LUX BARCELONA

METROPOLITAN TRANSPARENCY REVIEW

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AMB

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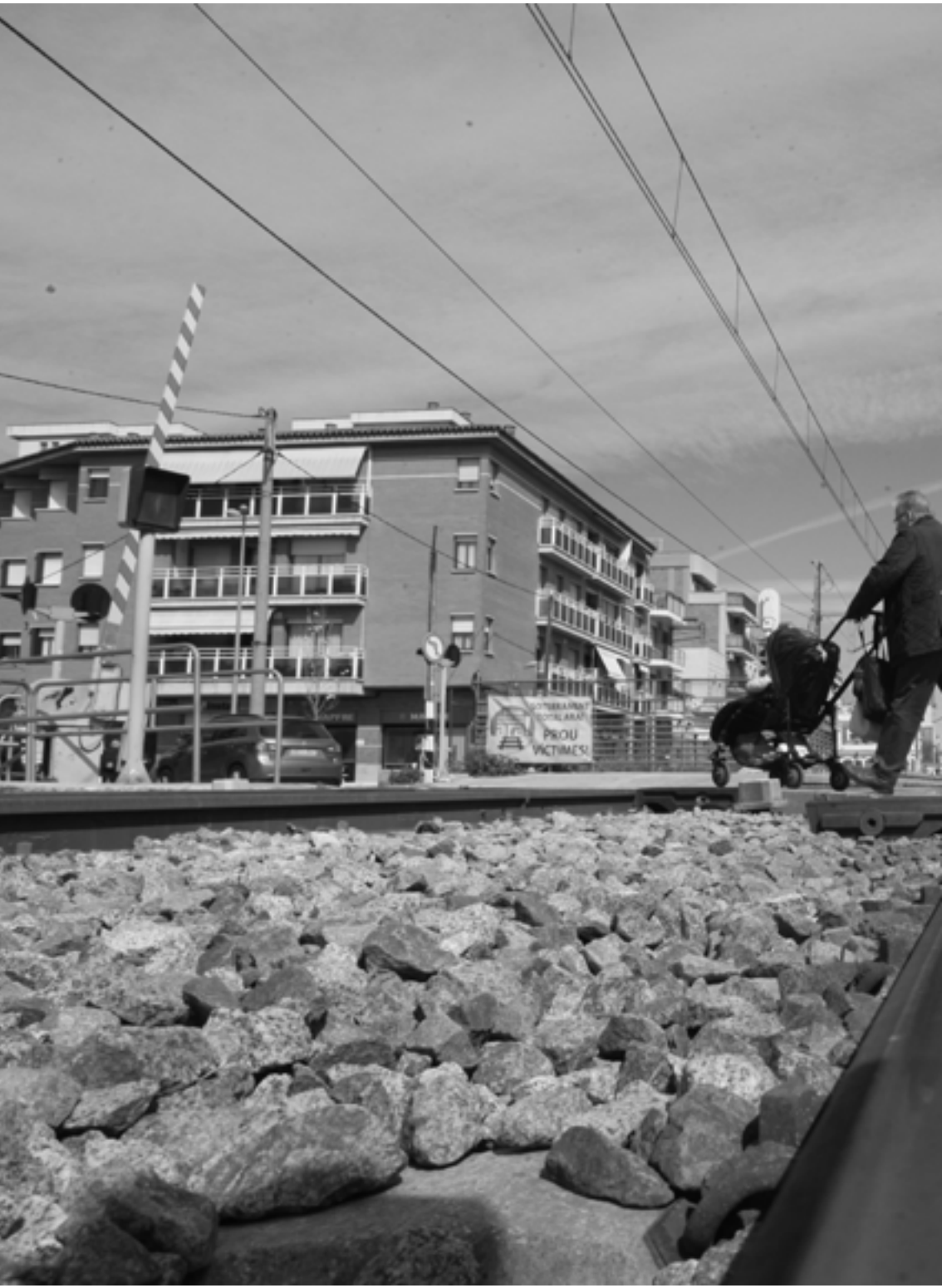
REINFORCING PUBLIC INTEGRITY

This second volume of the magazine *Lux Barcelona* reflects on public integrity, on the code of ethics and on related groups of interest. Following an introduction of the director of the Transparency Agency, Gemma Calvet, the *Code of ethics and conduct for senior officials of the AMB and related bodies*—approved by the Metropolitan Council on 2018—is reproduced in its entirety.

The two mainstays in the field of good governance are the *Guide to the identification and prevention of criminal risks in the Barcelona Metropolitan Area and its associated and dependent entities*, by Marc Molins, and the reflection made by Pau Bossacoma, *Metropolitan funding of political groups, political parties and trade unions*.

The magazine *Lux Barcelona* is completed by four insights that, in the section "Lighthouses", invite us to reflect from a humanistic perspective. In this second volume, the beam of our lighthouses is shone by Begoña Román, "Taking care of institutions", Francesc Torralba, "Ethics, cosmetics and credibility", Miguel Ángel Gimeno, "Ultimate goal: A culture of integrity", and Mònica Planas, "Mothers before time". The gaze of the photographer Kim Manresa and the illustrations of the graphic opinion leader Jordi Duró enrich the global vision sought by the magazine.


PROU
VICTIMES!

Montcada i Reixac. Level crossing at Bogatell street
© KIM MANRESA

"You are fake as the marble trim around the fireplace, there is nothing I wouldn't do to be away from here. I do nothing."
Margaret Atwood

"A blessed and imperishable being neither has trouble itself nor does it cause trouble for anyone else; therefore, it does not experience feelings of anger or indebtedness, for such feelings signify weakness."
Epicurus

"The port is full of boats loaded with crimes from Never and guilts from Nowhere. And this body in my cupboard…"
M. Mercè Marçal

"If you are in an administrative post and you give orders to many people, always aspire to be irreproachable and include no injustice in your order; for truth and justice are great, their virtue is lasting."
The Maxims of Ptahhotep

"There is no democracy to genius, only a terrible injustice and lifethreatening burden. There are the few, as Hölderlin said, who are compelled to catch lightning in their bare hands."
George Steiner

THE WALL OF TRANSPARENCY

"Truly, over the course of my life, I have had the luck of being able to devote myself to cracks in the surrounding conformism, and to put the phenomena of society and juridical frameworks into convergence."
Simone Veil

Those of us who have been working for years on the paradigm of transparency have had to make a great effort to sustain confidence in this new dimension of public administration. When we come to establish a realistic balance between the efficacy of our struggle against the prevention of corruption and for democratic regeneration (by strengthening compliance with the law) and the impulse of public-private administrative responsibility, we find ourselves caught up in an obstacle race and a logic of continuous paradoxes that undermine the "certainty in transparency". The Lorenzetti programme signed by the Transparency Agency of AMB, the Paris City Hall, the Veeduria in Bogota and the Montreal Authority has enabled us to create a shared working framework in which to analyze these difficulties.

The incorporation of the paradigm of transparency and good governance has been achieved via three axes: active publicity, citizens' right to information and public-private administrative responsibility through ethical leadership. In short, the main challenge of transparency is to build a continuity between law and ethics, and between the public and private sectors, linked with the need to strengthen the democratic system from the bottom up.

This far-reaching reform has been accompanied by the modification (due to European directives on public contracts) of the new contractual regulations, which have become much more stringent in order to consolidate profound changes that can advance democratic regeneration and the prevention of corruption. The implementation of electronic administration also serves to provide juridical safeguards in the processing of administrative documents, by means of trustworthy public tracking that is difficult to interfere with. These changes represent a response to the outcry against corruption, as a factor that breaks the links between citizens and the res publica. In other words, between social perception and democratic certainty.

These demands for reform imply a major upheaval in the procedures and roles acquired to date—and the implementation of such reform is fraught with difficulties. The first shock is the repudiation of a vertical, highly centralized system of public administration in favor of a horizontal criterion for the distribution

of functions and responsibilities. There is a risk that the requirements of this new direction make authorities feel that they are being called to task or that their entrenched power is under threat. And this means that day-to-day tasks are often subject to dynamics that obstruct change; these dynamics are not new, if we go back to Weber, but they are different and subtler. As this German sociologist, economist and jurist pointed out in a very timely analysis, there are two types of functionaries: the "political" ones and the "charismatic" ones. The first become prisoners of bureaucracy and routine, but an attitude that could once be seen as just a symptom of apathetic inertia becomes, under the requirements of transparency, a permanent antidote to the changes proposed, which Weber described as the "fundamental demands of political action". In other words, the weapons to use against open administration and any explanation of its operation are more bureaucracy, more confused procedures and more technological mazes that thwart any transformation. These weapons are often created within administrations in opposition to the work of bodies that guarantee transparency and good governance.

The other functionaries, the "charismatic" ones, are totally opposed to routine and the concentration of static, unipersonal power. They are open to new obligations, they want to share information, and they construct itineraries of everyday practice to make this approach a reality. The theorizing about open and transparent administration can now focus on obtaining a good diagnosis of how to overcome any resistance still in place and on accelerating the implementation of such administration. These postulates of Weber have taken on a new relevance and our efforts have to be geared along these lines, by seeking to strengthen compliance with the codes of ethics and behaviour applicable to high-ranking posts.

If transparency affects the traceability of public money and decision-making, it is evident that its extension, and therefore the aforementioned effects, also affect public-private dynamics and companies that sign contracts with the pu-

blic administration, especially those involving services of general and universal interest, that have to render accounts of their service/supply activities to the administration responsible. In this respect, the *Code of Ethics and Conduct of the AMB and its associated entities* (also published in this journal) offers a working framework in which principles and mutual obligations are clearly identified. The big novelty is the existence of a sanctioning regime in the Catalan Law of Transparency, 19/2014. This element is key to understanding that there has been a leap from a programmatic law to a binding one. Another key element is the questionnaire on conflicts of interest and the registry for lobbyists.

That is to say, we have moved from a "marketing" transparency to a real transparency.

As we have said, the focal point of large-scale prevention of corruption is public contracts. We have to reinforce publicity about procedures, guarantees of free competition, the participation of SME in bids for tenders, the distribution of contracts by lots and the control over the implementation of contracts, while being on the alert against precarious work and subcontracting. The clear identification of costs and the segmentation of the implementation of budgets can prevent grey areas of financial profits and commissions to intermediaries. Even though the logics of corruption often find ways to turn matters to their advantage, a combination of instruments could make this difficult, although the road to achieving these instruments is blocked by a strong and real wall of hostility towards transparency.

What are these hostile logics? The first one, is that the importance of transparence, good governance and the prevention of corruption in political discourse is generally inversely proportional to the endowment of financial and human resources to the work of safeguarding bodies. Politicians are not always duly informed about the means for overcoming these inertias, as some of the relevant high-ranking officials in long-standing organizations that remain bound to the

dynamics of opacity expend a great deal of effort in isolating transparency bodies and branding the people in charge of them as "reckless". The latter, if they are to be effective, need an organic setting that propitiates transversal work, the utmost distance from party politics and an independent technical dimension.

The second hostile logic is that the value of the common good or the general interest has dropped in the democratic market. The trend toward privatization as a tool of efficient management has now become linked to the trend toward privatization as a logic that prevents transparency in public management, and thus the wall of transparency becomes even higher. The defenders of collaborative democracy believe that falling into this trap is a mistake that clearly harms both sectors.

Once the wall has been identified, it has to be scaled by a leap that is both individual and common to the public and private sectors. This leap is called ethical leadership and commitment.

The outlook is not optimistic but we cannot renounce our objective. As the Spanish philosopher Santiago Alba Rico has written: *"Democracy—political and economic—, so exceptional in history, essential to any possible rescue of civilization, has been defeated again. It is difficult to anticipate the consequences without being frightened".*

Gemma Calvet i Barot

Director of the Transparency Agency
of the Barcelona Metropolitan Area

Code of Ethics and Conduct for senior officials of the Barcelona Metropolitan Area (AMB) and its associated entities

Preamble and principles

Article 55.1 of Law 19/2014, of 29 December, on transparency, access to public information and good governance, specifies the principles and rules of conduct that must guide the actions of senior officials. Section 3 of this article states that "the government, local authorities and other public bodies and institutions included in Article 3.1 must draw up a code of conduct for their senior officials that will specify and develop the principles of action referred to in Section 1, establish other additional ones where appropriate, and determine the consequences of not complying with them, without prejudice to the penalty system established by this law". By approving this Code of Ethics and Conduct as a self-regulatory instrument for senior officials, the Barcelona Metropolitan Area complies with this legal obligation.

The Transparency Agency of the Barcelona Metropolitan Area, for its part, states that "it bases its action on a series of principles and values that define good governance, are based on the fostering of personal commitment, and are reflected in corporate teamwork".

These principles are the following:
— Legality
— Responsibility
— Integrity
— Accountability
— Right to information
— Objectivity
— Public ethics
— Equity

Each of these principles expresses, in one way or another, the correspondence that must exist between the rights of citizens and the duties of those who have agreed to guarantee these rights. In addition to observing the principle of legality, senior officials hold the main responsibility for complying with and enforcing the law and for adapting or interpreting it in accordance with the

circumstances of each situation for the benefit of the general interest and good governance. This responsibility entails making responsible and ethical use of their position and meeting the requirement of managerial discretion in the duties entrusted to them. The Code of Ethics and Conduct, as a system of institutional integrity, must be a guarantee for the senior officials that sign it, in the sense that it offers them a tool for ethical self-regulation, reinforcing the regulations but not reproducing them, and therefore guiding and protecting them in situations of behaviour that may compromise ethics.

Transparency is the necessary condition for satisfying the right to information, a right that must be guaranteed with diligence, impartiality, honesty and loyalty. Citizens must be able to enjoy equal access to the information they need with equal treatment, and they must be aware of the functioning and activity of the public administrations. Transparency and good governance should make it possible for citizens to continually monitor and evaluate political and administrative actions. A transparent administration is an administration that accounts for its functioning and thus encourages citizen participation.

The Charter of Fundamental Rights of the European Union of 7 December 2000, incorporated into the Treaty of Lisbon, introduced citizens' right to good administration (Art. 41), promoting codes of conduct and organizational simplification.

Insofar as the Code of Ethics and Conduct presents the risks and malpractices that may arise from non-compliance with the commitment to transparency and good governance, it is a tool that facilitates the assumption of responsibilities by senior officials and the habit of being accountable for actions taken.

The behaviour of the councillors of the AMB must always correspond to the public trust deposited in them as elected officials. They must always exercise their powers with integrity and honesty, ensuring that they do not enter into any conflicts of interest or other situations that may unduly condition the exercise of their representative position. For this reason, they must always maintain a respectful behaviour and an exemplary attitude towards the other councillors and towards citizens. This behaviour should always involve the use of correct language and relations based on constructive and cordial interaction and dialogue with all people and all groups, without exclusion.

Likewise, the ethical dimension that forms part of senior management goes beyond compliance with the law: first, it reinforces the sense of responsibility and knowledge of the law and, second, it reinforces the individual and organizational capacity to promote best practices. Nevertheless, a code of ethics and conduct cannot reiterate compliance with the existing regulations or limit their validity.

In the area of metropolitan regulation, without prejudice to any reforms that may be made, the current Organic Metropolitan Regulations establish the following:

Art. 1.2. Object of the regulations: formulation of the principles of transparency of the Institution's activity in the regulation of access to information and in the participation of citizens and municipalities and entities in the metropolitan area.

Art. 73. Principles of transparency and participation.
73.1. The AMB adopts the aim and obligation of broadening and increasing the transparency of its activities, and recognizes and guarantees the right of citizens and municipalities to access information on these public activities.

73.4. The AMB will ensure that this culture of transparency and participation is incorporated into the practices and working methods of all its services and departments, and that these draft and publish regularly updated information on their activities related to the operation of public services, so as to ensure transparency, monitoring and control.

The Transparency Agency, as the guarantee body of the AMB and its associated entities, will ensure compliance with this Code of Ethics and Conduct and the evaluation of this compliance, in the conviction that it must be an effective and credible tool in its functioning and deployment and in the continued evaluation of its fulfilment.

1. Obligated subjects

The present code applies to persons in representative positions, all members of the Metropolitan Council, the senior officials and managers of the AMB (the general manager and the area and service managers) and those of the associated entities that have a similar position.

The adherence of senior officials to this code of ethics will be actively announced on the portal, and will be mandatory.

Senior officers must adhere to the Code of Ethics and Conduct when they occupy their positions or join the organization; senior officials who are already members of the organization must adhere to it when it is approved.

2. Ethics in public information and accountability

The commitment to transparency means that it is obligatory to make public especially all important actions that are relevant with regard to the accountability of public activity and those that, by their nature, could be susceptible to malfeasance.

The information that is explained below must be made public or accounted for to the internal guarantee system and to the responsible administration:

2.1. **Traceability of public money.** The use of material resources in order to show compliance with budgetary legality and the elimination of any expenditure not clearly linked to institutional obligations.

2.2. **A culture of merit in management positions.** The professional merit and curriculum of each senior official and manager, in addition to the payments, compensations and expenses that are assigned to them.

2.3. **A public schedule in relation to stakeholders.** The schedule of senior officials in their interaction with stakeholders in the monitoring system implemented by the Transparency Agency in order to exercise accountability in their work.

2.4. **Compatibilities.** The conditions of incompatibility and declarations of compatibility of senior officials must be communicated in a timely manner from the time of their appointment to the time when they leave their posts, in addition to their declarations of assets.

2.5. **Public procurement.** Public procurement procedures must be made public in accordance with the law. Best practices must be promoted, and compliance with the regulations on transparency and good governance in public procurement approved by the Metropolitan Council must be ensured.

2.6. **Selection and recruitment of staff.** Staff must be selected and recruited in compliance with the law. Best practices must be promoted, conflicts of interest must be avoided and openness of public information and free competition must be guaranteed in all processes.

2.7. **Conflicts of interest.** In order to promote a culture of integrity and the prevention of conflicts of interest, and to guarantee the prevalence of public interest over private interests, the questionnaire annexed to this code must be signed. In cases of doubt regarding conflicts of interest, the person involved must refrain from acting.

2.8. **Right of access.** Publishing the report and showing diligence in dealing with requests for information from users and in requests by citizens for right of access, following the established procedures.

2.9. **Publication of criteria.** Drafting objective criteria based on decision making and making them public in both individual resolutions or actions and in the management of teams.

2.10. **Subjection to commitments of governing bodies.** Elected officials must make public any commitments made by the governing bodies and be accountable to citizens in all public actions carried out.

3. Ethics in senior management

Taking on managerial responsibility entails a high level of requirement of integrity, responsibility, teamwork and self-criticism. Good governance requires ethical criteria and norms of conduct that foster ethical leadership.

3.1. **Institutional responsibility and loyalty.** Taking on the management of managerial discretion in each area in a responsible manner, and justifying decisions objectively. Integrating the general interest and the common good as a guiding and prioritizing criterion in metropolitan management, applying the utmost institutional loyalty and taking into account public information and statements by the public.

3.2. **Quality and austerity.** Ensuring good management of expenditure, with criteria of prudence and austerity, giving priority to the general interest and direct service to citizens. To this end, the ethical dimension of decision making, evaluation by merit and allocation of expenditure must be strengthened.

3.3. **Equity and non-discrimination.** Involvement in reinforcing the working conditions of staff, promoting a culture of quality in working conditions with defined structures and established duties, promoting equal opportunities for men and women, and avoiding any form of discrimination.

3.4. **Diligence in compliance with the law.** Fostering decision making based on the law, knowing the content of regulations and laws and the procedures for transparency and good governance, and exercising the utmost diligence in their implementation. Senior officials may not accept any type of incentive, gift or benefit that is related to any type of decision making or is offered because of the position occupied.

3.5. **Veracity and integrity.** Accepting ethics as a tool for preventing criminal risks and conflicts of interest, and filling in the questionnaires with veracity and

objectivity. Ensuring that staff recruitment is based on ability and not on political affinities or family ties. Refraining from participating in decision making when the interests converge directly or indirectly with personal or partisan interests, or ones that involve benefits to associated third parties.

3.6. **Horizontal vision and professionalism.** Working in a culture of shared decisions; promoting horizontal management to ensure a good work environment, professional competence and the empowerment of workers.

3.7. **Training and self-demandingness.** Encouraging continuous training and the exchange of best practices in collaboration between administrations, as well as in the ability to exchange data and to integrate and complement services. Innovation, excellence and modernization in administrative tasks must be encouraged.

3.8. **Determination and commitment.** Believing in the capacity of constructive creativity and in the ethical dimension offered by transparency and good governance as a new working culture. Making a commitment to this conviction in day-to-day management, both in monitoring the protection of public goods and in promoting transformative action.

3.9. **Attention and service.** Making an effort to limit bureaucracy in procedures in order to prioritize citizen service, accessibility and flexibility in procedures and information. Ensuring that existing services and programmes are not duplicated, and offering full cooperation with the local authorities and the various services of the Barcelona Metropolitan Area.

3.10. **Courage and honesty.** Protecting and respecting public servers who warn of risks of malfeasance or irregularities related to the Code of Ethics and Conduct, transferring the information to the Transparency Agency and channelling the decision making in order to resolve any incidents and determine their solution, including, if applicable, the right to rectification in case of possible violations of the right to honour.

3.11. **Confidentiality.** Guaranteeing confidentiality and reservation in procedures that require it, prioritizing the right to privacy of workers and citizens, and observing secrecy and safekeeping in communications and documents that require them.

3.12. **Big data and use of technology.** Refraining from using the data obtained by technological means or in the monitoring of electronic data in the metropolitan area in an interested or commercial way or one that is alien to the interest of the service.

4. Involvement in transparency and good governance and collaboration with the Transparency Agency

4.1. **Availability and cooperation.** Senior officials must show a collaborative attitude towards the Transparency Agency, as the body that guarantees the application of the Code of Ethics and Conduct, as well as towards the internal and external control services for compliance with this code, by delivering information and following the recommendations arising from the regulations regarding transparency and good governance.

4.2. **Dissemination and training.** Knowledge of this Code of Ethics and Conduct must be promoted through internal training, monitoring, and identification of any incidents that occur in its implementation. Application of the code by third parties that are related to the administration must be facilitated.

4.3. **Indemnity guarantee.** Senior officials must be offered guarantees of confidentiality and protection against any pressures that may be placed on them to carry out acts that are incompatible with the Code of Ethics and Conduct and against any consequences of their warning of malfeasance. Senior officials must also offer such guarantees to their subordinates.

