings together a number of citizen's rights in dealing with electronic administration, which arise from the principal right to deal with the public authority by electronic means.

### 5.1. Right to choose between electronic channels

Article 6.2.a of the LAECSP acknowledges the right "to choose the channel through which to deal with public authorities electronically from the options available at any given time". As mentioned, Article 8.1 of the LAECSP establishes that public authorities "will have to activate different channels or means for providing electronic services, guaranteeing access to them by every citizen in any case, regardless of their personal circumstances, means or knowledge, in the way that they deem appropriate".<sup>21</sup>

It does not refer to the right to choose between physical or electronic means, but the right to choose from the channels that enable electronic communication, such as internet, text messaging, landline or cell phones, digital terrestrial television, and so on, or the option of physically visiting a citizen services desk in the offices of the corresponding public authority, to receive the electronic service.<sup>22</sup>

The choice of the electronic channels that are available for each specific relationship with the public authority should not cause any sort of difficulty either for the authority or the citizen, given that they all assume that the information is digitised, as the fundamental characteristic of the electronic option.

### 5.2. Right not to provide information that the public authority already has in its possession

Article 6.2.b of the LAECSP establishes the "right not to provide information and documents that the public authority already has in its possession. The public authorities will use electronic means to recover this information on the condition that, in the case of personal data, they have the explicit consent of the interested party in line with the terms established by Organic Law 15/1999, of 13<sup>th</sup> December, on the protection of personal data, or a regulation with the standing of law that stipulates to this effect".

20. On this matter, see R. Oliver Cuello (2011a, pp. 79 *et seq.*).

21. According to the definition established in the annex of the LAECSP, "channels" is a term that means "the structures or means of announcing the contents and services, including the face-to-face channel, the telephone and electronic means, as well as others that exist now or may exist in the future (mobile devices, digital terrestrial television, etc.)". In any case, it is important to remember the function performed by the right to withdraw one's consent to deal electronically with the public authority, acknowledged explicitly in Article 27.1 of the LAECSP in general, and in 28.4 of the LAECSP in the case of notifications. In relation to electronic notifications on taxation, see A. M. Delgado García (2011a, pp. 66 *et seq.*).

22. On this matter, see R. Oliver Cuello (2011b, pp. 44 *et seq.*).

In turn, for the effective exercise of this right, Article 9.1 of the LAECSP establishes that "every public authority must facilitate access by the other public authority to information on the interested parties that are in their possession and stored electronically", specifying the conditions, protocols and functional or technical criteria with the highest guarantee of security, integrity and availability, in compliance with what is stipulated in the LOPD.<sup>23</sup>

In the area of taxation, the right not to provide documents that the tax authority already has is regulated by Article 99.2 of the LGT, although it does not mention electronic means anywhere. This Article 99.2 of the LGT establishes that "taxpayers may refuse to submit documents that are not required by tax law or those that have previously been handed over by the taxpayers and are in possession of the tax authority". Furthermore, according to the final remark in this article of the LGT, when it is a matter of information provided by a third party, the tax authority can allow the taxpayer to refrain from submitting it again if the authority has it. In these cases, accreditation of the information known to the tax authority will suffice for this purpose, through people other than the taxpayer themselves.<sup>24</sup>

In addition, Article 95.2 of the LGT establishes an important obligation to act for public administrations, and not only a citizen's right to be exercised or not at their discretion. This precept states that "when public authorities may have the information by said (electronic) means, they must not demand the submission of tax certificates from the taxpayers regarding such information".

This Article 95.2 of the LGT is pioneering in the legislation and constitutes a considerable step forward in the protection

of personal data and in the rights and guarantees of citizens in the area of ICTs. As discussed below, it is a more progressive regulation with greater emphasis on guarantees for citizens than the regulation by LAECSP on this matter.<sup>25</sup>

Indeed, Article 6.2.b of the LAECSP could be criticised in the way that it is configured as a right of the citizen rather than an obligation of the public authority, regardless, therefore, of a citizen's desire to exercise their rights. In other words, the citizen may choose not to exercise the established right according to this precept and decide whether or not to provide the information and documents requested when dealing with the public authority.<sup>26</sup>

As we have seen, this is not the case in taxation, given that Article 95.2 of the LGT clearly establishes the public authority's duty, so it does not require a citizen necessarily to exercise their right.

