



Analysis and comment on the proposed law Ley  
Integral de Lucha contra la Corrupción y Protección  
de los Denunciantes



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# Analysis and comment on the proposed law *Ley Integral de Lucha contra la Corrupción y Protección de los Denunciantes*

## Blueprint for Free Speech, Corruptil & FIGBAR

One year has passed since the Spanish Congress has almost unanimously agreed on taking into consideration a draft law establishing an anti-corruption framework in the country. For the first time in Spanish history, the proposed *Ley Integral de Lucha contra la Corrupción y Protección de los Denunciantes* aims at addressing one of the most serious disruptive factors in Spanish society – a widespread culture of corruption – in a comprehensive manner.

Unarguably, this is a very important step: In 2018, the GRECO Interim Compliance Report on Corruption Prevention commissioned by the Council of Europe<sup>1</sup> has concluded that Spain continuously fails to implement recommended measures preventing corruption among parliamentarians, judges and prosecutors. These failings come at a cost, as the estimated loss of public finances go up to 90 billion<sup>2</sup> – annually.

Furthermore, individuals who report details about these shortcomings pay a high personal price: Despite increasing support from the public and politicians from all over Europe, several whistleblowers from all areas of Spanish society face harassment, unemployment, legal proceedings and psychological damage<sup>3</sup>.

Effective legislation tailored according to international recommendations and best practice standards is the only sustainable remedy to these circumstances. While the proposed Spanish legislative initiative is a good first step, it is far from comprehensive. This document aims at pointing towards existing shortcomings in the draft law, and lays out additional aspects that should be taken into consideration by policy makers and parliamentarians.

### Combating Corruption

While named *Ley Integral de Lucha contra la Corrupción y Protección de los Denunciantes*, a central flaw of the proposed legislation is that while it addresses a variety of aspects regarding the protection of whistleblowers (see further below), it is **comparatively limited when it comes to establishing integral mechanisms combating political corruption**.

It is important to note that the draft law does not include many of the recommendations issued in the above-mentioned January 2018 GRECO report commissioned by the Council of Europe, which are of paramount importance in the fight against corruption in Spain.

In particular, the law fails to address the following recommendations:

#### a) Code of Conduct

Currently, the draft law does not foresee an obligation for the Congress of Deputies to adopt a **Code of Conduct for parliamentarians**. In line with GRECO, we recommend the development of comprehensive, binding guidelines to **prevent conflict of interest**, the receiving of gifts or other advantages and suspicious conducts.

An Ethics Code in the judicial system is an essential pillar in any anticorruption law. There should be an ethnic code guaranteeing transparency with norms allowing control and participation trough the civil society, clearing any doubt or suspect of corruption. This has a special relevance in the **General Council of the Judiciary** (Consejo General del Poder Judicial - CGPJ), where it is a must to ensure transparency on judicial activities, institutions and members. Although the institution has adopted an Ethics Code which was adopted in December 2016, the recommendation on a clear and exhaustive code of conduct for judges remains partially only implemented.

## b) Lobby Register and Regulations

It does not require the **introduction of a public register of interest groups**, and does not foresee amendments to Congress Statutory Provisions that would help to control lobbying parties. Without these provisions, there is no oversight over interest groups influencing legislative proceedings in ways that are one-sided beneficiary.

This register should include

1. budgets and expenses approved by the lobbies,
2. information on the meetings between lobbies and political parties,
3. documentation of information shared between lobbies and public institutions,
4. agenda of public officers and the content of their meetings with parliamentary groups,
5. documents distributed in the meeting where public decisions are taken,
6. public evaluation of these groups,
7. documents used and consulted for making choices and
8. a register of entry to the Congress and the key offices of the Government.

Furthermore, the law does not view legal or professional consultancy as lobbying activities. Clarification is needed, as otherwise, this provision is prone to loopholes.

Along with this register, there need to be clear guidelines for politicians to engage with lobbyists. To weaken ties between politicians and lobby groups and to ensure politician's independence, there need to be **designated periods barring politicians from entering new positions after their retirement from political posts**. We recommend an intermediary phase of at least two years.