4.4. **Guarantee.** The Metropolitan Transparency Advisory Council, a body of the Transparency Agency for discussion, deliberation and support, is constituted as means for resolving any doubts that may arise and for establishing the criteria for interpreting specific cases, as a non-binding tool for help, support, protection and control.

4.5. **Evaluation and monitoring.** Senior officials must collaborate in the drafting of an annual report on compliance with the Code of Ethics and Conduct that will disseminate it and allow it to be evaluated by the Transparency Agency based on the indicators that are used in its external evaluation.

4.6. **Penalty system.** Compliance with this code is linked to the penalty provision of Law 19/2014, of 29 December, on transparency, access to public information and good governance. Powers are granted to the Transparency Agency as the guarantee body for investigating and proposing disciplinary action. The Presidency of the AMB is responsible for making decisions.

JORDI DURÓ

TAKING CARE OF INSTITUTIONS

The demand for ethics and transparency in our institutions is a call for care. Here we will argue that institutions that take care of people must also be taken care of. Our lack of tradition in the ethics of organizations has led us to take it for granted that institutions stand on their own as long as their regulations, charters and codes of conduct are complied with, and this may sometimes be sufficient, especially in times of prosperity when everything runs smoothly. However, in the global village (with the consequent global problems), and in dramatically changing societies such as ours, traditional approaches are obsolete, new technologies and customs require legislation, and citizens are more aware of their rights and of the consequences of their disaffection and resentment with regard to public services. We must therefore consider how to take better care of our institutions, because they are fragile and when they are neglected we all lose a lot.

In *Nicomachean Ethics*, Aristotle noted that the end (*telos*) is the principle of actions. The telos guides the choice of the most suitable means according to the circumstances, and this choice depends on the great virtue of the practical wisdom that he called *phronesis*. Nietzsche also noted: "he who has a why to live for can bear almost any how". Fifty years ago the hippies of 1968 formulated it in another way, although the idea was the same: if you don't know where you're going, you end up somewhere else. Indeed, final causes are those that stimulate, those that invigorate, those that give us our reason for being and define us. That's what ethics is about, defining good life from a form of behaving (*ethos*) and being in the world.

Humans are *zoon politikón*, animals of the *polis*, interdependent, in need of networks of support and trust—that's why we create institutions. A public institution is at the service of

the people, adapting instinctively like an animal but also shaping the world and the citizens. Keeping institutions up to date is not the same as preserving them; rather, it means accepting the continuous tension of adapting to an environment that is today undergoing accelerated change. Replacing the intrinsic, constitutive purposes of an institution, which are essential because they are defining and proper to its ethos or character, with the extrinsic ones, which are shared with other organizations and are not necessary to them (such as prestige, fame, power and money), leads to conflicts of interest (putting private benefit before public benefit), corroding the institution and with it the life in and of the city.

Taking care of institutions requires a change in the mentality and training of politicians, public servants and citizens. Citizens are the centre of the institutions, which must open to meet and adapt to new realities. Social demands are not expressed clearly and transparently: organizations must know how to listen to them all—those that have the capacity to be heard (lobbies) and those that do not (the vulnerable ones). Public goods in morally plural societies must therefore open themselves to public discussion: explain why decisions are made, with what criteria, based on what forecast of consequences and for whom. And they must explain themselves, revealing who does what and how. Failing to pass the test of disclosure (without counting privacy) causes rejection, mistrust and ultimately the red face of shame—the opposite of what was intended. Shame is an emotion that, before one knows rationally why, clearly reveals on someone's face that an action is inappropriate and out of keeping for the institution.

The culture and ethical structure of codes of ethics, good practices, ethics committees, compliance reports and process indicators address the demand for care of inclusive institutions in which everyone has a place. The values make explicit why we want to be evaluated, over and above electoral goals and maximizing strategies

more typical of Hobbes (the culture of influence), by which the rules are followed when things are going well and from fear of punishment. Ethics, by contrast, reminds us that rationality is universal: what we might wish for everyone publicly, reciprocally and sustainably is good. However, it is not just about being good, but about moving forward at the service of the life of the citizens of today and of the future. This requires risk taking, complexity management, project hierarchization and impact evaluation with indicators based a priori on rights, capabilities and human development. People make institutions and these in turn make people: the fact that they take care of each other is what allows us to transcend individual and short-term interests (elections) and think about the common good in the long term, so that, as time goes by, life follows a line of progress.

However, there is a great danger that transparency will become the end, or that ethics will become a mere bureaucratic protocol of committees and codes of conduct. Transparency is neither the end nor the cure for disaffection. Its purpose is trust: it is about taking care of this key social capital in the basic structure of a fair society whose institutions are at the service of citizens. Ethics is thought in action, a reasonable distribution of risks that avoids vulnerability, and a continuous learning from mistakes. Converting transparency into the end or ethics into a code of conduct is a road to nowhere, playing to the gallery (showing the efficiency of the work done), and disregarding the ends (the impacts on the persons for whom the work is done). Human organizations learn, rectify and remedy past mistakes, and they progress if they are able to diminish their structural violence against life and the level of exclusion. We must be accountable for serving people's lives, for taking care of them. To achieve this, in coherent reciprocity, we must take care that institutions do not stray from the path or become distorted.

Begoña Román Maestre

La Palma de Cervelló.
Traditional irrigation tanks
© KIM MANRESA

ETHICS, COSMETICS AND CREDIBILITY

In recent years, a wide range of organizations have shown an interest in drawing up codes of ethics.

Those of us who dedicate ourselves professionally to applied ethics are often consulted by these organizations, who hope that codes of ethics will help them develop well and improve their competition and quality.

We feel a certain perplexity at this sudden interest in ethics and have serious doubts as to whether these documents, however well done they are, can really trigger deep changes in organizations and make them more equitable, fairer and more respectful of the rights of their employees and users.

We believe that, at best, codes of ethics are instruments, guidelines for action, but that the true change in organizations begins with an internal change in people, a transformation of their order of priorities, in their value systems and in the way they interact with each other. The interest in applied ethics therefore raises many questions.

There may be three main reasons for this emerging interest in ethics and values in general. First, there is a very clear need to reinforce trust and credibility in a social and political situation of increasing mistrust in institutions. This phenomenon is not new but is now becoming widespread. The public has lost its confidence in institutions due to a climate of suspicion and mistrust. Citizens wish to be able to restore their faith in institutions, but the bad experiences of the past and the present involving deceit and corruption make them suspicious of the public discourse. They now demand ethics, values, institutional coherence, and clarity in the accounts and in the distribution of roles and responsibilities. They want to know who is responsible for the successes and failures and demand a fair deal.

If an organization is publicly presented as an ethical one, in which users' rights are respected and work is carried out in line with the institutional vision and values, citizens may well consider it more honest and therefore choose it instead of others. Then, of course, they will want to verify with facts and achievements that they made the right choice.

Mistrust is widespread in today's societies. In recent years some institutions have lost their social credibility and this seriously affects their functioning. From the highest institutions of the state to the educational, social, health, economic and religious institutions, the fiduciary pact between citizens and institutions, the relationship of reciprocal esteem and social empathy, has suffered a serious crisis.

Institutions can only display their aims if citizens trust their potential and the competence of the professionals that work in them. This crisis of credibility is not a coincidence and does not arise spontaneously. The reasons for this crisis of confidence in institutions include bad practices, carelessness, incompetence, slowness, the contradiction between values and facts, financial scandals, corruption and foul play, although some are much more pronounced than others.

The second reason for the interest in ethics is instrumental. It is understood that ethics can be used to sell an organization better. This is what we call the transformation of ethics into cosmetics, and it is far from negligible phenomenon. Sometimes, ethics is understood only as an instrumental asset for selling or improving the image of an organization, as a cure for its outer skin. It then becomes a cosmetic product that does not alter the internal behaviour of the institution or really improve the inner life of the people who collaborate with it. It simply serves to embellish the facade, its web page.

In this case, ethics is cynically converted into an object of merchandising. When a code of ethics is not accompanied by an internal process of change and an ethical audit to ver-

ify the improvements that have been made in rights and duties, it is worthless—a missed opportunity for ethics.

The third and last reason for this increasing interest in ethics is the concern for quality and excellence shown by many organizations. In fact, ethics and quality are intimately related. In the society of demand, citizens not only demand attention, they want to be treated properly and receive an appropriate service. They expect professionals to be not only scientifically and technically competent, but also ethically competent, with the capacity to respect rights, to fulfil their duties and to establish relationships of equality with their users.

Ethics is a guarantee of quality and fidelity. When users feel well treated, when they see their rights respected, they are satisfied with an institution and return to it when they have the opportunity. By contrast, when they feel unfairly treated or have their rights violated, they reject it and do not return to it when they have the opportunity. Ethics is thus a market good, because it makes organizations better, more competent and more socially competitive.

The quality of organizations depends not only on spaces and times, on structures and technology; rather, it depends essentially on the human quality of its professionals, which are its driving force. Human quality is made up of this intangible, spiritual capital, which consists of values and virtues.

These three hypotheses are not mutually exclusive. Nor can one know in advance what motivates an institution to draw up a code of ethics. These instruments can activate real processes of change, but only if they are configured in dialogue with all the sectors of the organization, highlighting the real problems and viable options, because dialogue is already a valuable ethical exercise in itself.

Francesc Torralba

Molins de Rei. Playground
located in a plot, Major street
© KIM MANRESA

Guide to the identification and prevention of criminal risks in the Barcelona Metropolitan Area and its associated and dependent entities

Marc Molins Raich

1. Introduction

1.1. The change of paradigm: new forms of intervention of criminal law in the life of the Public Administrations

Since the approval of the Criminal Code, which some called "the Criminal Code of Democracy", the text has been modified 29 times. On practically all of these occasions, the lawmakers referred to the need to adapt the text to the new times and to the demands of citizens who are increasingly aware and vigilant regarding both traditional and new forms of crime.

Leaving aside the question of whether the changes to the Code were well founded, they resulted in a longer text, an increase in the number of types of offence, and an increase in the penalties associated with the traditional types of offence. They have thus increased the legal consequences arising from infringement of the legal provisions.

The criminal policy used by Spanish lawmakers has aroused some controversy in the profession, and some authors have claimed that it has overburdened the criminal justice system, explicitly violating the principles of proportionality and culpability on which it is based and which justify the application of *ius puniendi*. Nevertheless, as the successive reforms overcome the filters of constitutionality, the reality of this overburdened system leaves no room for defence and forces those subject to the law to adapt their daily conduct to the new regulatory situation.

The conceptual overburdening of criminal law is made especially clear in its impact on the Public Administrations. Through the successive reforms, the lawmakers have changed the model of intervention of criminal law in the Pu-

blic Administrations from one of relative accessoriness, in which the breach of administrative regulations was a necessary but not sufficient prerequisite for assessing the criminal relevance of the conduct of a public officer, to an absolute accessoriness, in which the breach of the administrative regulations is directly punished.

This phenomenon, symptomatically called "administrativization" of criminal law, generates a unique problem and leads to the conscious or unconscious redefinition of the boundaries of criminal risk for all professionals working daily in Public Administrations or their associated entities.

However, the toughening and extension of criminal law is particularly debatable if one takes into account that this occupation of areas traditionally reserved for administrative law is mainly carried out through principles based on references to regulations that contain the punishment but do not describe the prohibited or punished conduct. Furthermore, this process is operative in areas where there is already an administrative legal regulation that provides the corresponding penalty for cases in which the right protected by the regulation is violated. This means that it is sometimes difficult to disassociate the criminal and administrative relevance of the same conduct, so the agent is exposed to radically different legal risks without being clearly aware of it.

The clear regulatory excess that characterizes our current Criminal Code is not the only factor that points to a significant increase in the judicialization of life in the Public Administrations. Though this fact is in itself innocuous and lacks the rigour necessary to be used as the basis for a consistent critical argument, it does allow us to understand a characteristic factor of the current situation: the increase in the mechanisms of prevention and control of administrative action.

In this situation of greater sensitivity and greater formal and informal control of administrative activity, there has been a significant increase in the number of matters that are subject to judicial control, and public opinion has led to a real and effective increase in the pressure on the daily activity of the Administrations. This control would be meaningless if the aim were not to constructively improve the daily action of all the professionals to which it is addressed.

Whatever is thought about this extension of criminal law, the fact is that the modifications and the increase in the formal and informal pressure of our courts and bodies that control the daily activity of the Public Administrations (the Anti-Fraud Office, new sections of the Public Prosecutor's Office, Judicial Policies, etc.) obliges us to improve processes and conducts in order to prevent and avoid legal risks as far as possible.

In other words, however much one may disagree with the principle and the way in which the lawmakers have introduced these changes in the law, it is absolutely essential to adapt the guidelines and daily conduct to the new reality with a view to renewing the commitment to service and constant improvement characteristic of our Public Administrations.

1.2. Legal status of the Transparency Agency with regard to the Barcelona Metropolitan Area and its dependent entities

According to the Decree of the Presidency dated 14 December 2015, the Transparency Agency is responsible for specialized promotion and collaboration with regard to compliance with the rules on transparency, right of access and good governance that are applicable to both the Barcelona Metropolitan Area (AMB) and its associated or dependent entities. It must coordinate all the actions and initiatives aimed at promoting transparency, right of access and good governance both internally and externally. In the context of these powers, the Agency must promote the approval of the code of conduct of senior officers of the Barcelona Metropolitan Area and the establishment of indicators of transparency and good governance in evaluation processes.

These foundational objectives make the Transparency Agency cross-cutting, a true guarantor of the promotion of the principle of legality, described by the Agency as a commitment to its interest in and knowledge and promotion of diligence in compliance with the regulations by both the AMB and its associated and dependent entities. The fulfilment of this foundational objective depends to a great extent on the strict observance of different bodies of legislation and, especially, because of its primary and structuring nature, of the current Criminal Code.

The many recent modifications to the articles of this legal text, especially those dealing with issues of public interest and good governance of the Administration, make it advisable to draw up a document that allows the risks associated with the daily actions of the AMB and its associated entities to be clearly identified, in order to strengthen the work of the Transparency Agency in the promotion of legality and liability. Full knowledge of the profile of the regulation and its jurisprudential interpretation is a logical prerequisite for meeting the founding objectives.

The aim of this article is to draw up a guide and recommendations for identifying and preventing criminal risks for the Transparency Agency of the Barcelona Metropolitan Area and its associated and dependent entities in order to increase the culture of fulfilment with regard to the latest changes to the Criminal Code and to tangibly improve the protocols and forms of conduct and interaction with citizens and other legal and commercial agents.

In summary, the aim is to assess and detect any criminal risks faced by the AMB and its associated and dependent entities, and to draft a protocol or list of measures specifically aimed at minimizing these risks.

In view of the wide variety of areas of action and the many agents acting under the umbrella of the entity, it is essential to define the scope of the article objectively and subjectively in order to keep it within the necessary limits. From an objective perspective, the article will focus primarily on the risks arising from the following processes:

— Decision making.
— Staff recruitment.
— Public procurement.
— Document management from the perspective of custody, integrity and fidelity of documents.
— Management of related public funds.

From a subjective perspective, for the preparation of this document, a detailed analysis of the processes and areas of risk of the Barcelona Metropolitan Area and its associated and dependent entities was ruled out. The article is therefore drafted as a general, operational and protective instrument that does not include an analysis of the specific processes in which the source of risk is detected but starts form the premise that the persons linked to this entity are directly or indirectly public officers.

After identifying these risks, the article describes the current regulation from a very practical perspective and in simple terms in order to create a document that is comprehensive and easy to read. Finally, through the daily experience accumulated both personally and professionally and the evidence laid down in the scientific literature, it is attempted to create a guide or list of suggestions that will improve the daily conduct of the professionals who assume these legal risks.

Through these guidelines, it seems possible to prevent and avoid any risks and criminal liabilities that affect the daily lives of the people who humanize our Administrations by achieving and establishing the characteristic parameters of excellence.

1.3. The legal status of workers of the AMB

The Criminal Code avoids any reference to the administrative regulations and makes its own definition of public officers for criminal purposes.

Specifically, Article 24.2 of the Criminal Code determines that, for criminal purposes:

"Everyone who, by immediate provision of the law or by election or by appointment of a competent authority participates in the exercise of public functions is considered a public officer"

Civil servant status shall also be deemed to be held by all those who, by immediate provision of the Law, or by election or appointment by the authority with relevant powers, participate in the exercise of public duties.

From the above wording, it can be seen that the Criminal Code has a broad definition of public officers that goes beyond administrative law. It is a definition based on juridical-political ideas that is aligned with a specific political-criminal approach, awarding the status of public officer according to some functions and goals of criminal law that do not always coincide with administrative law.

Therefore, for criminal purposes, a person who meets the following requirements will be considered a public officer:

a) Participation in the exercise of public functions: as a basic and indispensable requirement, the jurisprudence of the Supreme Court has understood that public functions are everything that is carried out by a public entity subject to public law and with the aim or purpose of satisfying public interests.
b) Public appointment for the exercise of public functions, which may adopt any of the forms laid down in Article 24.2 of the Criminal Code, that is to say, the appointment must be by immediate provision of the law or by selection or appointment by a competent authority.

In this field, the selection requirements for admission, the category, the pay system, the legal and/or regulatory status, the social protection system and the degree of stability are of no relevance. An employment contract or even a mere agreement between the individual and the person empowered to make the appointment is sufficient.

Furthermore, because of its practical importance, it should be noted that whether the individual forms part of the workforce or is in an interim position is also of no relevance to their being considered a public officer.

Organic Laws 5/2010 and 1/2015, both on reform of the Criminal Code, led to a radical change of paradigm of our legal system because, for the first time, they established the direct and autonomous criminal liability of legal entities. Although the consequences of the foregoing are many and very diverse, we can say that, after many centuries of validity, an end has been put to the Latin aphorism *societas delinquere non potest.*

The reform of the Criminal Code has largely consisted of the addition of Article 31b, which stipulates the cases in which legal entities will be subject to criminal liability.

This new provision implements two different channels of attribution of criminal liability to legal entities. These entities will be criminally liable for the following offences:

a) Offences committed on their behalf and for their direct or indirect benefit by their legal representatives or by those who, acting individually or as members of a body of the legal entity, are authorized to make decisions on behalf of the legal entity or have powers of organization and control within it.
b) Offences committed in the exercise of corporate activities and on behalf of and for the direct or indirect benefit of these activities by those who are subject to the authority of the natural persons mentioned in the previous paragraph and have been able to commit the offences because the persons in authority have seriously failed to supervise, monitor and control their activity according to the specific circumstances of the case.

Although this paradigm shift in criminal liability is aimed at preventing and punishing the increase in crime within companies (known as "organized irresponsibility"), in fact the subjective scope of application encompasses a wider spectrum of possible active parties—that is, legal entities that may have criminal liability autonomously and personally—than would have been initially imagined.

This is not a trivial change, because the lawmakers have created a new provision in the Criminal Code that expressly covers those cases in which public-law entities, and specifically public companies, may also have criminal liability autonomously and personally. Article 31.5 of the Criminal Code states that:

1. The provisions regarding the criminal liability of legal entities are not applicable to the national, regional and institutional Public Administrations, regulatory bodies, public business agencies and entities, public-law international organizations, or others that exercise sovereign or administrative public powers.
2. In the case of public companies that carry out public policies or provide services of general economic interest, only the penalties provided for in letters a) and g) of Article 33.7 may be imposed. This limitation is not applicable when the judge or court considers that it is a legal form created by its promoters, founders, administrators or representatives in order to avoid criminal liability.

Despite the general exclusion of criminal liability with respect to the Public Administration in the strict sense, this provision unequivocally prevents this

new culture of regulatory compliance introduced through criminal law from being applied to all public companies, i.e. ones that have a direct or indirect shareholding of the public sector of more than 50 percent.

From the foregoing, it is deduced that whenever an entity belonging to the public sector has a shareholding in public companies, it will be necessary for it to have a programme of regulatory compliance and prevention and avoidance of criminal risks in order to promote and maintain a culture of regulatory compliance and exonerate itself from criminal liability in the event that a manager, legal representative or employee of a public company commits an offence within it.

2. Analysis of the most important areas of risk from the perspective of the AMB

2.1. Risks arising from decision making in the AMB

2.1.1. Introduction to offences of administrative malfeasance

Administrative malfeasance, described roughly as the type of offence committed by a public officer or authority who makes an arbitrary decision in an administrative matter or case, is an offence that has in recent years been defined on the basis of a democratic view of the power held by the Administration (Art. 106 of the Spanish Constitution).

Thus, following the logic of the separation of powers in a democratic state of law, the lawmakers have chosen to control judicially any deviations from duty and excesses that occur within the Public Administration in the exercise of the powers that have been conferred upon it.

In line with the foregoing, the legal system also provides for the possibility of criminal liability when, in the exercise of these powers by the members of the Administration, there is a "distorted application of the law", which is ultimately the core of all the precautionary measures provided for in the Criminal Code.

Bearing in mind that misuse of power and political and administrative corruption are not only inconsistent with democracy but also incompatible with democratic control of administrative acts and that, in addition, the principles of equal opportunities, citizen participation in the control of power and (especially in the field of malfeasance) impartiality and correction in administrative action (Art. 103 of the Spanish Constitution) are basic in a state of law, for those cases in which they are not respected and indeed seriously

infringed, the lawmakers have chosen to apply the harshest branch of the legal system: criminal law.

As stated above, it is important to note that criminal law is governed by the minimum intervention principle. It is thus reserved solely for cases in which administrative action constitutes a very serious violation of the basic principles of the Public Administration. Therefore, in order for criminal law to be applicable, the offence must go far beyond the minor illegalities or illegal actions that can be corrected by other, less punitive types of legal instruments such as the administrative courts.

2.1.2. Legal rights protected against offences of administrative malfeasance

For a full understanding of the penal scope of offences of administrative malfeasance, it is important to understand the socially valued reality called the "protected legal right" that led to the inclusion of the offence in the legal system.

As established by the Supreme Court, the legal right protected by these provisions is the proper and normal functioning of the Public Administration, which must act fully in accordance with the system of values established in the Constitution and, in particular, in Articles 103 and 106.

The provisions on administrative malfeasance are therefore intended to protect the proper exercise of public service in accordance with the constitutional parameters that must guide its actions, which include the following:

1. Priority to serving general interests.
2. Full observance of the law.
3. Absolute objectivity in the fulfilment of its aims.