The right not to provide information and documents that the public authority already has in its possession, regulated in Article 6.2.b of the LAECSP is closely related to several precepts of this law, such as Article 9 of the LAECSP, which governs "information transmissions among public authorities"; or Article 27.7 of the LAECSP, on the priority use of electronic means in their communications with other public authorities; or Article 34 of the LAECSP, which, among the criteria for electronic management, establishes the "suppression or reduction of required information from citizens, by means of their substitution for information, information transmissions or certificates".

This right is also related to the provisions of Article 35 of the LAECSP as, in Subsection 2, it regulates the submission of

23. According to Article 9 Subsection 2 of the LAECSP, the availability of such information will be restricted to those required data to the citizens by other public authorities for the processing and resolution of the procedures and actions of their competence, in accordance with their rules. Access to personal data will be also conditional on compliance with the terms established in Article 6.2.b of the LAECSP.
24. Nevertheless, the inclusion of the expression "in any case", referring to the requirement, is not in line, once again, with Article 35.f of the LRJPAC and the regulations stipulated in its enactment, since the latter, before allowing the authority to issue another requirement, demands that there be a justification for the total impossibility of obtaining the document, even when it is not a matter of providing a new document, but rather the accreditation of the specific information about oneself or a third party, already provided and contained within such documents. Meanwhile, it is noteworthy that, if the improper requirement of such documents is left unattended, this may even lead to the annulment of the administrative action ordered, regardless of the existence of the documents which were unduly requested and rightfully not provided by the taxpayer, on the condition that its grounds are the assumed failure to provide requested documents. On this matter, see E. De La Nuez Sánchez-Cascado and M. Ogea Martínez-Orozco (1998, pp. 135 - 136).
25. On this matter, see R. Oliver Cuello (2011c, pp. 89 *et seq.*).
26. Julián Valero is of the same opinion, stating that "from the point of view of efficacy, it would have been preferable to have followed the model of the tax legislation, specifically Article 95.2 of the LGT rather than acknowledging a right of the citizens to choose a channel for transmitting the information precisely in dealing with an area of the authority's responsibility". See J. Valero Torrijos (2008, p. 273).



digitised copies of documents by citizens and the option for the public authority to certify their authenticity without the originals having to be shown physically for verification; as well as what is established by Subsection 3 of the same precept, which stipulates that “the standardised application systems can include automatic verifications of the information provided with regard to information stored in their own systems or belonging to other authorities, and even offer the entirely or partially completed form, so that citizens can verify the information and change it or complete it as required”.

This final provision is clearly related to the extensive experience of the tax authorities in matters of drafting of the personal income tax return, as well as its confirmation through various electronic channels. In this respect, Article 98.1 of Law 35/2006, of 28<sup>th</sup> November, regulating personal income tax (*Ley del impuesto sobre la renta de las personas físicas* or LIRPF), states that “taxpayers can request that the tax authority send them, for purely informative purposes, a draft of the tax return”. Furthermore, Article 98.4 of the LIRPF states that “when taxpayers consider that the draft of the tax return reflects their personal taxation situation for income tax, they can approve it and confirm it, in accordance with the conditions established by the Finance Minister. In this case, it will be considered to be the tax return for this tax for the purposes stated in Subsection 1 of Article 97 of this law” (which regulates the submission of the self-assessment of the personal income tax).

The provisions of this Article 98 of the LIRPF are enacted every year by Ministerial Order. It establishes the cases and conditions in which it is possible to submit the self-assessment and the confirmation or amendment of the draft of the tax return by electronic means or telephone.

### 5.3. Right to equality of electronic access

In Point c) of Article 6.2 of the LAECSP, there is recognition of the “right to equality in the electronic access to public authority services”. The aim of the right acknowledged in Article 6.2.c of the LAECSP does not constitute a prohibition of discrimination that might arise by imposing electronic communication in administrative affairs, an issue referred to in Article 27.6 of the LAECSP. Nor does it aim to avoid possible discrimination that might be suffered by those who choose not to use electronic means, as mentioned in Article 4.b of the LAECSP.