It is also necessary to create a control of "revolving doors", and establish a minimum period where former public officer are not allowed to run lobbying activities on matters they managed while in office.

## c) Transparent Politicians

The law would not introduce a **transparency portal**, recording the number of hours Members of Parliament dedicate to their constituents, explain the nature of their work or provide information on sponsorships.

The existing Transparency Law in Spain does not guarantee public access to information of the public contracts, and neither for adjudications and minutes of meetings. So far, access is granted through an administrative request that could be easily denied in the practical implementation of the law. Any of the documents produced by the local or national Government should be publicly available.

The currently proposed *Ley Integral de Lucha contra la Corrupción y Protección de los Denunciantes* does not ensure any of grantees of transparency.

## d) Appointment of Judges

GRECO highlights the fact that Members of Parliament cannot be involved in the **appointment of judges to the General Council of the Judiciary (Consejo General del Poder Judicial)**. Furthermore, political authorities must not engage in the selection process for judges to the Supreme Court, to the High Court of Justice, Constitutional Court or in any other. Neither aspect is addressed in the proposed legislation.

Independence of the Constitutional Court, the Supreme Court and the General Council

of the Judiciary need to be improved, even if the latter constitutes a governmental, non-judicial institution. To encourage this independence, the Constitutional Court should implement a transparent and public selection process, which foresees the appointment of members according to merit and professional capacity. Following the merit exam, candidates need to be approved in both legislative chambers in a 2/3 vote, and pass a council of civil participation. In the Supreme Court, the judges and magistrates should be selected according to the same process, limiting the time on the position. The General Council of the Judiciary should also follow an open process of selection under the control of civil society.

Even if the GRECO report underlines some initiatives under the current Government to discuss the possibility of a reform, an in-depth reform of the judiciary system has not yet been implemented.

#### e) Limitation Period for Disciplinary Procedures

Additionally, the law does not introduce **extended limitation periods for judges' disciplinary offences**. The current period of six months has proven to be short in practise.

#### f) Prosecutor General

Finally, the law does not provide for **a change in the selection process and term of tenure of the Prosecutor General** to warrant the position's independence. Presently, Government appoints the post after hearing recommendations by the General Council of the Judiciary appoints the post.

The recommendation to **guarantee transparency of communications between Government and the Prosecutor General** by introducing the rule that they must always be in writing and "appropriately published" remains equally ignored.

### Protecting Whistleblowers

We welcome the perspective of including legitimate measures to protect whistleblowers as an element of the draft law. This has been a common approach in a number of European countries, among them France, Luxembourg and Slovenia. At the same time, it remains important that combined laws meet the same international standards in paving the way for effective protection as standalone laws.

The Spanish proposal includes a set of measures on the protection of whistleblowers, which can however not be considered comprehensive. This section aims at providing the reader with an overview over the most important features that should be included in a legislative proposal that can effectively protect all whistleblowers.

#### a) Broad Range of Disclosable Wrongdoing:

The current proposition of the law only covers the reporting of instances of corruption. It is advisable to establish a mechanism that allows the **disclosure of all kinds of wrongdoing**, as limiting reportable wrongdoing can create dangerous uncertainties for whistleblowers. We recommend allowing and facilitating the reporting of all **misconduct considered breaches of integrity in the public interest**.

#### b) Disclosure in the Public and the Private Sector and Broad Definition of Whistleblowers:

Currently, the proposed legislation would only protect whistleblowers in the public sector. While corruption in public administration is certainly among the central challenges in the Spanish society, corruption and other wrongdoing among elected leaders as well as the private sector should not be neglected. In order to avoid loopholes, we strongly recommend to **also including protection for whistleblowers in the private sector**.

Furthermore, it is advisable to include **a definition of whistleblower that is as broad as possible**. Protection should be granted to anyone who witnesses misconduct or wrongdoing in the public interest, as well as those who support whistleblowers in their actions.

#### c) Broader Range of Channels

In the proposed law, the choice of channels for whistleblowers to disclose information in the public interest is very limited. To cover all eventualities, we recommend to also **allowing external disclosures**, especially in cases where disclosures to internal and other official channels have not been followed up on, where internal disclosures put whistleblowers at risk or are believed to deter chances of appropriately addressing the wrongdoing.