In line with the foregoing, it is often said that the provisions on offences of administrative malfeasance seek to guarantee due respect for the principle of legality in the field of public service, protecting it against severe and malicious offences that may be committed by public officers or authorities in the exercise of their public functions.

2.1.3. Types of offence included under the heading of administrative malfeasance

General malfeasance

Article 404 of the Criminal Code states as follows:

> *"a public officer or authority who, being aware of the injustice thereof, makes an arbitrary decision in an administrative matter must be punished with the penalty of special disqualification from public employment or office for a period of seven to ten years".*

As will be explained below, the lawmakers have established this provision as the basic type in relation to other specific offences of administrative malfeasance provided for in the Criminal Code, which refer expressly and directly to Article 404.

After this statement, the jurisprudence establishes the typical characteristics that are required to identify an offence of this type:

1. The person who commits the offence must be a public officer or authority.
2. The public officer or authority must have made an arbitrary decision. For a decision to be considered arbitrary, it must not only be illegal but also clearly and completely in opposition to the applicable legal regulations, to the point where there can be no justification or reasonable interpretation for it.
3. The arbitrary decision must be made by the public officer or authority "in knowledge of its injustice", that is to say, that the conduct is of an arbitrary nature.

Although in later sections examples of this type of offence will be provided, it is important to emphasize what is meant in particular by "an arbitrary decision in an administrative matter". Note that this offence is based on the concept of arbitrariness.

Bearing in mind the vagueness of the legal concept of arbitrariness, its meaning has been shaped by the rulings that have been made on it by the Supreme Court. To consider a decision to by arbitrary, it must first be contrary to law, which will be true, for example, depending on the seriousness of the case, when it is made without the legally required powers, when the essential regulations of the procedure have not been respected, when its basis clearly and directly contravenes the current law, when it involves a misuse of powers, when it involves disregard for the general interests, etc.

Lastly, in order to be able to understand this offence, it is not necessary for there to be an active conduct of the public servant or authority: it is sufficient for them to voluntarily omit to perform a specific administrative action in cases in which the omission has effects equivalent to a denial. In this regard, see the non-jurisdictional Decision of 30 June 1997 issued by the Second Chamber of the Supreme Court.

Special malfeasance due to the area of action of the public officer

Though Article 404 of the Criminal Code has been used as the main provision regarding malfeasance committed by public servants, the lawmakers also provided for specific cases of malfeasance committed by public servants in some areas of action that are covered by Article 404 but are subject to more severe penalties.

These special cases of malfeasance include the following:

— Article 320 of the Criminal Code deals with malfeasance in spatial planning:

1. *A public officer or authority who, being aware of the injustice thereof, advises favourably on instruments of town planning, development, zoning, re-zoning, construction or granting of permits contrary to the regional planning and urbanization regulations in force, or who during inspections omits to report the infringement of said regulations or fails to make compulsory inspections will be punished with the penalty established by Article 404 of this Code and, moreover, with a prison sentence of eighteen months to four years and a fine to be paid daily for twelve to twenty-four months.*

2. *The same penalties will be applied to a public officer or authority who, individually or as a member of a collegiate body, decides or votes favourably on the instruments of town planning, development, zoning, re-zoning, construction or granting of permits referred to in the previous section, being aware of the injustice thereof.*

— Article 322 of the Criminal Code deals with malfeasance in the field of preservation of the historical heritage:

1. *A public officer or authority who, being aware of the injustice thereof, issues favourable reports on projects of demolition or alteration of specially protected buildings will be punished with the penalty established in Article 404 of this Code and also with a prison sentence of six months to two years or a fine to be paid daily for twelve to twenty-four months.*

2. *A public officer or authority who, individually or as a member of a collegiate body, decides or votes in favour of an award, being aware of the injustice thereof, will be subject to the same penalties.*

— Article 329 of the Criminal Code deals with malfeasance in the field of environmental protection:

1. *A public officer or authority who knowingly issues a favourable report on the granting of clearly illegal permits that authorize the operation of the polluting industries or activities referred to in the previous articles, or who on the occasion of their Inspection fails to report on the infringement of laws or regulations of a general nature that regulate them or fails to carry out mandatory inspections will be punished with the penalty established in Article 404 of this Code and, in addition, with a prison sentence of six months to three years and a fine to be paid daily for eight to twenty-four months.*

2. *A public officer or authority who, individually or as a member of a collegiate body, decides or votes in favour of an award, being aware of the injustice thereof, will be subject to the same penalties.*

As stated at the beginning of this section, although the wording of these provisions does not coincide literally with that of Article 404 of the Criminal Code (e.g. the expressions "contrary to the regional or urban planning regulations in force" and "clearly illegal" are used, whereas Art. 404 uses the expression "arbitrary decision"), the fact is that, apart from the criminal framework and the typical particularities of each area of action of the special cases of malfeasance, they constitute the same offence as that set out in Article 404 of the Criminal Code.

2.1.4. Particular aspects of offences of administrative malfeasance: distinction between administrative and criminal offences

Although it is not easy to clearly distinguish administrative offences from criminal offences, the courts of justice have maintained that to cross this limit it is not sufficient to make an illegal decision that is contrary to the law. If it were sufficient, the administrative courts would be left without work and criminal law would be extended excessively and lose its nature as the last resort.

Therefore, it is necessary to distinguish between administrative offences, even when they are sufficiently serious to be considered void ab initio, and those that go beyond administrative law and are considered criminal offences. Although the cases involve serious violations of the applicable law, they cannot be simply identified as void ab initio and malfeasance.

In order for an action to be qualified as criminal, it is not sufficient for it to involve contradicting the law. This excess of anti-legality that leads to the intervention of the criminal jurisdiction is legally specified in the requirement that the decision be unfair and arbitrary, which should here be understood as meaning the same.

Developing the foregoing, the violation of the law that occurs as a result of an interpretation that is erroneous, mistaken or debatable will not constitute an offence; to constitute an offence there must be such a clear and evident disagreement between the decision and the legal system that no one could find a reasonable explanation to support it. That is to say, the injustice must be so flagrant that its arbitrary nature is clear.

The thesis described above, which for years has been maintained by the Supreme Court and has been called an objective thesis, has been complemented by another line of jurisprudence that emphasizes and considers the arbitrary exercise of power as a decisive element of malfeasance (punishable under Article 9.3 of the Spanish Constitution). It is said that power is arbitrarily exercised when a public officer or authority makes a decision that is, purely and simply, a product of their will, unreasonably converted into an apparent source of regulation.

Finally, other rulings of the Supreme Court have determined that arbitrariness occurs when the decision is not sustainable through any acceptable method of interpretation of the law, when there is no reasonable legal foundation different from the will of its perpetrator, when the decision taken is not covered by any interpretation of the law based on accepted interpretative standards, or, finally, when it corresponds to a consciously distorted application of the law.

2.2. Risks arising in the field of staff recruitment in the AMB

2.2.1. Introduction

Unlawful appointments

The Criminal Code defines the offence of unlawful appointment with that of administrative malfeasance in Chapter I, on malfeasance of public officers and other unjust conducts. Though the heading is inappropriate, the new location of this type of offence corresponds to its true nature. It is, without a doubt, a specific type of malfeasance (although it shows some differences from the typical conduct of article 404 of the Criminal Code), in which a public officer makes a decision (appoints, proposes or grants possession to hold office in a public post) without meeting the legal requirements for it.

From the perspective of respect for the principle of legality, the conducts typified in Article 405 of the Criminal Code are less harmful than the type of malfeasance laid down in Article 404, since the typical description only requires that the decision be illegal, a concept with a clearly different meaning to that used to describe the decision in the offence of malfeasance (arbitrary). From this point of view, the offence of unlawful appointment constitutes a less serious form of malfeasance, since it is sufficient for the administrative decision provided for in this type of offence (proposing, appointing and granting possession to hold office) to be illegal, without requiring the more serious circumstance of arbitrariness.

With respect to the foregoing, in order to understand the scope of this provision, it is important to delimit and differentiate the concepts of arbitrary and discretionary, which are difficult to distinguish but have radically opposed legal consequences. The discretionary powers of the Administration are defined as the power to act freely when the law enables it to do so. In other words, discretionary powers arise when the legal system gives the Administration powers to appreciate what is of public interest in a given case.

On the other hand, arbitrariness is an action of the Administration that lacks a basis of reason or experience, making such action or decision a mere human whim, in contravention of the guidelines that govern administrative action, i.e. rationality, coherence and objectivity.

At this point, we must ask ourselves what turns a discretionary act into an arbitrary act, that is, when is the fine line between legality and illegality crossed? Although different parameters have historically been used to distinguish the two concepts, jurisprudence is currently unanimous in considering that there are two differential indicators: the motivation for the act and its objective justification. A discretionary act will be motivated when

the basis under which it is made is externalized, thus ensuring seriousness in the formation of the Administration's corporate will, guaranteeing that the person affected by the administrative decision can, if they see fit, challenge it and submit it to judicial control.

However, as noted, motivation is a necessary but not sufficient cause. It is therefore not sufficient for the administrative body in the use of discretionary powers to choose an option from the available ones and explain why it has chosen it; rather, it must be proved that the option chosen is the best possible one, the most appropriate one for the intended purpose. The motivation must be correct, appropriate, i.e. the intellectual operation carried out by the organ in choosing one of the various possible options must be the most rational one. Consequently, in order to consider that a discretionary act of the Administration is in accordance with the law, it must meet the conditions of motivation and objective justification, which should be stricter, as stated above, for discretionary acts than for regulated acts.

Having concluded the above digression on the delimitation and distinction of the concepts of arbitrariness and discretionary powers, we will now introduce the other aspect of Article 405 of the Criminal Code, that is, the punishment for the individual who receives the appointment (Art. 406 of the Criminal Code). Observing the principle of reciprocity, the lawmakers considered it necessary to punish not only the public official or authority who appoints illegally, but also the appointed individual.

Although the active subject of the conduct may be any person, the intervention of a public officer who proposes, appoints or grants possession to hold office in a public post is required. This is an offence of "necessary participation", that is, one in which the intervention of two or more subjects is expressly or implicitly required, regardless of which of them is penalized for the offence. Article 406 states that respect for the principle of legality not only obliges those who carry out public functions to comply with it, but that any citizen in general must adapt their action to the principles of functioning of the public authorities when they establish relations with them.

Prohibited bargaining by public officers or authorities

The range of offences related to prohibited bargaining by public officers and other abuses in the exercise of public service included in Chapter IX of Title XIX is residual with regard to the remaining types of offence laid down in Title XIX. This chapter contains a heterogeneous set of offences whose common denominator must be considered the abuse of a position with the aim of directly or indirectly obtaining an economic or other type of benefit, which may favour the public officer or authority or a third party.

The conducts described as offences in Articles 439 ff. are characterized by the use of public posts for purposes that are different or contrary to the general ones. However, most of the offences included in this chapter do not require proof of effective harm to the proper functioning of the Administration. On the contrary, with the exception of the offence of using secrets or privileged information, the offences in Chapter IX are considered as a type of abstract or specific danger. This increase in the barriers to penal intervention is, in most cases, the consequence of the failure of the administrative controls that the legal system provides for the exercise of public activity. Examples of this are the duties of abstention of the civil servant or the list of incompatibilities.

2.2.2. Protected legal rights

Unlawful appointments

Exercising public service requires certain qualities in the person who does so (variable according to their specific role), and the lack of one of these requirements will necessarily mean that the appointment is invalid. Therefore, what the lawmakers aim to protect with the classification of this conduct is, broadly speaking, respect for the principle of legality that must be exercised by those who carry out public service and the prohibition of arbitrariness of all public powers and, strictly speaking, access to the public function bounded by the requirement of legitimacy and legality.

Although the protected interest lies generically in due respect for the principle of legality, the express classification of the offence of unlawful appointment is justified according to the degree of importance of the decision made by the public officer. This involves, in addition to a direct violation of the principle of legality, the exclusion or restriction of other guarantees on which the legal requirements for the exercise of a public position are based. Among other functions, the aforementioned requirements guarantee objectivity in the selection of administrative staff, the fulfilment of a minimum capacity and aptitude for exercising the post, and equal access to public service, all of which tend to ensure the correct exercise of this service.

Prohibited bargaining

The legal right protected by this provision is based on compliance with the principle of impartiality in the exercise of public services. Nevertheless, from this perspective the conduct penalized in Article 441 of the Criminal Code involves simply threatening the aforementioned principle. It is a question of avoiding the possible convergence in public officers of public and private interests that may directly or indirectly affect the exercise of their functions. It can be observed that the offence mentioned does not require the public officer to have been influenced in their public activity by private interests, but only that this may be possible given the double public and private professional activity that they carry out.

2.2.3. Types of offence of unlawful appointment and prohibited bargaining

Unlawful appointment

— Active conduct of unlawful appointment

Article 405 of the Criminal Code states as follows:

> *A public officer or authority who, in the exercise of their duties of office, and being aware of the unlawfulness thereof, proposes, appoint or grants possession to hold office in a specific public post to any person without said person fulfilling the legal requisites established for this purpose will be punished with a fine of three to eight months and suspension from public employment or office for a period of one to three years.*

The elements that characterize the conduct of this type of offence can be characterized as follows:

1. This type of offence is considered a special offence, i.e. it can only be committed by a certain group of subjects, such as competent public officers or authorities. For the action of proposing, appointing or granting possession to hold office in a post to become an offence, it must be carried out by a public officer or authority who has the capacity to do so. Excluded are those subjects who have the status of public officers but do not have the duties of proposing, appointing or granting possession of a public post. However, these conducts by an unqualified subject can constitute other offences such as misappropriation or even usurpation of public functions.

2. The public officer or authority must be competent to propose, appoint or grant possession of a public post. It is not sufficient for them to have the status of public officers: their powers must include proposing, appointing or granting possession.

3. There are three types of criminal action: proposing, appointing and granting possession to hold office in a public post. This is an offence of conduct, which means that the offence is committed at the time the decision on the appointment is made without the requirements legally established for it. Other moments related to the consequences arising from the illegal appointment, such as the exercise of the work, the receipt of payment, etc., are excluded. Also excluded is the need for the person proposed, appointed or granted possession to hold office to actually accept the post (conduct typified in Article 406 of the Criminal Code): the offence is committed by making the decision that contains the illegal appointment. Also, carrying out more than one of the conducts described in the type does not involve the commission of several offences: they are all punished under a single liability.

4. Appointment without the legally established requirements. This requirement is based on the illegality of the appointment, that is, only the non-observance of ordinary legal regulations is required. This is an important question because it marks a difference from the offence of malfeasance regulated by Article 404 of the Criminal Code. In this case, only the illegality of the

proposal, appointment or granting of possession to hold office is required, understood as the absence of compliance with the legally established requirements, without it necessarily being unfair or arbitrary (as required by Article 404 of the Criminal Code).

5. It is required that the action of proposing, appointing and granting possession to hold office in a public post be done with knowledge of its illegality (fraud). The public officer or authority must be fully aware that he or she is making an illegal decision on appointment because they desire that result and place their desire before any other consideration. On the other hand, those cases in which the public officer or authority does not know of the illegality that they are committing will be outside this type of offence because negligence is not included in the definition of such offence.

Reference should be made to the determination of the subjects who have the status of a public officer or authority and the power to make appointments. The Criminal Code determines that the status of an authority is held by a person who individually, or as a member of any corporation, court or collegiate body, has a position of leadership or exercises their own jurisdiction. On the other hand, the status of a public officer is held by a person who, by immediate provision of the law or by election or appointment by the competent authority, exercises public services.

This distinction places the onus mainly on the status of public officers. It is therefore important to highlight the possibilities offered by Spanish administrative legislation regarding the provision of employment positions. The essential regulations are the Law on Measures for the Reform of the Public Service, of 2 August 1984, and Royal Decree 364/1995, of 10 March, which approves the general regulations for the admission of staff to the General State Administration and the provision of jobs and professional promotion of public officers of the General State Administration, establishing the conditions for admission to the Administration of statutory and contractual staff.

— Passive conduct of unlawful appointment

The counterpart of the above offence, that is to say, that of a person who does not meet the conditions required to become a public officer, is dealt with in Article 406 of the Criminal Code:

> *The same penalty will be imposed on the person who accepts the proposal, appointment or granting of possession mentioned in the previous article in the knowledge that they do not have the legally enforceable requirements.*

This offence is in fact a form of participation in the offence of unlawful appointment provided for in the previous article, but on this occasion the lawmakers wished to resolve the problems of interpretation that arise in special offences by considering participation of individuals in their own unlawful

appointment as an independent offence. This offence also requires knowledge of the lack of legally enforceable requirements.

Therefore, an individual appointed illegally becomes a de facto public officer, and in addition to this offence may commit any other offence related to the service that they exercise illegally as a result of their unlawful appointment (bribes, misappropriation, malfeasance, usurpation of public functions, etc.).

— Prohibited negotiations

Article 441 of the Criminal Code states as follows:

> *A public officer or authority who, except in the cases admitted in the laws or regulations, exercises a permanent or occasional professional or advisory activity individually or through another person, under the dependence or service of private organizations or individuals, in a matter in which they have to intervene or have intervened as a result of their position, or one that is processed, reported or resolved in the office or management centre in which they are working or on which they depend, is subject to a fine to be paid daily for six to twelve months and suspension of employment or public office for a period of two to five years.*

The typical conduct in this offence consists in carrying out a permanent or occasional professional or advisory activity under the dependence or at the service of private entities or individuals. However, for the parallel exercise of a profession (or advisory work to a private company or individual) to be considered the offence described in Article 441 of the Criminal Code, two circumstances must also be present:

1. Said parallel activity must be carried out outside the cases provided for in the laws or regulations. Thus, for the analysis of specific criminal conducts, it will be essential to use the administrative regulations covering the system of public incompatibilities at a national, regional or local level.
2. In addition, one of the two situations indicated in the type of offence must be present. The first of these requires that the professional or advisory activity be related to a matter in which the public officer has to intervene, or in which they have already intervened because of their position. The second consists of situations in which the advice or private professional activity carried out by the public officer is related to reports or decisions that must be issued at the public office or centre to which they are attached, even if they are not personally responsible for making them.

This provision does not require the effective impact of the private activity on the resolution of public affairs or an effective abuse of the knowledge gained from the exercise of public functions. If there were a real impact on the exercise of public functions, the offence of malfeasance or disclosure of secrets would be applicable. In this regard, the areas of procurement and tendering are particularly sensitive.

In short, the aim is to avoid any kind of abuse or interference in the exercise of public functions that can undoubtedly occur when a public officer has private interests in matters over which they must decide as a public servant.

As in the aforementioned offences, the active subject of the offence must have the status of a public officer or authority under the same conditions. There is no limitation with respect to the type of activity they exercise. The incompatibility system extends to the entire public service, although its scope depends on the specific activity carried out. The offence may even be committed by a person who does not have the status of a public officer if the professional activity or advice to private companies is delegated to a third party who acts on behalf of the public officer.

2.2.4. Distinction between administrative offences and criminal offences

Particular aspects of offences of unlawful appointment

The condition that determines whether the conduct is an illegal offence is the contravention of the law in the process of appointment. That is, it consists solely of consciously and voluntarily avoiding those requirements required by the law for access to the public service. Unlike the offence of malfeasance, in this case only the non-observance of legality at the time of the decision on appointment is relevant, without it being required that this decision be unfair or arbitrary. In this case, the conduct must necessarily be redirected to the scope of application of Article 404, which is subject to harsher penalties, as it is no longer simply an illegal conduct but one that even violates constitutional provisions.

Particular aspects of offences of prohibited bargaining

In this case, the threshold of the criminal offence lies in the disturbance of the impartiality of the public officer or authority. That is to say, an activity or advice of a public officer or authority that does not jeopardize their impartiality, impair the duty of exclusivity that governs any public action or cause interference between private and public interests cannot be considered an offence.

The important point here is the content of the activity or advice that is carried out by the public officer or authority, because if it is not relevant, it will not meet the conditions of the offence and should be considered as a legally inappropriate conduct that is reproachable under administrative law but not under criminal law.

2.3. Risks arising in administrative recruitment at the AMB

2.3.1. Introduction to offences of fraud and illegal extortion in the Public Administration

Within the scope of offences against the Public Administration, Chapter VIII of Title XIX of the Criminal Code contains a set of offences entitled "frauds and illegal extortion".

As with most offences against the Public Administration, this group of offences is defined with the aim of fighting one of the most endemic problems in the Public Administration: corruption.

Under the heading "fraud and illegal extortion", the lawmakers included in Articles 436, 437 and 438 of the Criminal Code certain abusive conducts that may be committed by public officers in the area of administrative recruitment. Simply, we can say that these offences protect citizens because they try to guarantee the impartiality and honesty of public officers involved in the following:

1. Public procurement procedures of all kinds (fraud - Art. 436 of the Criminal Code).
2. Procedures or processes by virtue of which citizens are required to pay taxes, tariffs, duties or other fees (illegal extortion - Art. 437 of the Criminal Code).

Finally, it should be added that the last provision of this chapter of the Criminal Code, Article 438, provides for an aggravated type of common offences of fraud in provision of benefits of the Social Security system when these are committed by public officers in the exercise and abuse of their posts.

2.3.2. The legal right protected from offences of fraud and illegal extortion

As is the case with the vast majority of offences against the Public Administration, the socially valued reality that the lawmakers aim to protect with the penalties typified in the Criminal Code is the straightforward and normal functioning of the Public Administration, which must act fully in accordance with constitutional values and current legislation. This common protected legal right also has specific meanings according to the specific type of offence.

First, the provisions on the offence of fraud (Art. 436 of the Criminal Code) also seek to protect the principles of transparency and publicity that must be observed in public procurement, protecting the interests of individuals so that they can compete for awards on equal terms (Art. 1 of Law 30/2007, of 30 October, on Public Sector Procurement). It also safeguards the assets of the Public Administration, avoiding the consequences that fraudulent agreements would have for the efficient use of public funds.

Second, the provisions on illegal extortion protect, cumulatively with the normal functioning of the Public Administration, the property interests of citizens subject to illegal demands in the form of undue fees, duties, taxes or tariffs that may be demanded by a public officer or authority.