The object, therefore, of Article 6.2.c of the LAECSP is possible discrimination affecting effective electronic access for every service provided by public authorities.

Furthermore, it must not be forgotten that any discrimination concerning electronic access may violate the right to equality stipulated in this precept. There are situations of positive discrimination which precisely aim to promote electronic access for certain groups by regulating certain measures that certainly establish a different treatment for the individuals of such groups. In these cases, the discriminating treatment is perfectly admissible from a constitutional point of view and, of course, it does not violate the right to equality as recognised by this precept.

There may be possible different treatments that citizens might receive in terms of exercising a right that the law recognises for them, such as in the case of the right to choose among different available electronic channels (Article 6.2.a of the LAECSP), or the right to use the various systems of electronic signatures (Article 6.2.h of the LAECSP), or the right to choose the software applications or systems to deal with the public authorities (Article 6.2.k of the LAECSP).

In all of these cases, it may be that citizens are treated differently by the public authority depending on the channel, device for electronic signature or software application or system of their choice. Thus, it may be the case that the administrative procedure, in its electronic interaction, is faster or slower because of the legitimate choices made by each citizen.

Therefore, to conclude any possible violation of this right, it will be necessary to assess the adequacy and balance of the initiative, taking into account all of the interests at stake.

### 5.4. Right to know the progress of the procedures electronically

Point d) of Article 6.2 of the LAECSP recognises the right “of the party involved to know by electronic means the stage at which the procedure is being processed, except in cases where the relevant law establishes restrictions on their access to such information”.

Furthermore, Article 37.1 of the LAECSP establishes that, “in administrative procedures managed entirely by electronic means, the public body that processes the procedure will provide the interested parties with a restricted electronic service through which, after identification, they may consult at least the information regarding the stage at which the procedure is being processed, except when the applicable legislation establishes restrictions on such information. The



information on the stage of the process will include the list of the acts carried out within the process, indicating their contents, and the date they were completed".

Article 37.2 of the LAECSP provides that "for the rest of procedures, electronic information services will also be activated regarding the processing stage for the procedure and the public body or unit that is responsible for it".

When the procedure is not processed by electronic means, this right is put into practice by requiring substantial human and technological resources from the general administration of the State, or, in other words, the public authority directly obliged in this case, by virtue of the third final provision of the LAECSP.

### 5.5. Right to obtain electronic copies

Point e) of Article 6.2 of the LAECSP recognises the citizens' right to "get electronic copies of the electronic documents that are part of the procedures where they are involved". Article 99.4 of the LGT refers to this matter, although it is not adapted to electronic means. It establishes that "the taxpayers who are party to the taxation action or procedure may obtain a copy of the documents that appear in the file at their own cost, unless they affect the interests of a third party or the privacy of other people, or current legislation stipulates to this effect. The copies will be provided in the hearing procedure or, otherwise, in the procedure of allegations after the proposed decision".

This precept refers solely to the taxpayers who are "party" to a tax action or procedure. This concept is much more restricted than "interested".<sup>27</sup>

The reference to "the interests of third parties" in Article 99.4 of the LGT, on the other hand, cannot enable a comprehensive interpretation of this concept, given that it could remove the right of someone who requests the copies of the documents, which are part of the file.

The right to get a copy of the documents, according to Article 99.4 of the LGT, may also be refused when it is thus stipulated in the current legislation. The most frequent case

is constituted by Article 23.2 of the LOPD, when "impeding the administrative actions leading to ensure the compliance with tax obligations and, in any case, when those affected are being inspected."

Article 95.4 of the RGGIT refers to getting electronic copies of documents that are part of a procedure. Specifically, this precept establishes that "in those cases where the documents are in the corresponding records or file stored by electronic, computerised or telematic means, then the copies will be released preferably by these means or in the format that is appropriate for such means, on the condition that the technical means available make it possible".

Nevertheless, the terms of Article 95.4 of the RGGIT do not establish a right for the taxpayer to obtain such copies, since it restricts the release of electronic copies to "the technical means available to make it possible", which is to be criticised and contrasts with the legal provision contained in Article 6.2.e of the LAECSP.