In general, we recommend the introduction of a tiered system of disclosure channels, including the mandatory establishment of internal reporting channels that encourage and facilitate internal reporting, official external recipients of claims, and the possibility to report to external organizations.

#### d) Special Channels for Sensitive Information

The current proposition of the law does not include specifics on the disclosure of information that qualify as classified information as well as issues related to national security. Different whistleblower cases in Spain as well as around the world have shown that a significant number of cases arise especially in these contexts. Hence, it is important to **introduce special channels and procedures to blow the whistle in a sensitive environment** when they relate to wrongdoing in the public interest.

#### e) Anonymity

While the proposed law grants confidentiality regarding a whistleblower's identity, it does not protect disclosures made anonymously. We recommend the **establishment of channels that allow for anonymous reporting** if whistleblowers consider this necessary, and advise on the **protection of whistleblowers who are being identified later**. It is paramount that these channels are established in a technically safe way in order not to put whistleblowers at risk.

Under no circumstances should a whistleblower's identity be revealed without their expressed consent.

#### f) Legal Aid

In the current proposal, legal support for whistleblowers is limited to advice instead of providing legal aid if needed. Without this provision, whistleblowers are likely to face expensive judicial fees, high legal costs and lawyers' fees, which in many cases leads to financial ruin. This is why **whistleblowers need to be granted legal aid**.

#### g) Extensive Protection Against Reprisals

As a protective measure for whistleblowers, the proposed law only offers after-the-fact recognition of their acts. To support whistleblowers and their actions actively, **protection needs to be preemptive**. It is advisable to introduce a "whistleblower status", the carrier of which are placed under special scrutiny while initial investigations into their disclosures are ongoing. The "Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina"<sup>4</sup> can serve as a good example.

If necessary, whistleblowers and their families should have the right to receive witness protection.

#### h) Penalties for Retaliators

In order to create effectively prevent retaliation against whistleblowers in the first place **any**

**such acts should be penalized.** Economic, and other types of penalties, are an effective method to dissuade retaliations against whistleblowers.

i) **Legislative Review**

The law should foresee a mechanism that allows for regular **monitoring of its implementation and effectiveness**, to ensure that the legislation can easily be updated accordingly if necessary.

**Independent oversight: Autoridad Independiente de Integridad Pública**

As a crucial feature of any law aimed at preventing corruption as well as protecting whistleblowers, we recommend the **establishment of an independent oversight institution**. This has partly been foreseen in the draft law. However, the envisioned setup of the *Autoridad Independiente de Integridad Pública* has significant gaps, which need to be addressed to ensure effective protection of the public interest:

a) **True Independence**

In order to avoid conflicts of interests, the suggested institution needs to be independent from political oversight. The current proposal foresees the governing structures of this entity to be appointed by parliament, as is the case for Judges to the Supreme Court, to the Constitutional Court, the Ombudsman as well as the Chairman of the Court of Audit. Dependent on political power, these institutions have in the past repeatedly proven ineffective in the fight against corruption.

This is why for the appointment of the position of Director of this institution, we recommend the establishment of a mechanism that ensures absolute independence from all political parties. Crucial to this would be the involvement of civil society representatives in an oversight committee. Furthermore, the appointed director needs independence in appointing staff.

b) **Transparent Financing**

The institution needs to provide public insight into its finances. Budgets, salaries and expenses need to be listed and publicly available.

c) **Receive Complaints**

With a centralized agency for whistleblowers to turn to in case internal channels do not yield results, responsibilities are clear. Furthermore, the agency can provide help in following procedures correctly.

d) **Investigate Claims**

The proposed institution should have the power to launch an initial investigation into the claims of a whistleblower, coordinate accordingly with other authorities and, if necessary, call upon public prosecutors to further pursue substantial claims.

To ensure absolute and transparent investigations, the institution needs to retain the status of monitoring future steps of the investigation process. It has a right to veto proceedings and appeal in the interest of public integrity if this principle is violated.

e) **Lend Support**

Most whistleblowers require financial or psychological support when making a disclosure. Ideally, these are being provided in a centralized institution accustomed to dealing with whistleblower issues.