Third and last, the aggravating factor provided for in Article 438 of the Criminal Code for the common offences of fraud of benefits of the Social Security system for cases in which they are committed by a public officer or authority in the exercise of their functions are based on the idea that those who are obligated by their profession to guarantee the legal system (Article 103 of the Spanish Constitution) cannot become its offender. The foregoing is precisely the reason for the additional penalty provided for, since the commission of an offence of fraud or misappropriation by a public officer in the exercise of their functions would be a general violation of the trust that citizens place in the Public Administration.

2.3.3. Types of offence of fraud and illegal extortion

The offence of fraud (Article 436 of the Criminal Code)

Article 436 of the Criminal Code states as follows:

> *A public officer or authority who, acting by reason of their position in any act of the types of public procurement procedures or in the sale of public goods or assets, comes to an arrangement with the parties concerned or schemes in any other way to defraud any public institution will be subject to imprisonment for two to three years and special disqualification from public employment and office for a period of six to ten years.*

From the above provision, it is clear that the essence of this offence lies in resorting to deceit in order to defraud the Public Administration in the procurement or sale of public goods or assets.

The Supreme Court has developed this type of offence by establishing the following requirements for the conduct of public officers to be punishable:

1. The facts must be committed by a public officer or authority acting with regard to the facts in virtue of and in the exercise of their functions.
2. The action by the public officer must take place in any of the matters mentioned in the provision, that is, in public procurement or in the sale of public goods or assets.
3. The core of the conduct is the arrangement reached by the public officer or authority with the interested parties, which will ultimately result in the defrauding of the Public Administration.

In order to fully understand the conduct punishable by the Criminal Code, it is necessary to mention the core element of the offence, that is, what the lawmakers mean by "agreement". Our courts have understood that this agreement is based on the act of the public officer to agree with interested third

parties in order to defraud any public entity, that is to say, to subject it to a loss of property.

The lawmakers have also chosen to limit the object of the agreement between the public officer and the interested party. In order for it to be subject to criminal punishment, this agreement must take place in any of the acts of the modes of public procurement or sale of public goods or assets; this circumstance includes all the asset rights corresponding to public entities. Thanks to the foregoing, the lawmakers protect both the expenditure (procurement) and income (sale) of the Public Administration.

Finally, it is important to emphasize that this agreement to defraud is in no way related to the discovery of any administrative irregularity that occurs, and each and every one of the requisites set forth above must be met for the facts to take on criminal relevance.

The offence of illegal extortion (Article 437 of the Criminal Code)

Article 437 of the Criminal Code states as follows:

> *A public officer or authority who directly or indirectly demands undue fees, tariffs or duties or ones that are greater than those legally set will be punished, without prejudice to any reimbursement they are obliged to make, with the penalties of a fine to be paid daily for six to twenty-four months and suspension from public employment and office for a period of six months to four years.*

From this provision it can be seen that the core conduct to be prevented and punished is that of demands by public officers to pay undue taxes, duties or fees that are greater than those legally set.

The Supreme Court has developed this type of offence by establishing the following requirements for the conduct of public officers to be punishable:

1. First, it is necessary for those who commit the deeds to have the status of public officers or authorities.
2. Second, the typical action involves two differentiated modes: directly or indirectly demanding undue fees, tariffs or duties, that is, ones that are not legally set; and directly or indirectly demanding fees, tariffs or duties that are greater than those legally set.
3. The offence will be considered to have been committed at the time when the public officer or authority expresses the demand for an undue or greater amount; it is not necessary for the individual to finally make payment of it or for the public officer or authority to effectively receive it.

In line with the foregoing, it must be emphasized that this "demand" that determines the type of offence may not be coercive, that is to say, it may not be imposed by the public officer on the citizen under the threat of harm in

the event of not being satisfied This more serious conduct must necessarily be considered an offence of bribery, provided for in Article 419 of the Criminal Code, which will be dealt with in another section of this article. The offence of illegal extortion dealt with here is limited to fraudulent conducts in which the individual is not fully aware of the undue nature of the amounts requested.

The offence of aggravated fraud of benefits of the Social Security system (Article 438 of the Criminal Code)

Article 438 of the Criminal Code states as follows:

A public officer or authority who, abusing their position, commits an offence of fraud of benefits of the Social Security system under Art. 307c is subject to the higher range of penalties established respectively for these offences, up to the most severe penalty, and special disqualification from public employment or office and from the exercise of the right to run for office for three to nine years, unless the deeds are punished with a more serious penalty under some other provision of the Code.

As shown in the above provision, this article provides for an aggravated subtype of offences of fraud of benefits of the Social Security system under Art. 307c of the Criminal Code for cases in which they have been committed by a public officer or authority in the exercise and abuse of their position.

This is a type of offence that rarely comes before the courts of justice. The provisions on this offence are aimed at closing the system, because the punishable conduct is defined by reference to the generic offences of fraud of benefits of the Social Security system. Therefore, in order to assess the commission of the offence set forth in Article 438 of the Criminal Code, there must be a convergence of the elements that constitute the offence of fraud of benefits to the Social Security, and in addition, the perpetrator of the offence must be a public officer or authority acting in the exercise and abuse of their position.

In order to fully understand the scope of this offence, the penalties for which may be very high, it is necessary to consider the offences referred to, i.e. those of Articles 248 and 307b of the Criminal Code, though there is insufficient space in the present article to provide the full details of each one.

Article 248 of the Criminal Code states that "*Fraud is committed by those who, for profit, use sufficient deceit to lead another party into error and induce them to carry out an act of provision to their own detriment or that of others*".

Article 307bis of the Criminal Code states that:

Whoever obtains the benefits of the Social Security system or its improper extension for themself or another, or helps another to obtain such benefits, by means of the error caused by the simulation or misrepresentation of facts or the conscious concealment of facts of

which they had the duty to inform, and thereby harms the Public Administration, will be punished with a penalty of six months to three years in prison. When the facts, in view of the amount defrauded, the means used and the personal circumstances of the perpetrator are not of special gravity, they will be punished with a fine of six times the amount defrauded. In addition to the penalties indicated, the perpetrator will lose the right to obtain subsidies and the right to enjoy fiscal or Social Security benefits or incentives for a period of three to six years.

2.4. Risks arising from document management from the perspective of custody, integrity and loyalty

2.4.1. Introduction to the offences of falsification and disloyalty in the custody of documents

This section aims to analyse briefly all the types of offence involving public officers or authorities that are covered by the law in order to guarantee the proper functioning of the Administration from the perspective of its document management.

For reasons of systematic logic, this section will be divided into two parts. First, it will consider offences of falsification of public, official and business documents committed by public officers or authorities. Specifically, it will deal with the particularities of Articles 390 and 391 of the Criminal Code. Second, it will deal with offences of disloyalty in the custody of documents committed by public officers or authorities, such as destruction or concealment of documents that are in their custody because of their position. Specifically, Article 413 of the Criminal Code will be analysed. Although the aim in both cases is to protect documents that have probative value in legal business, the approach taken in each case is different.

While the provisions on document falsification guarantee the authenticity of documents that have probative value, those on disloyalty in custody guarantee their integrity and security against conducts such as stealing, concealing, rendering unusable or destroying them.

2.4.2. The protected legal right in offences of falsification and disloyalty in the custody of documents

As noted, the provisions on both falsification and disloyalty in the custody of documents aim to guarantee the functions of a document that has probative value in legal business, which is the common socially valued reality that all the provisions on this group of offences aim to protect.

However, bearing in mind that each of these groups of offences protect the document from a different perspective, despite this common feature, each group shows important particularities with regard to the protected documents.

The provisions on offences of falsification of public, official and business documents (Articles 390 and 391 of the Criminal Code) are aimed at protecting mainly public trust and security in legal business and preventing the entry in civil, business or administrative life of false probative elements that may alter the legal reality in a way that is detrimental to the affected parties.

Thus, a person who, in one way or another, presents as real or authentic, as truthful, something that lacks such characteristics is subject to punishment for falsification. It is the same as falsely presenting something as legitimate. The protected legal right is the general legal traffic, insofar as a document leads third parties to trust in its authenticity and its effectiveness to prove what it states. Falsification is simply deceit aimed at creating error and confusion in third parties. Furthermore, while the offences of falsification analysed can only be committed by a public officer or authority, the provisions also indirectly cover the duties of veracity that are legally imposed on such subjects.

Offences of disloyalty in the custody of documents (Article 413 of the Criminal Code) have a specific meaning as an offence against the Public Administration. As determined by the Spanish courts, the object of protection is the content of the document and the rights arising from it. Therefore, the aim is to protect the document against material attacks of a diverse nature, such as stealing or wholly or partially destroying, rendering unusable or concealing the document under the custody of the public officer or authority.

2.4.3. The concept of a document for criminal purposes

Prior to dealing specifically with the offences of falsification and disloyalty in document custody, because of its importance for delimiting the typical conducts, we must define what is meant by a document for criminal purposes and the functions that are attributed to a document.

First, Article 26 of the Criminal Code stipulates that, for the purposes of this Code, any material medium that expresses or incorporates data, facts or accounts that have probative value or any other type of legal relevance is considered to be a document.

In their function of interpretation of legality, the Spanish courts consider that, as a result of the above definition, a document is any indelible, physical or digital medium bearing significant content of human origin of an original nature and with probative value.

Furthermore, as will be seen below, it is important to note the functions that a document must have in order to be considered as such. All documents must have at least one of the following functions:
a) Perpetuation: establishing permanently and reflecting the expression of someone's will or knowledge.

b) Proof: proving the statement made in the document, not necessarily its veracity, but the fact that it was made.
c) Guarantee: identifying the author or authors of the statements ade in the document, so that it is possible to ensure that the person identified therein made the statements attributed to them in the document.

2.4.4. Types of offence of falsification and disloyalty in the custody of documents

The offence of falsification of documents

Article 390 of the Criminal Code states as follows:

> ***1.*** *A public officer or authority who commits disloyalty as detailed below in the exercise of their functions will be punished with imprisonment for three to six years, a fine to be paid daily for twenty-four months and special disqualification from office for a period of two to six years:*
>
> *1. By altering a document in one of its essential elements or requirements.*
> *2. By simulating a document in whole or in part in such a way that it causes an error regarding its authenticity.*
> *3. By assuming the participation of people who have not participated in an event, or attributing to those who have participated statements other than those they have made.*
> *4. By giving an untruthful account of the facts.*

Article 391 of the Criminal Code complements the above provision in order to cover the negligent mode of the offence:

> *A public officer or authority who, due to gross negligence, commits any of the falsehoods laid out in the preceding article or causes them to be committed, will be punished with a fine to be paid daily for six to twelve months and suspension from public employment or office for a period of six months to one year.*

The provisions of Article 390 of the Criminal Code include four types of falsification of a document committed by a public officer or authority:

1. The first type (section 1, no. 1) requires the prior existence of a document of which a public officer or authority alters one of its essential elements or requirements. From the perspective of this offence, an alteration to the document occurs when, as a consequence of adding, replacing or deleting something, some of the functions of the document are affected. As stated above, these functions are perpetuation, proof and guarantee.
For example, the perpetuation function is altered when the material medium of the document is damaged intentionally or by serious negligence; the guarantee function is altered when the authentic signature of the document is replaced by another one; and the proof function is altered when the date of a document is modified.

2. The second type (section 1, no. 2) does not require prior existence of a document but applies to cases in which a document is simulated, which will

take place when an inauthentic document is drawn up. This may take place when someone claims to be the author of a document when they are not.
Likewise, due to its marked practical significance, it is important to note that cases of "simulated legal business" are also considered document simulation. These are cases in which the statement contained in the documents belongs to the subject that issues them but this statement reflects a legal business that does not correspond to reality. By way of example, an invoice that reflects a non-existent legal transaction is considered simulated legal business that may be punished under Article 390.1.2 of the Criminal Code.
Finally, the fact that the simulation may affect "all or part" of the document means that a document may be wholly inauthentic (e.g. a false administrative permit) or only partly inauthentic (e.g. a false clause that is added to a contract).

3. The third type (section 1, no. 3) is that of stating in a document that someone participated in an act when they did not. In this context, "assuming" means pretending that a person participated in an act when they did not. The term "participate" refers only to a significant presence. For example, stating in an administrative record the presence or participation of people who were not there will constitute an offence. Furthermore, giving an untruthful account of the statements by people who participated in acts is also an offence. Therefore, the person must have taken part in the act and made statements.

4. The fourth type (section 1, no. 4) refers to "being untruthful in giving an account of the facts." This type of falsehood, which is usually called ideological, involves written lies. Thus, unlike falsification, in which the authenticity is questioned, in ideological falsifications the external realization is always real and the document has been drawn up by the corresponding person.
According to the Constitutional Court, the punishable act will be the alteration or disfigurement in the description of human conducts or actions in addition to places, situations, dimensions or other data of the reality outside the document stated by a public officer or authority in a document in the exercise of their functions.

Offences of disloyalty in the custody of documents

Article 413 of the Criminal Code states as follows:

A public officer or authority who knowingly totally or partially replaces, destroys, renders unusable or conceals documents whose custody is entrusted to them by reason of their office is subject to a prison sentence of one to four years, a fine to be paid daily for seven to twenty-four months and special disqualification from employment or public office for a period of three to six years.

What is known as "material disloyalty" is by far the most serious and most widespread and serious type of offence related to the custody of documents.

According to the above article, the typical conduct consists of four types of offence that have a common element: they must be committed by a public officer or authority to a document whose custody has been entrusted to them because of their position.

These four types are the following:

1. Theft, which means moving the document out of the corresponding sphere of custody.
2. Destruction, which means partially or wholly destroying the document.
3. Rendering unusable, which is normally linked to destruction except in the case of digital documents, which may be rendered unusable without destroying them.
4. Concealment, which encompasses a large number of different conducts according to jurisprudence.

First, it includes cases in which the document is hidden where it cannot be found. Second, it includes cases of voluntary paralysis of the processing of the document. Third, it includes retaining or failing to deliver the document, thus preventing it from having the effects or objectives that correspond to it because of its content and purpose.

2.5. Risks arising from the management of public funds in the AMB

2.5.1. Introduction to offences of misappropriation of public funds

Chapter VII of Title XIX of the Criminal Code is dedicated in its entirety to misappropriation of public funds, a complex offence that includes a large number of punishable conducts and has recently been completely reformed.

As a result of the reform introduced by Organic Law 1/2015, which modifies the Criminal Code, the offence of misappropriation of public funds has undergone a profound transformation. It now includes the offences of mismanagement and misappropriation in the sphere of public service and public assets, to which it refers specifically.

As is apparent from the name of the offence, the provisions on misappropriation of public funds are intended to protect public assets against the conduct of public officers responsible for the Administration and custody of public funds who fail to perform their duty and cause detriment to these funds (Art. 432.1 of the Criminal Code).

The provisions on a second type of offence protect the public assets against conducts of public officers who seek to appropriate them for their own benefit or that of others. (Art. 432.2 of the Criminal Code).

Below we will deal with the details of these offences to clarify this section of the Code. However, it should be noted that this type of offence includes such varied conducts as transfer of public money by a public officer to their private account or the use of an official car for purposes other than those for which it was granted to a public officer.

2.5.2. The protected legal right in offences of misappropriation of public funds

As an offence against the Public Administration, the socially valued reality that is protected through the provisions on misappropriation of public funds is, first, the straightforward and normal functioning of the Public Administration, particularly with regard to the duty of loyalty and integrity that public officers must show towards the Administration.

Furthermore, as these provisions are ultimately aimed at protecting public assets, which must be at the service of the general interests, the provisions on this offence are aimed at maintaining and correctly managing public assets.

In other words, these provisions on misappropriation of public funds provide punishment for offences regarding the duties of loyalty and probity of public officers towards the Administration, which affect its functioning, and protect the public assets of the Administration from losing funds that are necessary for the correct provision of public services to citizens.

2.5.3. Types of offence of misappropriation of public funds

Article 432 of the Criminal Code states as follows:

> ***1.*** *A public officer or authority who commits the offence of Article 252 regarding public assets will be punished with a prison sentence of two to six years and special disqualification from public office or employment and from the right to run for office for a period of six to ten years.*
>
> ***2.*** *The same penalty will be imposed on a public officer or authority who commits the offence set out in Article 253 on public assets.*
>
> ***3.*** *Prison sentences of four to eight years and absolute disqualification for a period of ten to twenty years will be imposed if the facts referred to in the two previous points have occurred in one of the following circumstances:*
>
> *a) There has been serious damage or disturbance to the public service, or*
>
> *b) the value of the damage caused or of the appropriated goods or effects exceeds 50,000 euros.*
>
> *If the value of the damage caused or of the appropriated goods or effects exceeds 250,000 euros, the penalty imposed must be in the upper half, and may reach the most severe penalty.*

This new provision considers in the same article two types of misappropriation, applying identical punishments for misconduct of a public officer or authority who, because of their position, administers public assets (Art. 423.1 of the Criminal Code) and conducts of appropriation of public assets when it involves one of the types of offence of misappropriation, i.e. when they have

received the assets in the form of a deposit, commission or custody, or any other concept that involves the obligation to deliver or return them, or they deny having received them (Art. 423.2 of the Criminal Code).

Both basic types of misappropriation are defined by express reference to the general offences of mismanagement of assets (Art. 252 of the Criminal Code) and misappropriation (Art. 253 of the Criminal Code), and misappropriation is reserved for those cases in which these generic offences are committed by a public officer or authority and involve public assets.

Having defined the types of offence included in Article 432 of the Criminal Code generically, we will now consider the particularities of each type of misappropriation established by the lawmakers.

First, the type of misappropriation established in Article 432.1 of the Criminal Code by reference to the offence of mismanagement set out in Article 252 of the Criminal Code provides punishment for misconduct committed by a public officer or authority in cases in which they overstep their powers of administration of public assets, causing a financial loss to the public funds.

As is apparent from the text of this provision, the criminal conduct that it encompasses is, *a priori*, very broad. However, aware of this, the lawmakers restricted the types of infringement of the duties of administration that may lead to the commission of this punishable offence. It must therefore be made clear that not all infringements of the duties of administration entrusted to the officer will involve the commission of an offence. The public officer must overstep the powers of administration conferred on them, resulting in a loss of public assets.

Therefore, those conducts that consist in a simple omission of the duties arising from the powers of administration of public assets conferred on the public officer (e.g. a public officer fails to claim a debt due to the Administration from a third party) will remain outside the penal sphere, as will those that consist in allocating public funds to public purposes other than those initially planned or assigned, because in these cases there would be no real damage to the public assets.

Ultimately, this first type of misappropriation is mismanagement characterized by an abuse in the exercise of the functions of administration entrusted to the public officer or authority with regard to the assets of others, in this case public assets, which causes detriment to the same.

Lastly, taking into account that this type of offence refers directly to the offence of mismanagement set out in Article 252 of the Criminal Code, this article is set out below for a better understanding of the extent of the conduct that

may be included in this type of misappropriation of public funds. Art. 252 provides for punishment for "those who, despite having the legal power to manage assets of third parties entrusted by the authority or assumed through a legal business, infringe and overstep these powers and thus cause detriment to the assets managed".

Second, the type of misappropriation described in Article 432.2 of the Criminal Code, by reference to the offence of misappropriation set out in Article 253, is applicable to those conducts of definitive theft of public goods by the officer or authority to their own benefit or that of others, provided that they dispose of them in the form of a deposit, commission or custody or any other concept that involves the obligation to deliver or return them. Consequently, this type of offence will be applicable to those cases in which the officer or authority is initially in legitimate possession of a good of a public nature and, for their own benefit or that of a third party, takes possession of this public asset.

Finally, bearing in mind that, as stated above, this type of misappropriation refers directly to the offence of misappropriation set out in Article 253 of the Criminal Code, this article is set out below for a better understanding of the scope of conducts that may be included in this second type of misappropriation. This article states that "those who, to the detriment of another, appropriate for themselves or for a third party money, effects, securities or any other movable good that they have received in deposit, commission, or custody, or that have been entrusted to them under any other concept that produces the obligation to deliver or return them, or who deny having received them."

2.5.4. Particular aspects of offences of misappropriation of public funds: the concept of public funds

As a consequence of the reform of Organic Law 1/2015, amending the Criminal Code, the concept of public funds or goods has been replaced by that of "public assets". However, this does not involve a substantial change from the previous regulation, because the expression "public assets" has been interpreted by our courts as synonymous with the concept of "public funds or goods".

Public funds or goods, when they belong to the Administration, are considered to be any material or tangible good, capital, property, cash, currency, securities and negotiable effects convertible into money, such as checks, bills of exchange, bonds and promissory notes, as well as all kinds of tangible and tangible goods, that is, any object, good or thing that has an appreciable economic value, be it present or future.

Furthermore, under the concept of public assets that may be misappropriated, the new regulation also includes all real estate owned by the Administration. However, the previous statement presents limitations as a consequence of the

concepts set forth in Article 253 of the Criminal Code, referred to in Article 432.3 of the same legal text: the type of misappropriation. Thus, the ownership set forth in Article 253 of the Code is usually incompatible with real estate as a result, in particular, of the legal prohibition of depositing real estate (Art. 1761 Civil Code).

Lastly, although there have been judicial rulings to the contrary, the jurisprudence is currently stable and unanimous in considering that the concept of "public assets" does not include the human resources of the Administration.

3. List of concrete measures for the prevention of criminal risks defined jointly with the Transparency Agency

3.1. Training and information on the risks associated with the specific activities in the daily activity of each branch of the Administration

As was stated in the introduction to this article, the first instrument of prevention of criminal risks is the provision of suitable continuing training on the regulatory limits that govern the daily conduct of all public officers and the Public Administrations. For this reason, the first prevention tool that is proposed is the establishment of a policy of continuous training that can identify the doubts and restrictions that arise daily in the exercise of the duties of the office.

In this area, special care must be taken to explain (i) the areas in which there has been a substantial change in the legal or regulatory norms governing them; (ii) conducts that because they are habitual or considered of minor importance may have been bureaucratized and left uncontrolled; and (iii) conducts with regard to which the regulatory culture needs to be reinforced due to their importance in the process of formation of the corporate will of the entity.

In determining the specific risks associated with each area of activity, we must take into account the applicable sectoral regulations and the administrative and penal jurisprudential development that has been created on this particular question.

The training can be carried out internally or through outsourcing to criminal or administrative law professionals who can offer a unique value from the perspective of the expertise they obtain from their daily work.