Moreover, Article 6.2.e of the LAECSP does not refer anywhere to whether the procedure is ongoing or finished, unlike Article 99.4 of the LGT, which only considers the exercise of this right in the hearing process or, otherwise, in the allegations process subsequent to a decision proposal.

### 5.6. Right to store in electronic format

Point f) of Article 6.2 of the LAECSP recognises the right "of the public authorities to store electronic documents that are part of a file or record".

Certainly, it is inherent to the existence of an electronic administration to store the documents that are part of their files in electronic format, as it would be neither understandable nor effective to have an electronic administration that did not store electronically formatted documents properly.

The guarantee of electronic storage by public authorities of documents that belong to a file or record constitutes, in our opinion, evidence of the work that a legislator must do to combat the presumed vulnerability of digital

27. Article 99.4 of the LGT, therefore, in Ricardo Huesca's opinion, establishes a restriction, which seems to be based on the confidential nature, according to the LGT, of information obtained by the tax authorities, although the very exceptions contained within the precept are a sufficient safeguard of the rights of third parties. See R. Huesca Boadilla (2004, p. 676).

support systems. Electronic documents are exposed to a number of dangers which, obviously, do not threaten hard copy documents. In the face of such threats, it is positive for the legislator to underline the need for conservation in electronic format by the public authority for all those documents that are part of an administrative file or record.

The need to store and keep these documents must be related to the existence of procedures of mass management, especially in the area of taxation, which can multiply the effects of such threats. In the same way, it is related to the necessary measures of interoperability of computerised systems, as well as taking technical precautions to ensure convenient retrieval of information in electronic format, thereby establishing the necessary precautions in relation to backup copies and systems.<sup>28</sup>

Now, once again, in this case, the same criticism stated above could also be made, that is, that a subjective right is configured by this law in relation to a matter for which it would have been much more appropriate to establish an obligation for the public authority to comply with.

The drawback of the option chosen by the legislator lies in the fact that such a subjective right can be exercised or not by the citizen, whereas a duty on the public authority's side, considering the obvious level of underlying general interest, produces a stronger guarantee for the people, since it does not make a procedure for the exercise or not of a subjective right depending on the particular interest of the citizen.

### 5.7. Right to use electronic means of identification

Article 6.2.g of the LAECSP refers to the right "to obtain the necessary means of electronic identification. In all cases, individuals are allowed to use the systems of electronic signature contained in the National Identity Card for any electronic communication with any public authority". Moreover, Article 6.2.h of the LAECSP covers the right "to

use other electronic signature systems allowed in the area of public authorities".

In terms of forms of identification and authentication, Article 13.1 of the LAECSP stipulates that, in their dealings by electronic means, public authorities must accept electronic signature systems that are in accordance with the provisions of Law 59/2003, of 19<sup>th</sup> December, on electronic signature, and are adequate to guarantee the identity of the participants and, if need be, the authenticity and integrity of the electronic documents.

Thus, the LAECSP has configured a flexible system for the use of electronic signature systems, trusting and promoting the electronic National Identity Card, prioritising advanced electronic signature and foreseeing the likelihood of using other systems as well as digital signature for cases where the required levels of security and the nature of the administrative procedure allow for them.

In general, therefore, it might be said that LAECSP contains adequate legislation for the means of electronic identification.<sup>29</sup>

### 5.8. Right to guaranteed security and confidentiality of the data

Article 6.2.i of the LAECSP recognises the right "to guaranteed security and confidentiality of the data that appear in the files, systems and software applications of the public authorities".

The legislator makes an effort to establish special guarantees for the security and confidentiality of the information, which are presumably more seriously threatened in electronic environments than in traditional paper documents. This particular concern of the legislator to establish juridical guarantees to combat mistrust from citizens regarding the fragility or vulnerability of electronic systems is also reflected in some of the goals for the law, which is dealt with in Article 3 of the LAECSP.<sup>30</sup>

28. On this matter, see A. M. Delgado García (2012, pp. 19 *et seq.*).

29. On this matter, see I. Martín Delgado (2008, pp. 317 - 368).

30. Article 3 Subsection 3 of the LAECSP refers to the creation of "the conditions of trust in the use of electronic communications, establishing the necessary precautions for the preservation of the integrity of fundamental rights and, in particular, those related to privacy and protection of personal data, by means of the guarantee of security of the electronic systems, data, communications and services". Likewise, security constitutes one of the general principles established in Article 4 of the LAECSP. Specifically, Point f) of this precept refers to the principle of security in the deployment, implementation and use of electronic means by the public authority, by virtue of which there will be a standard of at least the same strict guarantees and security as required for the use of non-electronic means within administrative business.