### *Best Practise Excursions: Italy's ANAC and the Dutch Whistleblowers Authority*

*A leading example for a similar entity in Europe can be found in Italy: The Italian National Anticorruption Agency (ANAC)<sup>5</sup> unites efforts to combat corruption and receives complaints from whistleblowers disclosing information about breaches of public integrity. If, after an initial investigation, cases are found to be substantial, they are forwarded to public authorities.*

*Under certain provisions, ANAC can issue fines against employers who unfairly retaliate against an employee who blew the whistle. It provides support to companies and public entities in setting up internal systems, and gives out recommendations on how to deal with disclosures confidentially.*

*Furthermore, ANAC provides news regarding corruption in Italy, internal proceedings as well as information on the salaries of its employees on their website.*

*Regarding the procedures to provide effective support to whistleblowers, we recommend looking at the Dutch Whistleblowers Authority<sup>6</sup>. Based at the National Ombudsman's Office, it provides a platform for whistleblowers to turn to when making a disclosure.*

*The Whistleblowers Authority can lend advice on how to follow procedures correctly and supports whistleblowers when making a disclosure. If necessary, the institution can launch a preliminary investigation.*

*To strengthen prevention mechanisms, the Whistleblowers Authority provides information for employers on how to set up integrity policies and internal reporting mechanisms.*

*All services are treated confidentially and free of charge.*

### **Wording**

To ensure positive perception of whistleblowers among the Spanish public, we recommend the introduction of the legal term "alertador" instead of "denunciante". The latter carries a negative connotation; introducing the former as official term for what can still be seen as a new concept in the Spanish legal framework would elevate citizens' opinions and enhance public trust. The information provided by a whistleblower should be treated as a threat, a harm or damage to the public interest. It is important not to only refer to "crimes", as disclosure can be required in situations which are not consumed crimes but potential ones, giving clear indication of an irregularity or a damage to the society without a criminal nature in themselves.

### **Final Comments**

At present, political representatives oversee systems of control in Spanish society. This circumstance significantly increases the risk of corruption, as politicians who in turn oversee control institutions remain outside of legal controls themselves and thus above the law. This seriously damages democracy, the rule of law, and social welfare.

One effective measure to counter this is to increase transparency and strengthen civic participation – and on multiple levels. Establishing mechanisms that allow public oversight in institutions aimed at enhancing public trust and administrative accountability, such as in the planned *Autoridad Independiente de Integridad Pública*, is one way. Another is to support those who decide to come forward and have their back when they expose information that damages the whole of Spanish society.

Spain desperately needs a comprehensive anti-corruption framework that includes mechanisms for public participation, so that Spanish citizens gain control over their democracy.

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## About:

Blueprint for Free Speech is an international NGO with offices in Melbourne/Australia and Berlin/Germany. We engage in legal research and advocacy on numerous issues concerning free speech, whistleblower protection, and freedom of information. For more information, please visit our website: [www.blueprintforfreespeech.net](http://www.blueprintforfreespeech.net). If you have questions regarding this guide, please do not refrain from getting in touch with us.

## Corruptil

Corruptil is a non-for-profit organization, totally independent from political parties and from any corporate or other type of interest. Our aim is to fight corruption reinforcing thus Democracy, improving the Rule of Law and increasing Social Welfare. Our actions are multidisciplinary and we focus our efforts on finding solutions to fight political corruption from different angles: legal, educational, regulatory and investigative as well as by disseminating information.

## FIBGAR

The Baltasar Garzón International Foundation (FIBGAR) is a non-governmental, not-for-profit foundation, established in 2011 in the defense of Human Rights and Universal Jurisdiction. FIBGAR is founded upon principles of solidarity, respect, the advancement of Human Rights, cooperative development, mediation, and the fight against official impunity. With these animating principles, FIBGAR's mission is to defend Human Rights; defend victims and their rights to truth, justice, and reparation; and in so doing combat corruption and organized crime in all their forms. Web: <http://www.fibgar.org>



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## Endnotes

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