3.2. Reinforcement of the culture of prevention and avoidance of criminal risks

The effective avoidance of the criminal risks associated with the life of a Public Administration depends not only on the degree of knowledge of the applicable regulations but also, to a great extent, on the dedication with which work is carried out day by day. For this reason, the governing bodies will try to strengthen the culture of prevention of all the members of the entity.

The writing and signing of special codes of ethics for each associated body will be encouraged, including the values and best practices that characterize the conduct of public service. In particular, from the perspective introduced in the Section 2 of this article, the following recommendations will be taken into account:

1. In the case of offences of administrative malfeasance, the public officers or authorities must ensure compliance with and enforce the law in force when making any administrative decision with declaratory and/or constitutive effects.

2. Regarding offences of unlawful appointment, public officers or authorities, and particularly those who have powers to appoint, propose or award possession of public positions to candidates, must ensure compliance with the principle of legality in access to public service.

3. Regarding offences of prohibited bargaining by public officers or authorities, the necessary mechanisms and protocols must be established in order to avoid any type of confrontation between the public and private interests of these officers or authorities who participate in administrative matters.

4. Regarding offences of fraud, the necessary mechanisms and controls must be established in order to prevent public officers or authorities from being able to make arrangements with the interested parties in any type of public procurement or sale of public goods or assets.

5. Regarding offences of illegal extortion, the necessary mechanisms and controls must be established in order to prevent public officers or authorities from directly or indirectly demanding undue taxes, duties or fees, i.e. ones that are not legally established, or greater amounts than those legally established.

6. Regarding offences of document falsification or disloyalty in the custody of documents, correct document management must be guaranteed in order to prevent public officers or authorities from falsifying documents. The foregoing will be achieved, for example, with double document control systems. Furthermore, the digitization of all documents that pass through the AMB with a suitably stored back-up copy will prevent documents held by the administrative body from being destroyed, rendered unusable, concealed or stolen.

7. Regarding offences of misappropriation of public funds, the income and expenditure of the AMB must be managed suitably, by restricting access to

the its accounts strictly to staff who have powers to administer them because of their duties and by establishing control systems to verify and audit the destination and use of publicly-owned assets.

8. Regarding offences of illegal financing of political parties, the AMB will refrain from making any type of direct or indirect donation or contribution to a political party, federation, coalition or group.

3.3. Establishment and improvement of administrative protocols or procedures within which criminal risks can be specified

Notwithstanding the encouragement of drafting codes of ethics and codes of conduct for each of the entities associated with the AMB, the internal protocols of formation of its corporate will and those of the most sensitive processes will be reviewed.

In this review process, the location and effectiveness of the risk prevention and control mechanisms that are implemented at that time will be taken into account, and those that have proved to be ineffective or lack efficacy will be reinforced or replaced.

Documents will be drafted to explicitly regulate particularly sensitive matters, such as the policies on gifts and on conflicts of interest, clearly and comprehensively identifying the limits imposed by the sectoral and general regulations.

3.4. Establishment of an anonymous and guaranteed channel for reporting any breaches that are observed in the daily exercise of employees' duties or those of others

The administrative bodies of a size that makes it appropriate will establish an anonymous channel that will allow all workers to inform the management any acts of corruption or breach of rules that come to their knowledge. The anonymity of the informant will not prevent them from being identified when this information improves the investigation or the prevention of the facts reported.

This instrument will not only be aimed at all members or employees of the administrative body but also at any public or private natural person or legal entity. In studying the reports, the credibility of the facts exposed rather than their source will be taken into account.

The channel for reporting breaches may be outsourced to the Transparency Agency, which will manage the reports received in agreement with the entity

and the importance of the events reported in accordance with the applicable legislation and in coordination with any other entities that have received the report.

When it is concluded that the facts reported may constitute an offence, they will be immediately reported, as appropriate, to the Public Prosecutor's Office of the High Court of Justice of Catalonia or the Anti-Fraud Office of Catalonia.

3.5. Reinforcement of the disciplinary system to suitably punish non-compliance with internally agreed prevention measures

In order to guarantee the proper functioning of the Barcelona Metropolitan Area and to continue generating a climate of regulatory compliance, i.e. one of full respect and subjection to current legislation, as soon as a code of ethics or code of conduct is available, it would be advisable to approve a protocol establishing a disciplinary system for punishing breaches of such a code, based on the principle of proportionality.

However, in order to guarantee the rights of the staff of the Barcelona Metropolitan Area, the punishment must be preceded by an internal investigation which culminates with a decision stating that, without any doubt, a breach of the code of ethics or code of conduct has been committed and that there is a specific offender.

3.6. Periodic review of the policy of avoidance of criminal risks

When the Barcelona Metropolitan Area has arranged and implemented the crime prevention model, it must establish a provision to ensure a regular review of the model. Accordingly, if no major breach of the provisions set forth in the code of ethics or code of conduct has occurred, it is proposed to review the crime prevention model annually. However, if a breach has occurred, it should be reviewed immediately. Furthermore, when relevant violations of its provisions occur, or when there are changes in the organization, in the control structure or in the activity carried out, it will be advisable not only to review it but also to modify it.

"[…] today we ought to add the latest and perhaps most formidable form of such dominion, bureaucracy, or the rule by an intricate system of bureaux in which no men, neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly called the rule by Nobody." **Hannah Arendt**

"The Duke of Ai asked: 'How can I make the people follow me?" Confucius replied: "Advance the upright and set aside the crooked, and the people will follow you. Advance the crooked and set aside the upright, and the people will not follow you."
Confucius

"The way is plain before all like the grooves of launching: So forth into life and fear not, for so did we all in the ancient ages." **Robert Louis Stevenson**

"But [...] how can we guarantee the impartiality of the judges? The only guarantee, apart from that of their complete independence, is that they should be drawn from very different social circles; be naturally gifted with a wide, clear and exact intelligence and be trained in a school where they receive not just a legal education, but above all a spiritual one, and only secondarily an intellectual one. They must become accustomed to love truth." **Simone Weil**

"[...] the height of injustice is to appear just without being so. The person who is truly just doesn't merely want to appear good but wants to be good. Neither reward nor reputation is of any interest to the just person." **Rob Riemen**

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Metropolitan funding of political groups, political parties and trade unions

Pau Bossacoma i Busquets

1. Purpose and structure of the article

This article sets out to establish whether political groups, political parties and trade unions can receive local public funding, specifically from the Barcelona Metropolitan Area (hereinafter AMB), and if so, under what conditions. For the purposes of this article the term *political party* is taken in a broad sense to include federations, coalitions and and voters' groupings.

The article starts with a brief historical and comparative note (section 2) followed by a general introduction to the Spanish system of financing political parties (section 3). The article then goes on to defend the need to maintain a territorial balance in political party funding which will emanate and provide a constitutional justification in some of the conclusions on the particular case (section 4). After these more general and introductory sections, the article will deal with first the indirect metropolitan funding of political parties through endowments to metropolitan political groups (section 5) and then the direct metropolitan funding of political parties (section 6). Subsequently the issue of the metropolitan funding of trade unions will be addressed (section 7). The article finishes with some brief conclusions (section 8).

2. Historical and comparative note

Historically, in Europe, political parties have been funded through private sources. In general, state regulation and control over private funding seems to have had as a counterpart the introduction and growth of public contributions.[1] Broadly, therefore, we can say that regulation, transparency and control over the financing of political party have often gone hand in hand with public funding. In principle, this does not appear to be an objectionable relationship. The fact of receiving public funding in turn also justifies an increase in regulation, transparency and control.

Public funding by central government has consisted in financing parliamentary groups as well as the central apparatus of political parties. In some Eu-

ropean countries public funding began with parliamentary groups and then spread to political parties directly. This was the case in Austria (1963 for groups and 1975 for parties), Belgium (1971 and 1989), Denmark (1969 and 1987), the Netherlands (1964 and 1999) and Norway (1960 and 1970). In others, such as Sweden, Finland, Italy and France, funding began in the same year for groups and parties alike (1965, 1967, 1974 and 1989 respectively). In Germany, groups received funding later than parties (1968 and 1959 respectively). In Ireland and the UK groups receive funding (since 1973 and 1975 respectively), but parties do not. In Switzerland, at federal level, neither groups nor parties receive funding, although the issue seems to have generated some debate in recent times.[2]

It is important to bear in mind that the above information applies to central government levels, not local and regional ones.[3] However, with due caution, it does not appear irrational to extrapolate the trends and conclusions. It seems reasonable, *prima facie*, to seek to fund local council groups and political parties. In fact, this also happens between central and regional government tiers in Spain. While funding for groups would, in principle, be earmarked for their functioning and related to initiatives, debate and parliamentary or council work, funding for political parties would be of a more extra-parliamentary or extra-council nature. We should recall, moreover, that in Spain this funding of groups and parties exists alongside specific funding for election campaigns under the Organic Statute on the General Electoral System (LOREG). This funding also comes into operation in local elections and is essentially linked to the results obtained.

3. Predominance of public funding of political parties in the Spanish case

Historically and still today, public funding seems to be intended to complement private funding without replacing it. As can be seen from the Organic Statute on Political Party Funding (LOFPP), what is sought is essentially mixed financing, whereby private funding is combined with public funding with the aim of providing parties with a degree of independence with regard to the different sources of finance. As stated in the Explanatory Memorandum to the LOFPP:

> *The freedom of political parties in the exercise of their duties would be undermined if a model of total liberalisation were allowed as the financing formula, as this would always cast doubt on the influence that may have been exerted on a given political decision through contributions originating from a particular funding source and impair the function of political parties as institutions that channel the formation of the will of the people.*

> *Political party funding shall abide by a mixed system encompassing, on the one hand, contributions from citizens and, on the other, resources supplied by public authorities proportionately to their representativeness as a means to guarantee the independence of the system, but also its sufficiency.*[4]

Striking a balance between funding sources to guarantee a degree of independence is one of the typical arguments in the comparative party funding panorama. There are also other reasons, such as guaranteeing a fairer political and electoral competition without excessive intervention from private money, and allowing all parties, regardless of their colour, access to sufficient funding to make properly studied and advised political proposals. As of the second half of the 20th century, the success of political parties depended less and less on their members and supporters and more and more on the media and party professionals (to the detriment of what had once been the task of the membership). An *elitisation* and professionalisation that demanded more capital. It could be dangerous to leave the response to this demand in the invisible hand of the market. So it seems reasonable to combine and balance private and public funding, with the presence of correct regulation setting limits and conditions, obligations of transparency and effective forms of control.

Excessive public funding, however, is open to criticism and may cause problems. Firstly, excessive public funding can be detrimental to emerging political parties that still have little presence in institutions. It is suspected that the Spanish public funding of political parties, which consists mainly of public resources, discourages political pluralism. In general, criteria for access to public funding should not be much slacker than the electoral criteria for winning seats, but nor should they be much stricter, as this would perpetuate established parties.[5] In other words, if criteria for access to public funding generate entry barriers, the effect could be the loss of fair competition between parties, the crystallisation of the existing party system and the elimination of alternative options.

As far as the consolidated parties are concerned, excessive public funding may weaken the bonds between parties and citizens. More specifically, it may bring loss of contact with its political roots and the more pressing interests of its members, supporters, patrons and sponsors. Seeking private funding often guarantees the discussion and tackling of real problems that are on the mind of party voters, rather than more theoretical debates. If private funding is sought beyond big business, it can help to make politics less elitist and more participative. When someone pays they usually feel entitled to speak and be listened to. Limiting public funding may be a way of forcing politicians and politics out of their offices, as well as make it easier for new parties to appear or for the old parties to renew.

When high public funding is mixed with corruption scandals the upshot can be widespread disaffection (and emerging political forces that engage in dangerous calls for regeneration and populism). This danger is all the more intense when the traditional parties, which receive excessive public funding, are seen by a large part of the population as just another cog in the bureaucratic machinery of government. From a more liberal perspective, the criticism may be made that excessive public funding will turn political parties into public institutions rather than private associations. Likewise, the party lacks incentives to resort to contributions from members and supporters, thus widening the gap between leadership and grassroots and potentially feeding the present political disaffection. Furthermore, containment of public funding may encourage political parties to match their spending with the economic conditions of the society to which they belong. That is to say, the fact that private funding is more likely to vary depending on better or worse economic conditions could lead political parties to keep spending substantially lower in periods of economic decline.[6]

In the Spanish context, there is a problem of excessive public party funding, at least in comparison with the percentages of private funding, and with what we find in the light of comparative evidence.[7] In the case of the large consolidated parties, 70-90% of funding is public and 10-30% is private.[8] Public funding could be even greater than the accounts of political parties show if they included the entirety of local public funding (which the Court of Auditors only requires for municipalities with over 20,000 inhabitants, a requirement which, moreover, the parties are not yet meeting satisfactorily) and if, as some specialists propose, funding by elected representatives were regarded as public rather than private funding.[9] Nonetheless, private funding could also be greater if dirty money were to surface. In general, then, a distinctive feature of Spanish democracy is the strong presence of public funding of political parties, which is derived, to a certain extent, from the lack of a gradual historical evolution towards democracy and the importance of the constitutional recognition of political pluralism (Article 1.1 of the Spanish Constitution) and political parties (Article 6 of the Spanish Constitution).

The late arrival of democracy, together with some idiosyncrasies of Spanish political culture such as political cynicism, low involvement in public affairs and public and interpersonal distrust, led to substantial public funding of political parties from the start. From 1978 until the economic crisis that began in 2008, the tendency and shared strategy of "revenue maximisation" operated with the aim of increasing contributions received as opposed to controlling expenditure. Organic Statute 3/1987 on Political Party Funding responded to and supported this tendency towards the predominance of public funding. Organic Statute 8/2007 on Political Party Funding limited and regulated especially private funding sources and established mechanisms of control and supervision. In return, public funding was stepped up.[10]

There are comparative examples of measures for avoiding the excessive increase of public funding. The amount of the grant can be linked to other indicators that take into consideration the economic prosperity of the respective population. In Portugal, for example, both annual grants for parties and grants for campaign expenses are tied to the legal minimum wage. Another technique would be to link public funding to private funding. In Germany, in order to ensure a balance between public and private funding, public funding is conditional upon receiving an equivalent private sum.[11] It is not just an upper limit; every X amount of private money obtained by the party is rewarded with Y amount of public money. Beyond the desirability of seeking a balance between funding sources, it may be a smart way of discouraging dirty money, and so bringing an improvement in transparency and control in turn.

4. Territorial balance of public funding of political parties and how it matches the model of territorial organisation of the state

Public funding should guarantee three types of territorial balance, which are described below.

Balance between parties. As it does not seem reasonable to penalise the fact of there being (or that there may be) political forces with a presence at only one level of government, public funding should have a balance between tiers that allows more equitable competition between local, regional and statewide forces. In other words, fairer electoral and party competition. Multilevel funding is particularly relevant in plurinational realities such as Spain and in constitutional contexts that guarantee the autonomy of the various territorial layers of government. It would also serve to ensure that those political parties that only have a local presence are guaranteed the principles of *sufficient*, *regular* and *mixed* funding, in pursuance of the LOFPP, and more specifically of the Explanatory Memorandum to that statute.

Balance within parties. Whoever raises or possesses most money can exert most political influence. Therefore, it is desirable to seek or promote a territorial balance within the party to prevent one tier imposing itself excessively on another. More specifically, strong local and regional funding can be a driver for horizontalisation, pluralism and greater territorial representativeness in parties (i.e., a barrier against hierarchy and the predominance of central administration). However, some authors have criticised that territorial balance in the public funding of political parties "erodes the control of central adminis-

tration over local accounts, with the risk of encouraging stratarchy, territorial factionalism and the strengthening of regional elites, especially when the party is in opposition in the central parliament".[12]

Balance between tiers of government. As political science shows, the political party system can substantially qualify or alter the system of territorial organisation of power. In general, a legally decentralised system becomes more centralised if the party system is centralised, and vice versa, a legally centralised system becomes less centralised if the party system is decentralised. For example, if a country is controlled by a single highly centralised party, it can hardly be federal, whatever its constitution might say. Generally speaking, public funding of political parties that is well distributed between different layers of government can generate balance and equality between those different tiers and an effective deployment of the legal provisions regulating the territorial organisation of power.

In short, public funding of political parties should be consistent with the country's decentralisation model, in order to prevent the party system from distorting the constitutional and legal design of the system. If party funding does indeed clearly affect the party system, and this in turn clearly affects the model of territorial organisation adopted by the Constitution and the Statutes of Autonomy, multilevel public funding could become a constitutional requirement as a result of the territorial autonomy recognised in Articles 2 and 137 and following of the Constitution. There is no need to develop this idea further in this paper, as available data seems to indicate that regional and local public funding has gradually gained in importance, reaching levels that are similar to central government funding.[13]

5. Indirect metropolitan funding of political parties through political groups

5.1. Article 73.3 of the Spanish Basic Statute on Local Government (LBRL)

This provision contains the basic regulation on the possibility of local councils financing their political groups. It is relevant, therefore, to cite it here:

> *For the purpose of their corporate action, the members of local corporations shall constitute political groups, in whichever form and with whichever rights and obligations are established, with the exception of those who do not join the political group constituted by the electoral grouping for which they were elected or abandon their group of origin, who shall be considered non-ascribed members.*

The plenary of the corporation may assign to the political groups, out of its annual Budget, a financial allocation that shall include a fixed part, identical for all groups, and a variable part depending on the number of members in each case, within the general limits established, when appropriate, in the State General Budget Acts. This allocation may not be used to pay remunerations of staff of any kind at the service of the corporation or to purchase goods that might constitute fixed assets of a patrimonial nature.

The economic and political rights of non-ascribed members shall not be greater than those to which they would have been entitled, had they remained in their group of origin, and shall be exercised as determined by the organic regulation of each corporation.

This provision shall not be applicable in the case of candidacies submitted as an electoral coalition, when one or more political parties forming part of it decides to leave it.

Political groups shall keep a specific account of the allocation referred to in Paragraph 2 of the present Section 3, and make it available to the plenary of the corporation upon request.

When the majority of the councillors of a municipal political group abandon the political party that submitted the candidacy for which they contested the elections or are expelled from it, those councillors who remain in the said political party shall be the legitimate members of this political group to all intents and purposes. In any event, the secretary of the corporation may address the legal representative of the political party that submitted the corresponding candidature in order for him or her to notify the accreditation of the circumstances referred to.

Local councils are granted a general power to allocate to their political groups a financial allocation comprising a fixed part and a variable one depending on the number of members. Statute 11/1999 introduced this provision, and its Explanatory Memorandum expressed it in these terms:

For its part, the new Section 3 of Article 73 is intended as an express reference in the Basic Statute to the fact that the corporate action of the members of local corporations is performed through political groups, with the possibility of a financial allocation for their functioning following a regulation similar to that laid down in the Rules of Procedure of the Congress for its political groups.

Article 73.3 LBRL is therefore inspired by the model of funding for parliamentary groups in the Congress, which is also a model that inspired many autonomous communities' parliaments. Thus, analogies with parliamentary law are, in principle, pertinent. This funding is therefore for political or parliamentary groups, not for political parties, at least not directly.

Article 73.3 prohibits these financial endowments from being used to pay remunerations of staff at the service of the corporation. This is done to stop the funding of groups from serving to fraudulently supplement the salary of elected officials and public employees of the local authority.[14] Article 73.3 also forbids the purchase of goods that might constitute assets of a patrimonial nature. The reason for this restriction lies in the fact that the local council political group exists only temporarily, being tied to the results of each election.

Although State General Budget Acts can provide for general limits to the local funding of political groups, there is no record of this ever having happened. When Article 73.3 refers to the possibility of providing for these general limits, it seems to take for granted that they will coexist with other limits on a regional or local scale. It does not seem controversial for regional or local legislation to be able to implement and limit this type of financial allocation. Actually, what seems most controversial is that this legislation does not develop nor specify the basic provision of LBRL. This lack of local regulation therefore legitimises the intervention of the central government in the form of a more complete and concrete state legislation, either amending Article 73.3 or complementing it through the budget Act.

When due regulatory development is not available, one issue that raises controversy is the type of control over these allocations. Article 73.3 entrusts the groups with keeping a specific account of the allocation and making it available to the plenary of the corporation upon request.[15] It is a relatively vague and lax provision, but this vagueness and imprecision allows a regional and local development on the matter that a perfectly finished and specific wording would not allow. Hence, regional and especially local legislation ought to use this margin of development to particularise the allocation instead of taking undue advantage of the vagueness and imprecision to operate unrestrained and unchecked. In general, as has been seen to happen at a comparative level, increased public funding should be associated with an increase in regulation, transparency and financial control.

Another source of controversy is the purpose of the allocation: to what ends it can be used. This issue is highly controversial owing to the fact that in practice many political groups use it largely to finance their respective political party. There are several indications in Article 73.3 that point to earmarking of the allocation and a degree of restriction on the purposes of the spending. The provision begins with the words "for the purpose of their corporate action, the members of local corporations shall constitute political groups". This can be read as meaning that groups are constituted for the better running of the corporation, and therefore the following paragraph providing for the financial allocation to these groups is also in reference to corporate action. The fact that Article 73.3 provides for limits, specific accounting for the allocation and the possibility of control by the plenary also indicates to some extent that the allocation is intended for specific purposes.[16]

Given that the analogy with parliamentary law is relevant to the issue at hand, it is pertinent to cite a passage of Constitutional Court Judgement 214/1990:

> *Indeed, it is clear that the purpose of the various types of grants, established for the benefit of Parliamentary Groups, is none other than to facilitate the participation of their members*

in the exercise of the institutional functions of the Chamber to which they belong, to which end the Groups, in which the Members of Parliament must integrate following the Rules of Procedure, are provided with the necessary economic resources.

Several authors cite Judgement 18/2011 of the Court of Auditors to defend that the financial allocation of Article 73.3 LBRL is an earmarked allocation, with a specific purpose. In this case, however, the Court of Auditors used as a parameter of review, in addition to Article 73.3, the Murcian statute on local government and the rules and agreements of the town council in question; thus, according to the Court of Auditors:

Even when it is not laid down in detail what expenses can be met by these grants, they must be used to cover its functioning (Article 28, Section 2, of Statute 6/88 of 25 August, on the Local Government of the Region of Murcia), and to this end a specific account must be kept of this grant, which shall always be available to the Corporation, and shall be reported to it..." (Article 24 of the Organic Regulation of Totana Town Council), with memorandum of activities and accounting justification (agreement of the plenary of the Corporation of 13 June 1996), and the accounting records and supporting documents shall be informed by the intervention (agreement of the plenary of the Corporation of 28 September 1999).