Furthermore, the need for security is also defended with regard to information coming from the electronic sites and their communication systems (Article 10.3 of the LAECSP); from electronic registers (Article 25.4 of the LAECSP); from means or support systems that store documents (Article 31.3 of the LAECSP); or the set of criteria and recommendations in matters of interoperability (Article 42.1 of the LAECSP).

Likewise, Article 42.2 of the LAECSP deals with the National Security Scheme, which "aims to establish the security policy in the use of electronic means" within the LAECSP.

### 5.9. Right to quality of electronic public services

Article 6.2.j of the LAECSP establishes the right to "quality in public services provided by electronic means". The requirement for quality of the public services within general administration areas is reflected in some of the rights set out in Article 35 of the LRJPAC, as well as in some of the principles recognised by Law 6/1997, of 14<sup>th</sup> April, for the organisation and functioning of the general administration of the State.

In the enactment of these provisions, various laws have been published on how to legislate the quality of these services, their assessment, the systems for dealing with citizens, citizens' charters, the establishment of mechanisms for complaints and claims, etc.

In the LAECSP, this concern for the quality of services is noticeable in various precepts of the legislation. In this respect, a clear reflection of this is the principle of administrative simplification, recognised in Article 4.j of the LAECSP, or the principle of responsibility and quality with regard to information and services offered, established by Article 4.h of the LAECSP, or the principle of quality in the creation of electronic sites, regulated in Article 10.3 of the LAECSP.

Again, we could criticise the wording of this Article 6.2.j of the LAECSP, as it has configured a requirement for quality in public services in the area of electronic means as a subjective right granted to the citizen. This configuration as a subjective right can bring about certain difficulties in specifying its contents, as well as its scope of application,

and, in this sense, it would have been preferable to find it in Article 4 of the LAECSP, which deals with general principles.

The potential of this right would fit, in general, within the procedures for claims on the pecuniary liability of the public authority, since it would force an obligation to provide certain electronic services taken on by each authority and it would make it easier to recognise liability for damages caused by its absence.<sup>31</sup>

### 5.10. Right to choose the software applications or systems in the electronic relationship

Article 6.2.k of the LAECSP recognises the right to "choose the software applications or systems to deal with public authorities, provided they use open standards or, if applicable, others that are of widespread use by the people".

This right is very closely related to what is set out in Article 4.i of the LAECSP, which refers to the general principle of technological neutrality and adaptability to the progress of the techniques and systems of electronic communication.

For the correct interpretation of the right recognised in Article 6.2.k of the LAECSP in light of the general principle established in Article 4.i of the same legislation, it is advisable to go to the definitions contained in the annex to this law, especially the terms "open source application" and "open standard".

Article 41 of the LAECSP is also closely related to this matter, with regard to interoperability of the information systems. In this case, it is useful to go to the annex of the law for the definition of "interoperability".

Lastly, the provisions of Article 45 of the LAECSP relate to the right mentioned above. It also alludes to the software applications that are open source in relation to the reutilization of systems and applications property of the public authorities.

In short, it can be claimed that the legislation contained in the LAECSP regarding citizens' freedom to choose software applications or systems to deal with the public authorities can be considered to be adequate and positive, given that it facilitates access to electronic administration by the largest

31. Lorenzo Cotino is of the opinion that this right may acquire a singular predicament together with the citizens' legitimate trust in public information, strengthening the likelihood of success for claims of pecuniary liability of the public authority for damages caused by errors, inaccuracies or failure to update public information offered to citizens by the authority. See L. Cotino Hueso (*op. cit.*, pp. 214 - 215).

possible number of citizens, without restricting their choice of such applications or systems and respecting the principle of technological neutrality.<sup>32</sup>