Therefore, Judgement 18/2011 of the Court of Auditors defends the earmarked nature of the financial allocation of Article 73.3 LBRL in accordance with the regional and local concretion in question.[17] That said, in the case that concerns us, there is a regional and local development that makes the extension of this jurisprudence appropriate. As regards the regional development, Article 50.1 of the Catalan Statute on Municipal and Local Government links municipal groups to the better running of the corporation and Article 50.8 establishes, in a general manner, that municipal groups shall have the necessary means to carry out their functions (and it seems reasonable that one of the means to perform their functions is the financial allocation referred to in Article 73.3 LBRL):

50.1 For the better running of the corporation's governing bodies, the plenary can decide to create municipal groups. Municipal groups must be set up in municipalities with more than 20,000 inhabitants.

50.8 The municipality, in accordance with the organic regulation and to the extent possible, shall provide the groups with the necessary means to be able to carry out their tasks.

The local development in question clarifies the matter even further, as the organic regulation of the AMB expressly stipulates in Article 9.6, concerning metropolitan political groups, that "an economic contribution may be fixed according to the criteria set by the Metropolitan Council, in order to cover the expenses of the running of the Group".

With this regional and local legislation, Judgement 18/2011 of the Court of Auditors is indeed applicable:

With regard to sums paid by way of representation expenses and transfers to political parties, given that under Article 28 of Statute 6/88 of 25 August, Article 24 of the Organic Regulation of Totana Town Council and the aforementioned agreements of the plenary of the Corporation, grants to municipal groups are intended to provide financial allocations in order to cover their functioning and these groups are required to keep a specific account and report to the plenary, they have only been admitted if they are supported by documents attesting the final use to which they were put, since if the provision of these funds to third parties were admitted as evidence of expenditure with no other document attesting their real destination, the control that shall be exercised over these funds would be devoid of meaning.

Note, however, that the Court of Auditors does not prohibit these financial allocations to political groups from being used to pay certain party-related expenses, but rather prohibits a pure and simple transfer to the party without justified proof of any real and specific expenditure. In contrast, the Court admits a transfer from the group to the party if it is duly justified:

In relation to this expenditure, it should be noted that on 1 July 1995 a cooperation agreement was signed between the Secretary for Administration of the Socialist Party of the Region of Murcia and Alfonso M. B., Secretary of the Totana local group, in which it was agreed that the abovementioned party shall facilitate the recruitment of a person to deliver coordination functions for the Socialist municipal group and that to this end the accounts of said party shall be credited with the amounts corresponding to the salary and Social Security payments (folio 525, tome V of volume I of Preliminary Proceedings Nº 76/02), and the notes to the accounts of expenditures state that a person was recruited to deliver these activities. Consequently, it is appropriate to consider the expenditure incurred for this item as being justified for the amounts reported above.

In short, some transfers from the political group to the political party are admissible according to the case-law of the Court of Auditors. What this Court does not allow, as we will see, is for the local council to transfer the financial allocation stipulated in Article 73.3 directly to the political party. Nor does it allow the allocation to groups to be transferred without an accompanying justification for expenditure incurred for the performance of the group's functions, when this is a requirement in the specific case. One example that could fit might be the contracting of an advisory service by the party itself in which it is clear what services the party is obliged to provide to the parliamentary group. Concrete proof of the advice and the advisers might even be required. This contracting of advisory services could be in line with the constitutional function of political parties, namely that "they contribute to the formation and expression of the will of the people and are an essential instrument for political participation" (Article 6 of the Spanish Constitution).

Aside from this example, it is relevant that this financial allocation to political groups is intended for or closely related to local functions and interests, and this should be stated explicitly in the regional or local legislation. Local powers and competences are linked to local interests, as follows from Article

137 of the Spanish Constitution, the opening articles of the LBRL, case law and academic literature. Guaranteeing adequate funding of parties beyond or without regard to their territorial presence or connection could render them defenceless in terms of local spending and aiding power. This idea will be developed later on.

5.2. Article 2.1.*e* of the Organic Statute on Political Party Funding (LOFPP)

The interpretation maintained up to now is reinforced when we take the LOFPP into consideration. Article 2.1.*e* stipulates that the financial resources of parties originating from public funding include:

> *Those contributions that political parties may, when appropriate, receive from the Parliamentary Groups of the Chambers of the Spanish Parliament, the Legislative Assemblies of the Autonomous Communities, the General Assemblies of the Basque Historical Territories and groups of representatives in local government bodies.*

Rather than supporting the restrictive line, this provision actually recognises as resources of political parties any contributions made to them by their respective parliamentary groups and local political groups. The provision treats parliamentary groups and local political groups similarly, just as Article 73.3 is inspired by the parliamentary model of the Rules of Procedure of the Congress, as explicitly stated in the Explanatory Memorandum of Statute 11/1999. This recognition is not unconditional, as it includes the words "when appropriate". This expression can be interpreted in a weaker sense: *in the event of* local rules allowing it. Or it can be interpreted in a stronger sense: it is a possibility but not a duty, unlike other sources of public funding that are presented as mandatory according to the LOFPP itself (for example, "annual state grants for operating expenses, regulated under the present Statute" in Article 2.1.b). The relativisation or qualification introduced by the expression "when appropriate" give scope to both parliamentary rules of procedure and local organic regulations (among other possible rules) to regulate allocations to parliamentary and political groups, as well as to specify the reasons and ways in which they can be contributed or conveyed to the respective political parties. This transfer may, in principle, be made according to the following conditions and nuances:

1. On condition that the applicable legislation does not expressly preclude it or observing its limits. This legislation could, by the way, expressly admit it as well as impose specific limits on this transfer.
2. Insofar as there is no direct funding to political parties, the tolerance threshold for transfers from the group to the party can be more relaxed with a view to promoting or maintaining the three territorial balances mentioned earlier.

5.3. Reports and opinions on this topic

The 2008 report by the Spanish government's Directorate-General of Local Cooperation on several matters relating to financial allocation to municipal political groups argues the following:

> *No general regulation is established, however, with regard to the contributions that may be made by the political groups of Local Corporations to political parties. It shall therefore be for each Town Council to determine through its organic regulations or more specific regulations what criteria for assignation or uses shall be applicable to these allocations.*

The Opinion of the Consultative Legal Committee of the Valencian Community of 12 July 2016 rightly concludes:

> *The financial allocation to Municipal Political Groups referred to in Article 73.3 of the LBRL may be used to make a contribution to the corresponding political party, although the Local Corporation should determine, through its organic regulation or more specific regulations, what criteria for assignation or uses shall be applicable to these allocations, together with the anticipated procedure for the accountability of political groups.*

The Catalan Court of Auditors also seems to recommend a local regulatory development of the financial allocation referred to in Article 73.3 LBRL. Report 12/2017, on charges for transfers by Vilanova i la Geltrú Town Council, includes in the observations on aspects to be taken into consideration:

> *The Town Council had established no regulation on the specific accounts payable to the municipal political groups, did not check whether the restrictions established by the regulations for the use of these funds were met, and did not consider the other aspects subject to audit.*

The Spanish Court of Auditors, in its Report 1262/2017 on auditing of political parties for the years 2014 and 2015, appears to point to the desirability of greater specificity in the Organic Statute on Political Party Funding. This more detailed regulation of the LOFPP would cut back the space for regional and local regulation that currently exists but is often not appropriately developed. The second recommendation made in the Court of Auditors Report (p. 961) reads as follows:

> *It is deemed advisable for the applicable legislation to be able to consider the conditions and requirements under which institutional groups are allowed to make contributions to political parties, with the aim to harmonize the provisions of Article 2.1.e) of the LOFPP (…) with the provisions of the respective Regulations and Article 73.3 of Basic Statute 7/1985, of 2 April, on Local Government, regarding the use of the financial allocation made to institutional groups.*

The counsellor of the Court of Auditors, María Dolores Genaro Moya, explained in her appearance in the Senate on 22 February 2018 that they recommend the clarification of what she described as a "legal vacuum". The counsellor treats as a legal gap something which in the opinion of the author

of the present article is actually a basic legislation (Article 73.3 LBRL) and a renvoi to regional and local rules (Article 2.1 LOFPP). It is desirable to deploy these provisions at a local or regional level in order to avoid a future more detailed regulation by central government, among other reasons.

The Report of 12 July 2017 on the AMB Intervention, concerning the use made by metropolitan political groups of the financial allocation assigned for their functioning, rightly concludes with the following recommendations:

> *In the light of the above and considering that the contributions made by the AMB to the GPMs [metropolitan political groups] are intended to defray the groups' operating costs, the Metropolitan Council is recommended to regulate in greater detail, by modifying the ROM [metropolitan organic regulation] or by means of a specific resolution, the use that the GPMs can make of these funds and their justification, regulating at least the following aspects:*
> *- Requirements and procedure for justifying transfers made to political parties.*
> *- Requirements and procedure for justifying travelling and catering expenses.*
> *- Disposal of surplus funds at the end of the mandate, i.e., of AMB contributions that the GPMs have not used for running costs during their mandate.*

In this connection, Article 3 of the AMB's General Ordinance on Grants excludes from its scope of application contributions to metropolitan political groups (letter h), among other cases, on the condition that all cases excluded:

> *(...) must have their own regulatory frameworks, passed by the corresponding governing body, be they regulations, programmes, contracts, agreements or others, establishing the reasons and criteria, amounts, payment and justification of grants, contributions or assistance given.*

5.4. Article 14.4 of the Organic Statute on Political Party Funding (LOFPP)

This article refers to the specific internal rules for the accountability of parliamentary and local council groups:

> *The accountability of the Parliamentary Groups of the Chambers of the Spanish Parliament, the Legislative Assemblies of the Autonomous Communities, the General Assemblies of the Basque Historical Territories and local council groups shall abide by the provisions of their respective Regulations or their specific legislation, which must respect the general principles of this Statute with regard to accountability.*

This provision leaves the fixing of this source of political party funding to parliamentary or local council rules. And this regulatory fixing is lacking not only at a local level but also, very often, at the regional and central government levels, with the consequent harm that this may cause with regard to the general principles of the LOFPP.

5.5. Comparative note on the funding of parliamentary groups

Before analysing some parliamentary rules that might serve as inspiration for the local regulation of financial allocations to political groups, a brief comparative introduction is in order on the matter of the funding of parliamentary groups. Most European parliamentary democracies provide a certain degree of public funding for the activity of parliamentary groups. There is usually a fixed amount (which follows a sort of principle of equal opportunities) and a variable amount depending on the number of seats (pursuant to a principle of proportionality). The former principle affords more protection to small new groups, whereas the latter favours large consolidated groups while respecting to a large extent the political options with most support from citizens.

In general, the purpose of these financial allocations is for the groups to be able to properly carry out their representative and legislative activity, such as payments for research or study, management expenses, administrative assistance, etc. In this respect, it is interesting to highlight the singular case of the UK, where this funding is provided basically for the functioning of opposition groups (Short Money in the House of Commons and Cranborne Money in the House of Lords).[18] Indeed, this type of funding is particularly important for opposition groups, which, for example, need to study projects that come from government and draft their own proposals with a degree of rigour. Unlike the majority group, they cannot avail themselves of the governmental and administrative apparatus (and its human, material and economic resources) to criticise and formulate legislative and other types of proposals. It should be borne in mind, then, that this type of funding, insofar as we consider it to be earmarked, makes more sense for funding opposition groups than the group in power in central, regional or local government.

Following this brief introduction, let us go on to look at some parliamentary rules that have served or might serve as inspiration for local regulation. As we mentioned earlier, the Rules of Procedure of the Congress inspired the drafting of Article 73.3 LBRL. Article 28 of these Rules of Procedure stipulates:

> ***1.*** *The Congress shall make available to parliamentary groups sufficient premises and material means and shall allocate them, out of its Budget, a fixed subsidy which shall be the same for all groups, and an additional subsidy which shall vary according to the number of members of each group. The amounts shall be settled by the Bureau of the House within the limits of the relevant budgetary appropriation.*
>
> ***2.*** *Parliamentary groups shall keep a specific account of the subsidy referred to in the preceding paragraph, which they shall make available to the Bureau of Congress upon request.*

Note that the control exerted by the Bureau of Congress takes the place of the control exerted by the plenary at the local level. The Rules of Procedure of the Parliament of Catalonia also opts to leave control in the hands of the

Bureau, in the place of the control that was previously entrusted to the Interior Governance Commission.[19] Article 33 of these Rules of Procedure reads:

> ***1.*** *Parliament shall make available to parliamentary groups sufficient premises and material means. Parliamentary groups shall also have recourse to the necessary human resources and material means to perform their functions effectively and efficiently, especially in the sphere of technical assistance and administrative support. In this regard, Parliament may sign agreements and conventions with other administrations in personnel matters. In addition, it shall allocate them, out of its budget, a fixed grant and a variable one, to be determined by the Extended Bureau, taking into account the numerical importance of each group and the overall amount of the budget of Parliament.*
>
> ***2.*** *The Bureau of Parliament shall take the necessary measures to distribute the material means referred to in Section 1 among whichever parliamentary subgroups have been set up, in proportion to the respective number of members.*
>
> ***3.*** *Parliamentary groups and parliamentary subgroups, if any, shall keep a specific account of the grant referred to in Section 1 and shall be accountable for their management annually to the Bureau, for the purposes of control of this account in the terms established by the applicable legislation.*

The purpose of the grant for parliamentary groups seems to be linked to the performance of "their functions effectively and efficiently". Note also that the Rules of Procedure of the Catalan Parliament enforce accountability to the Bureau, without the need for the latter to request it previously. Although the Bureau can be considered a more technical and less political body than the Plenary, it is nevertheless markedly political and perhaps technically inadequate to control accounts without help from other more specialised bodies. Thus, both plenaries and bureaus should request, as they do in some cases, reports from the respective controller or accounts auditor. In this respect, the Metropolitan Council and the Bureau of Parliament requested reports on the matter in 2017. Once there is a control by a technical body as set forth here, the more political bodies can be left in charge of the appropriate decision to redress, penalise or prevent future malpractice. The controller and accounts auditor could, nevertheless, propose some measures on the matter.

In 2018, the Bureau of the Parliament of Catalonia agreed upon an "instruction" on the grant to parliamentary groups and subgroups. Point 1.2 of this regulation establishes that grants to parliamentary groups and subgroups must be used for expenses of a current nature and those necessary for the functioning of the group or subgroup concerned. Point 3 regulates accountability and provides for the accounts auditor issuing a report on the documentation to be presented by the groups and subgroups. Point 4.3 stipulates that it is the responsibility of the Bureau of Parliament to endorse accountability. The annual accounts shall be published in the Parliament's Gazette and transparency portal. Point 5 implicitly admits that contributions can be made to political parties, but establishes an additional audit system to the one set forth in the

LOFPP. It makes it mandatory to supply certain documents in order to guarantee that contributions to parties fulfil objectives linked to the functioning of the group or subgroup in question. Point 6 lays down a reimbursement and penalty system in the event of failure to meet the obligations established in the instruction. In short, in line with the findings of this study, contributions to political parties are not prohibited, but they require due regulation, limitation, transparency and control.[20]

5.6. The General Statute on Grants (LGS) and the AMB's General Ordinance on Grants (OGS)

It is noteworthy that Article 4 LGS excludes direct and indirect political party funding by parliamentary and local council groups from its scope of application. In the case of direct funding, letter d) specifically excludes:

> *Grants to the parliamentary groups of the Chambers of the Spanish Parliament, in the terms laid down in the Rules of Procedure of the Congress and the Senate, and grants to the parliamentary groups of the legislative assemblies of the autonomous communities and the political groups of local corporations, as established by their own rules.*

Therefore, the financial contributions referred to in Article 73.3 are not subject to the rules governing the granting, verification, justification and control of expenditure, intended for grants (unless local regulations establish otherwise).[21]

Article 3.*h* of the OGS of the AMB excludes the application of the Ordinance to endowments to political groups with one exception:

> *Monetary contributions to the political groups represented in the Institution to cover their running expenses, regardless, in this case, of the fact that the AMB shall comply with the publicity requirements established in Article 17 of this general Ordinance.*

This said, in numerous reports, resolutions and studies the financial allocation provided for in Article 73.3 LBRL is considered a grant.[22] In fact, Article 4 LGS refers to grants to parliamentary groups and political groups in local corporations. The aforementioned parliamentary rules of procedure also refer to these financial allocations as grants. However, if the political group is conceived as a parliamentary, municipal or metropolitan body it is more difficult to consider this financial assistance as a grant, since in that case it would not exactly be a financial benefit provided by a public authority to *a third party*.[23] All the more so if they are considered necessary local government bodies without legal personality. Specifically, Article 3.4 LAMB, regulating metropolitan government and administration, treats metropolitan groups as "necessary bodies of the AMB". In the matter at hand, moreover, the creation of local council groups is determined by legal mandate.

All this is without prejudice to the more singular and separate aspect of parliamentary or political groups regarding the institution of which they form part. This more private nature comes as a result of their intense connection with political parties, which are a special type of private association responsible for expressing political pluralism, and as such, fundamental instruments of political participation. The more private nature also derives from the wide margin for self-organisation they have with respect to other local bodies; public rules being unable to enter excessively into the regulation of their internal organisation, in similar way as happens with political parties. Although they have no legal personality, political groups have rights and obligations, enter into legal transactions and are acknowledged several abilities such as bringing legal actions. Still, their link with political parties is intense and cannot be ignored. [24]

6. Direct metropolitan funding of political parties

6.1. Article 73.3 of the Spanish Basic Statute on Local Government (LBRL)

This provision does not, in principle, impede direct political party funding, but neither does it protect it. Yet, an *a contrario* interpretation could hold that it does impede it, as it stipulates that the funding is intended for political groups and the relationship between them is close. This *a contrario* interpretation may seem similar, albeit more extensive, to that made by the Supreme Court in Judgement 3817/2012. In this case, it considers that according to the municipal organic regulation a financial allocation cannot be made to non-affiliated councillors since Article 73.3 LBRL only provides for this award in connection with groups:

> *Indeed, municipal life is by nature led through participation in "municipal groups" and in the light of this evidence approval cannot be granted for a financial allocation that is not regulated by Article 73.3 LBRL, and which cannot be understood as inherent in the referral made to the ROM [municipal organic regulation], as it is only made on "formal" grounds, and not with the capacity to modify the state basic legislation and give rise to new rights not included in that provision. We are entirely in agreement with the rationale offered by the lower Court, which due to its clarity does not require further considerations that would only be redundant. This is not exclusively a quantitative maximum limit; we must confirm that it is not possible to create a new allocation that does not match those recognised for councillors considered individually, therefore generating the appearance of a new,* de facto*, intermediate figure, not recognised in state legislation.*[25]

Two points need to be made here. First, Article 73.3 talks specifically about non-affiliated councillors, but not about political parties. That is to say, the *a contrario* argument applied to this provision works more naturally (less awkwardly) in the relationship between political group and non-affiliated councillor than in the relationship between political group and political party. The second point is based on the analogy with parliamentary law. Many parliamentary rules of procedure establish financial allocations to parliamentary groups, and these provisions, for example Article 33 of the Rules of Procedure of the Catalan Parliament, do not impede, on the basis of an *a contrario* argument, direct political party funding. Let us not forget that the Statute that introduced Article 73.3 into the LBRL was inspired by the Rules of Procedure of the Congress.

6.2. Article 2.1.*c* of the Organic Statute on Political Party Funding (LOFPP)

The Organic Statute on Political Party Funding admits both direct local funding of political parties and indirect funding of them through local council groups. Specifically, Article 2.1.c LOFPP establishes that the economic resources of political parties originating from public funding shall consist of:

> *Annual grants established by the Autonomous Communities for running expenses at the corresponding regional level, by the Basque Historical Territories and, when appropriate, by Local Corporations.*

In this regard, according to Article 3.2.*b* LBRL, metropolitan areas are "local authorities", and more specifically, Article 1.2 LAMB provides that "the Barcelona Metropolitan Area (AMB) is a supramunicipal local body of a territorial nature comprising the municipalities of the conurbation of Barcelona". Therefore, Article 2.1.*c* LOFPP can constitute a legal power for political party funding at the local level. It is not unusual for local competences to be defined or detailed by sector-specific laws. This is admitted in Article 7.2 LBRL, which includes among the competences of local authorities (only) those determined by statutory law. This primary legislation can be general (on local government) or sectoral (as the LOFPP could be in the case that concerns us here).

Even so, when Article 2.1.*c* LOFPP says "*when appropriate*, by Local Corporations" it seems to be weakening or relativising the attribution of competences. This "when appropriate" seems to be a nuance that does not deactivate the attribution of competences to local bodies to fund political parties, but attributes a power without a duty to finance. If we turn our attention to Article 2.1.*e*, we find that it too includes a "when appropriate" for the purpose of admitting the possibility of legislative chambers and local administrations funding their parliamentary and local council groups. In other words, the expression "when

appropriate" embraces the possibility of providing financial assistance but imposes no obligation to do so. Nevertheless, the expression does have the effect of weakening or qualifying the attribution of competences in the following respects:

1. Provided that legislation on local government do not impede it, or observing the limits contained within it.
2. Insofar as the regulations of the local authority provide for direct assistance and make it available. It can give assistance, in particular, if there are concrete and accurate rules on the matter that establishes certain limits and guarantees an equitable distribution among the various political forces.
3. Insofar as direct funding to political parties is not confused with the financing of local groups, which indirectly admits political party funding, but not in just any way or for just any reason. If there is direct local funding of political parties, the tolerance threshold for transfers from the group to the party could be stricter.