### 5.11. Right to electronic information on service activities

Lastly, Article 6.3 of the LAECSP stipulates that "in procedures related to establishing service activities, citizens have the right to get information through electronic means and complete all procedures and formalities through points of single contact". This right entails the transposition to our legislation of Articles 6, 7 and 8 of Directive 2006/123/CE, of the European Parliament and the Council, of 12<sup>th</sup> December, on services in the internal market.<sup>33</sup>

Therefore, in Article 6.3 of the LAECSP, there is recognition of citizens' right to get information electronically in relation to establishing service activities. In accordance with the provisions of Article 4 of Directive 2006/123/CE, it is about administrative procedures which are necessary for any self-employed economic activity, normally provided for remuneration, for an indefinite period and through a stable infrastructure.

With regard to Article 6.3 of the LAECSP, we could make the following criticism. Except for the specific reference to information on litigation, the rest of the aspects covered by this right were unnecessary, given that they are already understood to be protected under the provisions of Article 6.1 of the LAECSP.

## Conclusions

The greater potential for taxpayer assistance and information using computerised and electronic means should, in our opinion, address the increasingly important task of determining the tax debt by the tax authorities. Evidently, it is not about going back in history towards a system of applying taxation in effect prior to the 1978 fiscal reform.

It is more a question of taking full advantage of the huge potential of computer-related tools to discharge the taxpayer of formal duties. Basically, this is the case of submitting tax returns or calculating the amount of tax payable. Thus, the aim would be to achieve a reduction of indirect tax pressure and a more efficient application of taxation overall.

In this context, it is essential to develop and strengthen the rights and guarantees of the taxpayers, especially when they are dealing with the tax authority by electronic means. In such cases, the risks associated to using the ICTs must be addressed clearly and firmly by the legislator, in order to neutralise the risks and even promote their use by as many citizens as possible.

The advantages of using such technologies are evident, both for the taxpayer, and, basically, for the tax authority. However, the impact of the so-called digital divide is also now clear, separating citizens who have access to new technologies from those who do not. Sometimes, this problem is rooted in financial, social and educational causes, which can only be resolved as the information and knowledge society gradually spreads to every social group. It is, in short, a problem that affects both the private and the public sector, but, in our opinion, it is the latter that should lead the way in developing digital literacy.

As stated above, sometimes, the problem has a marked financial, social and educational side to it. However, frequently, the rare or non-existent use of ICTs is simply due to mistrust. This mistrust can be traced back to the assumed vulnerability of the electronic environment, which is perceived as easily manipulated; the likelihood of seeing citizens' privacy violated; or even actual difficulty in using such technologies, which are sometimes too demanding in terms of technological knowhow. In our opinion, this is where legislators have to make an effort to fight to dispel the risks that come with technological innovation, as mentioned above, since there are solutions, both technical and legal, which guarantee the reliability and trustworthiness of electronic support systems, which, in many cases are actually superior to paper.

32. On this point, see A. M. Delgado García and R. Oliver Cuello (2006, pp. 11 et seq.).

33. Article 6 of this Directive covers the points of single contact, establishing that Member States shall ensure that it is possible for providers to complete the following procedures and formalities through such points of single contact. Then, Article 7, whose focus is right to information, stipulates that Member States shall ensure that the information is easily accessible to providers and recipients through the points of single contact regarding service activities. Finally, Article 8 deals with procedures through electronic means and establishes that Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.

In any case, the promotion of ICTs and the encouragement of their use, in our opinion, require public service policies, as well as information and dissemination of the advantages that ICTs offer and the abovementioned technical and legal solutions that ensure the reliability and trustworthiness of electronic means.

However, as a previous step, it is essential to provide legislation that can fight mistrust in the use of these technologies. In this respect, it can be said that the LAECSP achieves this goal adequately, especially in terms of its recognition of citizens' right to communicate with the Spanish authorities by electronic means.

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#### About the author

Rafael Oliver Cuello  
 rafael.oliver@uvic.cat

Associate Professor of the Faculty of Business and Communication Studies  
 University of Vic  
 Central University of Catalonia  
 <<http://www.rolivercuello.com/>>

Sagrada Família, 7  
 08500 Vic

<<http://www.uvic.cat/>>