The Court of Auditors, in the abovementioned Report 1262/2017 on auditing of political parties for the years 2014 and 2015, repeatedly brings into question the direct local funding of political parties (p. 956 among others, including 102-3, 245, 257, 620):

> *In the auditing reports for 2014 and 2015 corresponding to 11 and 13 political parties respectively, it is indicated that the allocations awarded to the political groups of the party in local authorities were paid directly by the awarding institutions into the bank accounts held by the respective parties for their day-to-day functioning, which contravenes the provisions of current legislation. In this way, instead of political groups figuring as contributors to party funds, in accordance with the annual accounts submitted, these revenues appear as direct grants from the local authority to the political parties. These grants are not under any circumstances considered among the resources originating from public funding listed in Article 2.1 of the LOFPP.*

However, as mentioned in section 5.3 of this article above, what the Court objects is rather the fact of allocations intended for funding local council political groups being paid directly to political parties. This interpretation is reaffirmed when the Court (p. 68 and elsewhere, including 76, 223, 233, 287) also extends the criticism to autonomous parliaments and general assemblies of the Basque historical territories (as the possibility of these parliaments funding political parties directly, under Article 2.1.*c* LOFPP, is not contested):

> *Allocations granted to the political groups of the party by the Parliament of Navarre, the General Assemblies of Gipuzkoa and local authorities were paid directly from the various institutions into the operational bank accounts of the party, which contravenes the provisions of current legislation. In this way, parliamentary groups or political groups in Local Administrations do not figure as contributors, but rather, in accordance with the annual accounts submitted, these revenues appear as direct grants to the party, which are not under any circumstances considered among the resources originating from public funding listed in Article 2.1 of the LOFPP.*

In other words, financial allocations intended for political groups in accordance with Article 73.3 LBRL clearly cannot be paid directly to the political party. This should not be understood as local corporations being unable to establish a direct annual grant to political parties along similar lines as the existing regional-level grants admitted under Article 2.1.*c* LOFPP, which sets forth that one of the economic resources of political parties shall be annual grants, which local corporations establish, when appropriate, for running expenses in the corresponding territorial area. It is not inconsequential, but quite telling, that the Court of Auditors has remained silent on this possibility, referring only to Article 2.1.*e* LOFPP.

In general, the reports, publications and opinions consulted deal with local funding of political parties through the financial allocations provided for in Article 73.3 LBRL. However, although these works do not address local funding of political parties directly and specifically in the sense it is given in this section, a fairly widespread climate of opinion emerges that is contrary to this sort of funding.[26] If this inference were true, mind that this section of the present article may contain a minority opinion.

6.3. Barcelona Metropolitan Area Act (LAMB)

Let us now go on to see what other competences might provide grounds for this fostering activity of the AMB. The power of self-organisation (Article 3.1.*b* LAMB) would seem to enable or support the funding of political groups but hardly that of political parties. If we rule out this legal power, there may be no expressed competence in the LAMB that fits in well with this public aiding. One possibility might be to invoke the competence of promotion of activities that contribute towards meeting the needs and aspirations of the municipalities of which it is composed (Article 13.2 LAMB), if it is understood as the capacity to promote local interests in a broad sense.

But to channel direct political party funding through the "promotion of activities" might jeopardise political pluralism and equality between parties, as the activities of one party could be promoted more than those of another.[27] The funding of parties should not be based on the funding of their activities, except the activity of standing for elections (for which special funding already exists, also on the local level, under electoral law) and the representative activity carried out through political groups (which can also receive specific funding under the aforementioned legislation on local government, and usually does).[28] It is wise for direct political party funding to depend not on subjective assessments, but on rather objective criteria such as their electoral support and the institutional translation of that support within institutions. The principles of democracy, of representation, of political pluralism and of equality between parties ought to be correctly balanced.[29]

6.4. Other competence issues to take into account

Given that political parties are associations, coverage could also be found in Article 72 LBRL. This provision empowers local corporations to foster the development of associations in order to defend the general or sectoral interests of the residents, and in particular to facilitate access to financial assistance.

> *Local Corporations promote the development of associations for the defence of the general or sectoral interests of the residents, provide them with the most comprehensive information on their activities and, within their possibilities, the use of public resources and access to financial assistance to carry out their activities and encourage their participation in the management of the Corporation (...).*

Political parties, as constitutionally recognised singular associations, help to express local political pluralism and to manifest the will of the local people, and are a fundamental instrument of local political participation (following Article 6 of the Spanish Constitution). The Explanatory Memorandum of the Organic Statute on Political Parties argues along similar lines:

> *(…) although political parties are not constitutional bodies but private associations, they are an essential part of the constitutional architecture, they perform functions of paramount constitutional importance and they possess a second nature which tends to be summarised recalling their constitutional relevance as well as their institutional guarantee conferred by the Constitution.*

It is important to bear in mind that local authorities can neither foster nor promote interests beyond or above their territorial scope. Article 137 of the Spanish Constitution establishes local self-government "for the management of their respective interests", in the understanding that the competences, powers and activities of local authorities are closely linked to the respective local interests and cannot address any supralocal interests that are, in principle, mandated to higher tiers of government (especially if it is with a will to implement policies with opposite ends or that might be in conflict).

As we will see in closer detail in Section 7.3 below, the Supreme Court has linked the fact that the fiscal effort is made by residents to the norm of local governments being limited to the interests of their respective territorial areas. This Court has specified that it is in the hands of statutory law to determine the nature of these local interests. To be more exact, according to the Supreme Court, some point of connection must be observed with the areas of competence attributed to the local authority in question. Paraphrasing Supreme Court Judgement 5441/2006, the LBRL does not justify converting local authorities into organisations for the dissemination or defence of supralocal political projects, in which the collective point of reference ceases to be the municipality and shifts towards a broader, less defined collectivity, the representation of which actually corresponds to another type of territorial

public authority. As will be shown presently, although this jurisprudence refers expressly to the municipal level, it appears to be applicable to local governments in general.

These more or less broad local interests may bear some relationship with the understanding of local self-government in the case at hand. According to Article 1.3 LAMB, "the Barcelona Metropolitan Area has legal personality and full capacity and self-government to fulfil its goals." There are, however, different types and degrees of self-government. A more administrative understanding hinders political party funding, whereas a more political understanding facilitates it. Local funding of political parties may fulfil important constitutional functions based on the three types of territorial balances mentioned in Section 4 above (intra-party balance, inter-party balance, and balance between tiers of government). These three balances and their attainment gain importance insofar as local authorities are taken to be territorial governments of a more political nature rather than mere territorial administrations. Nevertheless, even if local self-government is considered to be more administrative, these balances can still be important insofar as they can moderate centralisation, uniformity and hierarchy as well as generate more representation, pluralism, transversality and more equitable electoral competition.

Lastly, if it were considered that this competence does not come under the legally recognised powers of the AMB, Article 7.4. LBRL would appear to be applicable. This provision establishes that local authorities can only exercise competences other than those under their own jurisdiction or delegated to them when this does not jeopardise their financial sustainability and budgetary stability (and they do not engage in the simultaneous exercise of the same public service as another public administration). To this end, previous binding reports by the competent administration on financial control (and, in the event of potential duplication of public services, by the administration with powers in that matter) would be necessary.

6.5. Article 4.*c* of the General Statute on Grants (LGS)

As already observed, Article 4 LGS excludes from its scope of application both direct political party funding and indirect funding through parliamentary and local council groups. Specifically, for the case of direct funding, letter *c*) excludes "grants regulated in Organic Statute 3/1987, of 2 July, on Political Party Funding."

7. Metropolitan funding of trade unions

7.1. Trade union pluralism and representativeness

The connection and relevance of political parties and trade unions is shown in their regulation in Articles 6 and 7 respectively of the Spanish Constitution. Their prominent place in the Constitution says a great deal about the importance the constituent power gave to both of them. Article 7 of the Spanish Constitution recognises the fundamental role of trade unions in the defence and promotion of their inherent economic and social interests. Trade unions are basic instruments for the exercise of the workers' fundamental right to strike in defence of their interests (Article 28.2 of the Spanish Constitution) and for workers' and employers' representatives to engage in collective bargaining (Article 37.1 of the Spanish Constitution). The criteria for determining which trade unions are representative for the defence and promotion of workers' interests are therefore relevant. In Judgement 53/1982, the Constitutional Court made the following statement on the participation of trade unions in public bodies:

> *The system of trade union pluralism arising out of freedom of association (Article 7 and 28.1 of the Spanish Constitution) means that when determining the presence of union representatives in bodies forming part of the administration some criterion shall be used that, without being discriminatory, allows an effective defence of workers' interests, which would be harmed by the atomisation of trade unions. One of these criteria that is often employed is to bestow this presence on the workers' representative organisations mentioned, for example, in Article 4.3 of the ILO Convention of 9 July 1948, ratified by Spain by Instrument of 14 January 1960, whereby each ILO Member State is obliged to (…) recognise the presence of the organisations which are most representative of workpeople, referred to in another context in Article 3.5 of the ILO Constitution. However, neither the rulings of the Committee on Freedom of Association of the ILO Governing Body nor the case law of the European Court of Human Rights provides any generally applicable rules to determine in all cases what is meant by most representative trade union organisation or organisations, or what the minimum required percentage of representativeness is to determine them, or at what territorial layer (national or provincial or municipal) they are to be measured. (…) The same Committee made a very enlightening statement regarding the principle according to which "the criteria for determining such distinction shall be objective and be based on prescriptions which give rise to no possibility of abuse" (Report 36, case 190, paragraph 195). This doctrine is in line with that established by the European Court of Human Rights in the Judgements cited in the first legal ground [case of National Union of Belgian Police v. Belgium and case Schmidt and Dahlström v. Sweden], in which, as a result of a joint interpretation of Articles 11 and 14 of the European Convention and in the context of a debate on problems of possible discrimination among trade union organisations, it is stated that "equality of treatment is violated if the distinction has no objective and reasonable justification".*

Constitutionally, then, there is a requirement of objective and reasonable criteria to determine the most representative trade unions (a typical requirement, incidentally, with regard to the principle of equality), which does not determine a particular solution, but rather admits different solutions to which public authorities can resort. Courts do not, in principle, determine the most appropriate or convenient system for determining representativeness, but rather whether a given system is discriminatory, by dint of irrationality or arbitrariness. Constitutional Court Judgement 147/2001 reads as follows:

> *But most representativeness requires correspondence between the technical composition of the representativeness and the type of trade union function, the tier of exercise or the characteristics of the collective interests at stake, without its being used for any purpose, such that not all uses to which it is put are constitutionally acceptable, and that use which employs selective criteria to establish different treatment with regard to matters bearing no relation to them is unacceptable (Constitutional Court Judgements 9/1986, of 21 January, and 7/1990, of 18 January). Hence, for example, this Court has considered it inappropriate to use the criterion of most representativeness as a rule to exclude trade unions that are not more representative but are, however, established in a particular ambit (e.g., Constitutional Court Judgements 184/1987, of 18 November, and 217/1988, of 21 November). In this way, it is reasonable to ensure the presence in each specific sphere of activity of the general interests of the entire workforce, and to examine in each case the purpose of the provision or the institutional representation (…).*

Although it may be important for representativeness to conform to the territorial organisation of the public power, it does not seem to be as relevant as in the case of political parties. The Organic Statute on Freedom of Association of Workpeople (LOLS) sets out the criteria for determining the most representative unions statewide (Article 6.2), the most representative unions region-wide (Article 7.1) and the most representative unions in specific territorial and functional areas (Article 7.2). These trade unions have the right to collective bargaining with overall effectiveness, in accordance with the Statute on Workers Rights. The most representative unions act in institutional representation before the central and regional public administrations.

In Judgement 147/2001, the Constitutional Court recognises that these criteria present certain problems:

> *It is true that the double scale does not expressly embrace a progressive tiered system linked to criteria strictly related to the greater or lesser degree of representativeness, as the division of the apportionment into only two airtight compartments fails to take into account that in the block containing the trade unions to which the LOLS attach most representativeness some unions may be "more representative than others" and in the block containing the rest of the unions some may be more firmly established than others. However, it is not for this Court to determine which criterion is most appropriate, most politically expedient or most consistent with the principles of the Constitution, as this would entail value judgements or preferences that this Court cannot issue (Constitutional Court Judgement 53/1982,*

of 22 July). The review must be limited to whether the criterion adopted by the administration lacks justification and is disproportionate.

Broadly speaking, the unique legal position of these (more) representative trade unions serves especially for the defence of the general interests of the workers, as opposed to the exclusive defence of their members. It is a model that reflects a certain corporatism whereby the union is not a mere association in defence of its members but is recognised as having a more public and general nature and goals. In this respect, the bylaws of UGT and CCOO establish as a priority the defence of the general interests of the workers.[30]

7.2. Public funding of trade unions

In Europe, communist, social democratic and working class parties have historically been financed by affiliated or related trade unions.[31] In the current Spanish context, however, trade unions do not appear to play a significant role in political party funding. In fact, in much the same way as with the major parties, public grants and endowments make up a large part of the income of the larger, or most representative, trade unions. But in comparison with political parties, public funding seems to account for a considerably lower percentage of their total income.[32] Trade unions receive direct public funding, which can broadly be subdivided into generic grants and grants for more specific purposes, and indirect public funding, particularly in the form of the transfer of buildings.

Direct public funding is channelled through grants included in central and regional budget acts. The Constitutional Court admits subsidising trade unions according to their degree of representativeness and audience, observing the principles of adequacy and proportionality, which is linked to the purpose and effects of the aid in question. Judgement 147/2001 argues as follows:

The concept of most representativeness is therefore an objective criterion, and as such, constitutionally valid. However, this does not mean that any regulation grounded on it is necessarily to be regarded as constitutionally legitimate (Constitutional Court Judgement 9/1986, of 21 January, and 7/1990, of 18 January), as it must also meet the remaining applicable requirements, and singularly, that of proportionality. These requirements are strongly determined by the purpose and effects of the measure considered and have led to consider, in line with constitutional requirements, some powers held only by the most representative trade unions.

The tension between the principle of equal treatment among trade unions and the promotion of some of them under the objective criteria set forth above has also manifested itself in the matter of grants to unions. The ILO Committee on Freedom of Association has stated that the various systems of grants to workers' organisations have different consequences depending on their form, the spirit in which they are conceived and applied,

and the extent to which such grants are awarded by virtue of precise legal texts or depend exclusively on the discretion of public authorities, clarifying that the repercussions of this financial assistance on the autonomy of trade union organisations will depend essentially on the circumstances, which are unappreciable in the light of general principles, being a question of fact that should be examined in each case, taking into account the circumstances of that case (Report 19, case No. 121, paragraph 180, and Report 75, case No. 341, paragraph 101).

In connection with these principles of adequacy and proportionality, the Supreme Court seeks to make distinctions according to the purpose of the grant awarded. When the grant is generic, it will depend above all on the representation and electoral presence of the trade unions. When a specific trade union activity is being subsidised, the grant must have regard to which union is or can be best suited for carrying out the subsidised activity. For example, Judgement 4017/1995 admits the most representative trade unions as sole recipients of a grant for institutional participation:

In the concrete case under discussion here it does not seem constitutionally objectionable, in principle, to include budgetary allocations, at autonomous community level, intended specifically for subsidising the institutional participation legally attributed to the most representative trade unions. This is without prejudice, however, to the correct distribution of resources requiring the observance of at least two basic constraints: transparency in the earmarking of the allocations and proportionality between the objective marked in the law and the means provided for its fulfilment.

(…) But in the case at hand some particular circumstances come together (…) especially, regarding the transparency and proportionality required earlier, we find that the orders challenged in the proceedings – the natural objective of which to fulfil should consist in the articulation of precise rules for the correct application of the expenditure items under discussion – escape all concretion, and all control mechanisms.

In practice, then, although there is no fundamental reason to object to the inclusion of two budgetary grants for trade union organisations, differentiated by purposes and by unions benefited, the implementation orders clearly do not adjust their regulatory content to the correct enforceability of the generic budget estimate. Consequently, they lend to the distribution of these public funds an element of discretion that jeopardises the safeguarding of the principle of non-interference from public authorities and non-discriminatory treatment of the various trade union organisations, as referred to in Articles 12 and 13 LOLS.

It would be admissible, for example, to have a specific grant to the most representative trade unions for expenses resulting from institutional representation, insofar as this were a function performed exclusively by these trade unions.[33] The jurisprudence repeated by the Supreme Court (reproduced in Judgement 6370/2007) is revealing in this respect:

The functions and prerogatives attributable exclusively to the most representative trade unions include cases of institutional representation to administrative bodies. In contrast, the awarding exclusively to these most representative unions of grants for union purposes

that pertain to all unions shall be rejected on the grounds of violation of freedom of association and for not being a consequence of the concept.

In the more recent Judgement 2150/2015, the Supreme Court insists:

(...) this Court shares the claimant's view that in the budget acts of the Valencian Generalitat for the years 2010 and 2011 the claimant may have been a victim of a constitutionally prohibited discrimination, due to the establishment of a nominal grant line, limited exclusively to the trade unions CCOO-PV and UGT-PV, for union activity towards the realisation of certain programmes, which were not inherent in the institutional function legally reserved for the most representative unions, but rather concerned the possible activity of any sufficiently representative union. The Court shares the claimant's position to the effect that there was no objective, proportional reason, in pursuit of a legitimate purpose, to establish, when articulating this grant line, the reserve made in it in favour of the two trade unions nominally indicated therein. This involved the exclusion of the rest of the representative trade unions, which possessed the same union interest as the nominal beneficiaries of the grant, and therefore a situation of discriminatory inequality against them, which should be considered constitutionally forbidden. The entirety of this Court's case law and the jurisprudence of the Constitutional Court, both of which are extensively cited in the merits of the claim, which were referenced, lead to the assessment we have set forth above.

7.3. Analysis of competences of the AMB to award grants

In general, Article 240.1 of the Statute on Municipalities and Local Government of Catalonia provides for the power of local authorities to award grants:

Local authorities may award grants and assistance of a financial or other nature to public or private entities and individuals which carry out activities that complement or supplement local competences.

More specifically, Article 122.1 of the Catalan Regulation on Works, Activities and Services for local authorities (ROAS) states the following:

Local authorities may award grants and assistance to bodies, organisations or individuals whose activities supplement or complement services placed under local jurisdiction or are of local interest.

At the metropolitan level, Article 5.4 of the AMB's General Ordinance on Grants (OGS) establishes:

Grants shall finance works or activities over which jurisdiction has been conferred to the AMB or are of metropolitan public or social interest, including solidarity and development cooperation activities.

To some extent, the three passages cited above seem to be expressed in increasingly broad terms. To the power to award grants for "activities that com-

plement or supplement local competences" are added activities that "are of local interest", in turn extended to activities that "are of metropolitan public or social interest, including solidarity and development cooperation activities". It is not clear whether or not this increasingly broad regulatory development of the power to award grants continues in the AMB 2017-2019 Strategic Plan on grants, contributions and other institutional assistance. It is not clear whether or not Section 2 of the Plan links "activities of public utility or social interest" to "metropolitan jurisdiction":

> *The Barcelona Metropolitan Area may award grants, contributions and other institutional assistance to metropolitan city councils, individuals, private entities and companies with the aim of fostering the realisation of activities of public utility or social interest, or promoting the achievement of public purposes over which metropolitan jurisdiction is conferred.*

Article 72 LBRL empowers, as observed, local corporations to foster the development of associations for the defence of the general or sectoral interests of residents and, insofar as they are able, access to financial assistance. Given that trade unions are a form of association included within the fundamental right of association and especially protected by the connection of Articles 7, 28.2 and 37.1 of the Spanish Constitution, Article 72 LBRL can provide a certain generic power to award grants to trade unions with implementation, representation or activity in the local area. In any event, it is necessary to justify a local (as opposed to supralocal) interest with regard to the grant. Local interest in relation to "activities that complement or supplement local competences" and in relation to "associations for the defence of the general or sectoral interests of residents". We should bear in mind that Article 137 of the Spanish Constitution reads that municipalities, provinces and autonomous communities "enjoy self-government for the management of their respective interests". Therefore, any possible local funding of trade unions must observe the limit on the basis of respective local interests.

In view of the constitutional recognition of local self-government, the understanding of local self-government in the case at hand may, to some extent, affect the spending power and promoting activity. Article 1.3 LAMB sets forth that "the Barcelona Metropolitan Area has legal personality and full capacity and self-government to fulfil its objectives." Thus, a more political (and less administrative) understanding of the local self-government in question could leave more room in the decision as to what to subsidise and with regard to self-government for the management of respective interests. If a given instance of self-government is more political, the interests of the local authority in question become broader. Similarly, more political self-government allows a broader interpretation of spending powers. In contrast, the more administrative the understanding of the self-government of a local authority, the more its spending powers are bound to its particular competences.

In general, as long as there is a budget line and sufficient resources, public administrations seem enjoy more leeway when they are promoting and funding private initiatives than when they are regulating private spheres or directly providing a public service. The activity of public administrations consisting in fostering or aiding private initiatives tends to have broad room for manoeuvre when it comes to deciding *what* to promote, provided that the legal requirements to decide *whom* to subsidise and *how* are observed.

Nevertheless, it is important to bear in mind that the Constitutional Court has drawn a distinction, in general, between the spending power of the central state, which can fund any goal, and the spending power of the autonomous communities, applicable also to local authorities following Article 137 of the Spanish Constitution, which shall be linked to the competences they have under the Constitution and the laws.[34] Judgement 13/1992 reads:

> *It can rightly be said that the State's power over spending or budget authorisation, a manifestation of the exercise of the legislative power attributed to the Spanish Parliament (Articles 66.2 and 134 of the Spanish Constitution), is not defined by connection with the distribution of competences established by the Constitution (Articles 148 and 149 of the Spanish Constitution), contrary to what occurs with the financial autonomy of the Autonomous Communities, which is linked to the exercise of the competences conferred on them, in accordance with the Constitution, by the respective statutes of autonomy and other laws (...).*

It is reasonable to assume that if the autonomous communities' spending power has to be connected with their competences, this must also be the case for local governments. The case law cited below appears to support this position. Although this jurisprudence refers specifically to the municipal sphere, it seems applicable to the local sphere in general. Note, then, the position of Supreme Court Judgement 3865/2006:

> *However, while the capacity to undertake obligations and the aforesaid municipal jurisdiction prescribed under the LBRL are incontestable, in this case it is not justified either materially or territorially for this allocation to take effect within the municipality, the only territory in which, under Article 12 LBRL, the Town Council exercises its powers. The residents of the municipality not only contribute to municipal charges but are also the beneficiaries of the municipal public services that come under its jurisdiction. In this respect, the lower court ruling is correct when it states that local autonomy, constitutionally and legally enshrined, is never an expression of sovereignty but rather refers to the limited powers set forth in Constitutional Court Judgement 84/1982, of 23 December, i.e., for the running of its respective interests which, as we have already recalled, are constrained to the respective territorial area.*

In Judgement 5441/2006, the Supreme Court explains the matter in greater detail:

> *The determination of the nature of those local interests is subject to statutory law that confers specific competences within a minimum guaranteed framework, whereas this*

self-government is not guaranteed to impinge on general or private interests other than those of the local authority (Constitutional Court Judgement 4/1981, of 2 February), local autonomy being characterised as qualitatively inferior to the political autonomy enjoyed by, among other powers, the Autonomous Communities.

Even if the legal framework yields a provision such as Article 25.1 LBRL, which introduces a broad local capacity, it is developed literally "within the scope of its powers (those of the municipality)", i.e., in the same administrative and not political legal sphere in which self-government is guaranteed, and the administrative powers conferred on the municipality by Article 4.1 of Basic Statute 7/1985, including self-organisation and financial powers, may not be exercised in a vacuum, subordinated, or placed at the service of projects and interests other than those referred to in the specific competences that necessarily belong to the municipality by virtue of Articles 2.1 and 25.2 or 28 of the mentioned Basic Statute on Local Government.

And in the case examined in these proceedings we find the earmarking of public resources for purposes in which it is difficult to observe any point of connection with the competences conferred on the Local Authority. By allocating funds to Udalbiltza, the defendant Town Council may be reflecting what it considers to be a majority claim in Basque society as a whole, but any activity it might undertake will not entail the development of any activity fit to be locally funded. The LBRL does not justify the conversion of Local Councils into organisations for the dissemination or defence of supramunicipal political projects, in which the point of reference ceases to be the collective substratum of the Municipality and shifts towards a broader, less defined collectivity the representation of which actually corresponds to another type of Territorial Public Authority.

Nevertheless, a panoramic look at the activities and programmes that are subsidised by regional and local authorities in fact seems to lead us to a relaxed understanding of the required connection between the grant and the competences of the public authority in question. An illustrative example can be found in the fact that numerous local authorities, including the AMB, dedicate part of their promoting and fostering activity to subsiding international cooperation projects. Although it is true that an attempt is made to establish the connection with local interest through the local implementation or origin of the cooperation organisation, it is no less true that the connection is sometimes tenuous or scant.

In this respect, bearing in mind the case at hand, it is interesting to note that that some town councils subsidise, on the grounds of international cooperation, the Josep Comaposada Foundation (the culture and international cooperation foundation of UGT of Catalonia, especially dedicated to promoting culture and trade union cooperation between workers) and the Peace and Solidarity Foundation (the foundation of CCOO of Catalonia to carry out international cooperation and development, especially in labour rights matters). When the Catalan Court of Auditors has reported on some local authorities that dedicated part of the local budget to subsidising these foun-

dations, it has not questioned this type of grant as such (only some details with regard to certain specific grants).[35]

7.4. Possible metropolitan competences for subsidising trade unions

Article 13 of the LAMB, on "metropolitan competences", reads:

> ***1.*** *The Barcelona Metropolitan Area exercises the competences conferred to it by this Act, those which may be conferred to it by other statutes and, with prior consent, those which may be delegated to it by municipalities and other administrations.*
>
> ***2.*** *The Barcelona Metropolitan Area may provide those services and promote those activities that contribute to meet the needs and aspirations of the municipalities that comprise it, without prejudice to the competences that belong to other public administrations.*

The second paragraph above seems to adopt a relatively expansive competence, lending more attention to the objective than to the particular power and matter. "Promote those activities that contribute to meet the needs and aspirations of the municipalities" seems to include activities that facilitate the development of municipal competences, but could go even further because it talks of meeting "needs and aspirations". Both needs and aspirations can go well beyond municipal jurisdiction in the strict sense. Therefore, it provides for a broad capacity to promote local interests.

The promotion of employment and fostering of social cohesion are competences expressly conferred to the Metropolitan Area by the Act regulating its creation. In this respect, Article 14 LAMB, on "general competences", establishes that the following competences belong to the Barcelona Metropolitan Area:

> *G. Economic and social development*
>
> *In the area of economic and social development and trade, the Barcelona Metropolitan Area has the following competences:*
>
> *a) To foster economic activity and promote employment and business creation in the fields of industry, trade, services and tourist resources.*
>
> *b) To promote a Metropolitan Strategic Plan to encourage, with the participation of economic, social and institutional actors, modernisation, research and innovation.*
>
> *H. Social and territorial cohesion*
>
> *In the area of social and territorial cohesion, it is the responsibility of the Barcelona Metropolitan Area:*
>
> *a) To promote the implementation of common public policies with regard to municipal services and services fostering social and territorial cohesion, with the aim of improving the living conditions of its citizens and the territorial balance of the municipalities that comprise it.*

Trade union funding could be encompassed by competence over employment matters insofar as trade unions safeguard conditions of employment (information, monitoring, control and negotiation on work conditions), access to employment (through, for example, courses and other training instruments), preservation of jobs (by controlling and negotiating individual and collective dismissal procedures or proposing and discussing new employment policies). Furthermore, insofar as trade unions safeguard decent material, legal and economic conditions of the workers of the metropolitan area, it could be argued that their funding forms part of the promotion of policies fostering social cohesion (for example, through the preparation, participation, debate and dissemination of these public policies fostering cohesion).

Note that these competences use the verbs "promote" and "foster", which afford a link with the abovementioned promoting and fostering activity of public administrations, often exercised on the basis of the power to award grants. Promoting and fostering competences are typical of supramunicipal authorities in Spain, which often operate in competition with other administrations. Here, then, the principle of avoiding duplication set forth in the Local Administration Rationalisation and Sustainability Act (LRSAL) does not seem to be of crucial importance (rather, this would refer more to services provided directly by local authorities).[36] Moreover, these competences are closely linked to some of the general principles of social justice and cohesion, which govern, together with others, the actions of the Metropolitan Area (Article 1.4.*e* LAMB).

Lastly, we should also consider the power of self-organisation, by virtue of which a supramunicipal local authority such as the Metropolitan Area (Article 1 of the Act) could justify grants for defraying expenses related to institutional representation functions, or otherwise to representation, protection or training functions of public employees of the AMB or even of the municipalities that comprise it.

7.5. The General Statute on Grants (LGS) and the AMB's General Ordinance on Grants (OGS)

Unlike in the previous cases, as far as trade union funding is concerned the provisions of the LGS should be applicable.[37] Consequently, it is advisable to take another look at the general principles contained in Article 8.3 LGS and reproduced in Article 6 OGS which we need to observe:

a) Publicity, transparency, objectivity, equality, non-discrimination and competitive tendering.
b) Effectiveness in the compliance with the objectives set by the AMB.
c) Efficiency in the allocation and use of public resources.

It is important to mention the possibility of direct award as a possible exception to the principle of competitive tendering. In this respect, Article 6.*a*) of the OGS specifies "only the principle of competitive tendering is inapplicable to expected cases of direct awarding". The rest of the principles (publicity, transparency, objectivity, equality and non-discrimination) would still be applicable in the event of direct awarding. Article 11 OGS regulates grants that can be "awarded directly, neither competitive tendering nor prior publicity being mandatory", among which it singles out "a) When they are earmarked in general budgets of the AMB, either in the initial budget or in subsequent modifications approved by the Board, or in any of its Annexes." Under Article 22.2.*a*) LGS, earmarked grants in the local authority's budgets can be awarded directly. According to Article 65.1 of the General Regulation on Grants:

> *For the purposes of Article 22.2 a) of the General Statute on Grants, earmarked grants in the Budgets of the State, Autonomous Communities or Local Authorities are those whose purpose, budget allocation and beneficiary are expressly determined in the statement of expenditure of the budget.*

Some scholars have added, as one of the general principles of the grant system, the principle by virtue of which the amount subsidised shall be less than the cost of the activity, and the grant must not represent a profit for the person who receives it.[38] This principle is not mentioned, however, in the LGS or its Regulation. Nevertheless, the principle can be deduced from Article 123.4 ROAS when it states that "Grants should not normally exceed 50% of the cost of the activity to which they are applied." In particular, Article 7 of the OGM of the AMB, on the amount of grants, reads:

> ***1.*** *The amount of the AMB grant shall not normally exceed 50% of the cost of the activity or project to which it is applied. If this limit is exceeded, it must be justified in the grant award dossier and this justification shall be included specifically in the agreement proposal to the appropriate government body. In no event shall it exceed the total cost of the subsidised activity or project.*
>
> ***2.*** *The amount of the AMB grant, together with that of any other grants awarded for the same purpose by other public administrations, cannot exceed the cost of the subsidised work or activity.*

7.6. Internal and external controls

According to Additional Provision 14 LGS, the ordinary internal and external controls stipulated in the Statute on Local Finances (Articles 213 and following) are applicable to grants to trade unions. Therefore, unlike in the case of political groups, the Plenary does not have discretionary power (in the absence of normative deployment of Article 73.3 LBRL).

In this respect, Article 27 of the AMB's General Ordinance on Grants (OGS) states:

1. *Financial control over grants is exercised by the Metropolitan Audit Office regarding the beneficiaries, in accordance with Article 214 of the recast text of the Statute on Local Finances.*

2. *The purpose of financial control is to guarantee the adequate and correct obtainment of grants, compliance with charges and obligations in the management and application of the grant, correct justification of subsidised expenses, the veracity and regularity of the operations and the adequate and correct funding of the activities subsidised. This control may consist of the examination of the accounting records, accounts and financial statements of the beneficiaries of the grant, the material verification of the investments financed and any other check that may prove necessary in view of the special characteristics of the activity subsidised.*

3. *Beneficiaries and third parties related to the object or the justification of the grant shall be obliged to cooperate and facilitate all documentation required of them in the performance of financial control duties.*

4. *When in the performance of financial control duties evidence is found of incorrect obtainment, destination or justification of the grant received, the Metropolitan Audit Office shall make a proposal to take proportionate and precise cautionary measures in order to impede the disappearance, destruction or alteration of the documents relating to the operations in which this evidence has been found.*

8. Three possible conclusions

I. Local financing of political groups may become a form of indirect political party funding, subject to the qualifications, conditions and restrictions derived from Section 5 of this article. It is important to insist specifically on the need for appropriate rules for the deployment of the basic provisions contained in Article 73.3 LBRL.

II. Local authorities, including the AMB, can fund political parties directly, subject to the qualifications, conditions and restrictions derived from Section 6 of this article. Local rules, however, must so provide and regulate. In particular, regulation should guarantee an equitable distribution among the various political parties present in the specific territory in which the local authority has jurisdiction. Regulation should avoid confusion between financial allocations to parties and financial allocations to groups.

III. The AMB can subsidise certain trade union activities, subject to the qualifications, conditions and restrictions derived from Section 7 of this study. In particular, a connection with local competences and interests is needed and trade union pluralism and fair competition between them shall be respected.

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Notes

1 See Rodríguez Teruel; Casal Bértoa (2016) "La financiación pública de los partidos políticos: España en perspectiva comparada".

2 See Van Biezen (2015) "Financing political parties and election campaigns – guidelines".

3 This information is difficult to find aggregated and analysed together.

4 The distinct typography in the quotes throughout this article has been added by the author to highlight their principal fragments and for ease of reading.

5 See Santano (2016) La financiación de los partidos políticos en España, p. 63 ff.

6 And lastly, when public funding is aimed basically at political parties, this may generate a predominance of the party over its candidates. As regards private funding, intensive funding by members would appear to reinforce the party, but funding from beyond party members may reinforce certain candidates insofar as the private funds depend on these individuals or are channelled towards financing their particular line within the party.

7 See Santano (2016) La financiación de los partidos políticos en España.

8 See Court of Auditors Reports on accountability of political parties. See also Rodríguez Teruel; Casal Bértoa (2016) "La financiación pública de los partidos políticos".

9 See Court of Auditors Reports on accountability of political parties for 2014 and 2015. On donations by elected representatives, see Van Biezen (2015) "Financing political parties and election campaigns".

10 Rodríguez Teruel; Casal Bértoa (2016) "La financiación pública de los partidos políticos".

11 See Van Biezen (2015) "Financing political parties and election campaigns".

12 Rodríguez Teruel; Casal Bértoa (2016) "La financiación pública de los partidos políticos".

13 At least as regards the everyday operation of political parties, which would include indirect funding through parliamentary and local government groups. See Rodríguez Teruel; Casal Bértoa (2016) "La financiación pública de los partidos políticos".

14 See Judgement 18/2011 of the Court of Auditors.

15 The obligation of keeping the accounts of the allocation is, however, independent of whether the plenary requests them or not. They must be available in case it decides to do so, without prejudice to the request being made within a reasonable period of time.

16 "From the inherent nature of the group and the wording of Article 73.3 of the LBRL, we deduce that we are faced with a grant of an earmarked nature, the purpose of which is to facilitate the running of the group with a view to its corporate action." Olea Romacho (2016) "La fiscalización de las dotaciones económicas a grupos políticos municipales".

17 Based on the LBRL in its own and not on its developing legislation, the Superior Court of Andalusia referred, in form of obiter dictum, to the "economic allocation for their functioning, following a similar regulation as the one provided by the Rules of Procedure of Congress for their political groups" (Judgement 16898/2001, of 29 November 2001).

18 See Van Biezen (2015) "Financing political parties and election campaigns".

19 An analogous option could be to attribute a role to the Special Accounts Commission of the local council, set out in Article 116 LBRL (also provided for in the AMB).

20 A more consolidated example of parliamentary regulation that it is also advisable to bear in mind is the content of Article 29 of the Rules of Procedure of the Parliament of Castile-La Mancha. See Mirón Ortega (2001) "Subvenciones y contabilidad de los grupos parliamentarios".

21 See Court of Auditors Report 12/2017.

22 By way of example, Resolutions 6/2018, 20/2018 and 22/2018 of the Commission of Guarantees on the Right of Access to Public Information (GAIP). As a consequence of these and other similar resolutions, the GAIP has approved, making use of its guidance role in matters of active publicity, Criterion 1/2018, on the compulsory nature of active publicity of grants to political groups in local corporations.

23 See Franch i Saguer (2009) "L'activitat de foment a l'Administració local: la subvenció".

24 See Olea Romacho (2016) "La fiscalización de las dotaciones económicas a grupos políticos municipales".

25 The Supreme Court ruled similarly in its Judgement of 3 July 2012 (Appeal 4270/2011).

26 This may be related, more directly or less so, with the quite widespread disaffection that is felt towards political parties and their members.

27 With the exception, perhaps, of activities aimed at citizen education and participation within the AMB. However, such activities should be funded with great respect for political pluralism and non-discrimination between parties.

28 The funding of party political foundations is beyond the scope of this study.

29 By analogy, the jurisprudential analysis on trade unions in the following section will be relevant.

30 See Lahera Forteza; Landa Zapiraín (2017) "La Financiación pública de los sindicatos: fundamentación jurídica y alternativas".

31 Van Biezen (2015) "Financing political parties and election campaigns".

32 At least on the strength of the information available on recent accounting years published on the websites of UGT and CCOO.

33 This open door to the earmarking of public subsidies will entail incorporating a subsystem within the general system, which will have as beneficiaries the most representative trade union organisations, which usually perform the specific functions that are subsidised. The justification, in these cases, of the expenses derived from these actions will be fundamental, so this specific direct public funding will give rise to greater administrative control mechanisms than those associated with general funding. Lahera Forteza; Landa Zapiraín (2017) "La Financiación pública de los sindicatos: fundamentación jurídica y alternativas".

34 See TORRES PÉREZ (2011) La projecció de la potestat subvencional sobre la distribució competencial.

35 See Court of Auditors Report 12/2017.

36 Furthermore, the competences expressed in this section seem sufficient to preempt or neutralise the will and philosophy of the LRSAL of avoiding local expenditure beyond own and delegated competences. See Article 7.4 LBRL.

37 This is corroborated by the Recommendation 2/2017 of the Transparency Agency.

38 Franch i Saguer (2009) "L'activitat de foment a l'Administració local: la subvenció", p. 537.

Torrelles de Llobregat.
Catalunya en Miniatura
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ULTIMATE GOAL: A CULTURE OF INTEGRITY

We are celebrating our tenth anniversary: the Law on the Anti-Fraud Office of Catalonia was passed by the Catalan Parliament in November 2008. This is the first anti-corruption agency to exist in Spain. Our elected representatives successfully anticipated the demands of a civil society that in recent years has focused on corruption as one of the main problems it faces. This phenomenon has become a central character on the public stage, and has occupied front pages of newspapers, hours of news on all the media and never-ending discussion threads on social networks. Over this decade, this phenomenon has come to form part of public life, and should form part of the public agenda of any government in the shape of strategies and plans to fight this social scourge. Plans that for the time being, it should be noted, go by sector and are disconnected from an overall strategy.

In this context, in order to effectively combat this "evil phenomenon", as it is defined by the United Nations Convention, the rejection of society is not enough; we also need its commitment to a culture of integrity. The struggle against corruption requires not only public powers, but also the private sector and civil society.

I attempt to explain the conformism we see in the statements made by several scholars who remind us that cases of corruption have occurred throughout history, in all geographical regions and under political regimes of all sorts. This observation goes hand in hand with the comment that where there are people there is a risk of corruption. These statements are indisputable; however, they must not serve us to slump into inaction and accept that this is an inevitable phenomenon, since if we were to accommodate our-

selves to such a pessimistic attitude we would be perpetuating the current status quo.

Every day, thousands of public servants act with the utmost rectitude and professional ethics. Nevertheless, we cannot deny that wherever decision-making capacity and public resources coincide there is a risk that someone will abuse them. We at the Anti-Fraud Office understand that addressing risks gives us a new angle on the phenomenon, and focuses public policies towards risk prevention and management. Once we have assumed that this risk can happen, we can identify the probability of it actually happening, take measures to reduce this probability, and lastly, plan actions to minimise the consequences if it does happen.

Prevention means administering risks. Today it is a requirement of good governance for the entire public sector to take on board that the concurrence of decision-making power and access to public resources creates the conditions for someone to be able to abuse that power to obtain private benefit. Limiting ourselves to trusting that it won't happen to us is proof of bad administration. For this reason, prevention strategies must necessarily be incorporated into the management agenda of our institutions in an overall and coordinated fashion among all the actors involved.

Preventing corruption inevitably entails managing these risks. If we identify them, evaluate them and deal with them appropriately, we will get to the root of the problem, the structural weaknesses that facilitate corruption. I dare to predict that the day will come when this exercise will be a mandatory rule, as has happened, for example, with health and safety at work.

However, we need to ask ourselves whether preventing corruption is enough. Whether this is enough to guarantee institutional integrity. What about those conducts that are not acts of corruption yet go against the rules or the principles and values that inspire a public institution?

This is where the concept of institutional integrity comes in. The real goal to pursue is to achieve integral organisations. Only when organisations are integral can they guarantee the citizens that they use their powers and resources to the ends for which they were created.

Integrity is coherence and consistency between what we do and the values, principles and rules that govern a given institution in securing the general interest. The legal framework is, of course, an unavoidable minimum, but it is not everything. Public ethics requires the decisions that are reached to be respectful and caring of others, and this is not achieved by just going by the book; it takes more than that. And threats to integrity take such diverse forms as corruption, fraud, irregularities and misconduct.

The ultimate goal, then, should be to encourage integrity within public institutions, using prevention tools as a deterrent. In fact, the Anti-Fraud Office is committed to the model known as the public integrity system, which is based on a threefold foundation: an ethical organisational culture, professionalism in public management and risk prevention for integrity.

The degree of integrity of a public institution is the result of the work done on a day-to-day basis by the individuals who form part of it and/or work for it. All of them without exception are responsible for giving coherence to the values, rules, principles and obviously the institutional integrity of the body.

Only through a model of institutional integrity, which should form an inseparable part of an overall plan to combat corruption, can we come close to the standards of European countries that we look up to, such as Denmark or Finland. And organisations with high integrity levels not only reduce the probability of cases of corruption, which is our final objective, but are also more efficient and serve citizens better.

Miguel Ángel Gimeno

Sant Adrià de Besòs. Centre Matern Infantil de la Mina, teenage mothers support centre
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MOTHERS BEFORE TIME

In the teenage maternity centre of La Mina, Kim Manresa portrays three mothers holding their children. The photographer captures the precise moment in which the mothers' faces are concealed behind the bodies of the babies. Behind the artistic sensitivity to guarantee their anonymity, there is a symbolic element in this photograph: the birth of these children has also effaced the identity of these girls in their everyday environment. From now on, they will above all be distinguished by being young mothers, mothers before time. This will determine their present and future, because they will have to look after a child, and maternity will absorb them in all other areas of their lives in a vicious circle.

Between 60% and 90% of pregnancies in teenage girls are undesired or unplanned. These figures vary according to the sociocultural environment. Every year in Catalonia, some 1,200 women have children before the age of 19, and about 20 before the age of 15. Pregnancy in this vital stage, in which young women are still undergoing physical, psychological and emotional development, has adverse effects on their health and that of their babies. It also has negative effects on their social and economic wellbeing and, above all, on their education. In most cases they do not finish compulsory education. Maternity radically decreases their job opportunities and they therefore become more vulnerable, with a greater risk of poverty, social exclusion and dependence.

Although abortion is made available to them (sometimes crudely and traumatically), many girls in Catalonia—and the vast majority of those of Latin American origin—decide to give birth. These teenagers have no life project and suddenly find one that seems exciting: motherhood in the most naïve sense, that of taking care of an angelic baby, becoming impor-

tant for that person and taking on a noble responsibility. They even see it as a guarantee of personal stability. For the first time, they are the protagonists in someone's life. Motherhood finally gives meaning to their existence, but the path they will encounter will be full of difficulties.

We live in a society that favours precocious sexual relations. The social references and the media lead teenage girls to quickly develop attitudes, behaviours and fashions. They are slaves to the most traditional patterns. They long to have a sentimental relationship because it is often the only thing that makes them feel accepted or gives them the clear role in life that society has failed to offer them. The most primal instincts that appear in adolescents are combined: the feeling of invulnerability in the face of danger, immediate gratification, and curiosity to experience new, stimulating experiences. Young mothers have not learned to discuss or negotiate with regard to affectivity and sexuality.

Motherhood suddenly disrupts their everyday life. Having a child at this age is a crisis that overlaps with another one: that of adolescence. It is a fallacy that maternity gives them a sudden maturity that automatically transports them to adulthood: they do not stop being who they are. They suffer emotionality, the accentuation of previously unresolved conflicts, immaturity and insecurity. And they also have the desire to go out, have fun, and move away from the family nest. Pregnancy will change their present and future, but not for the better.

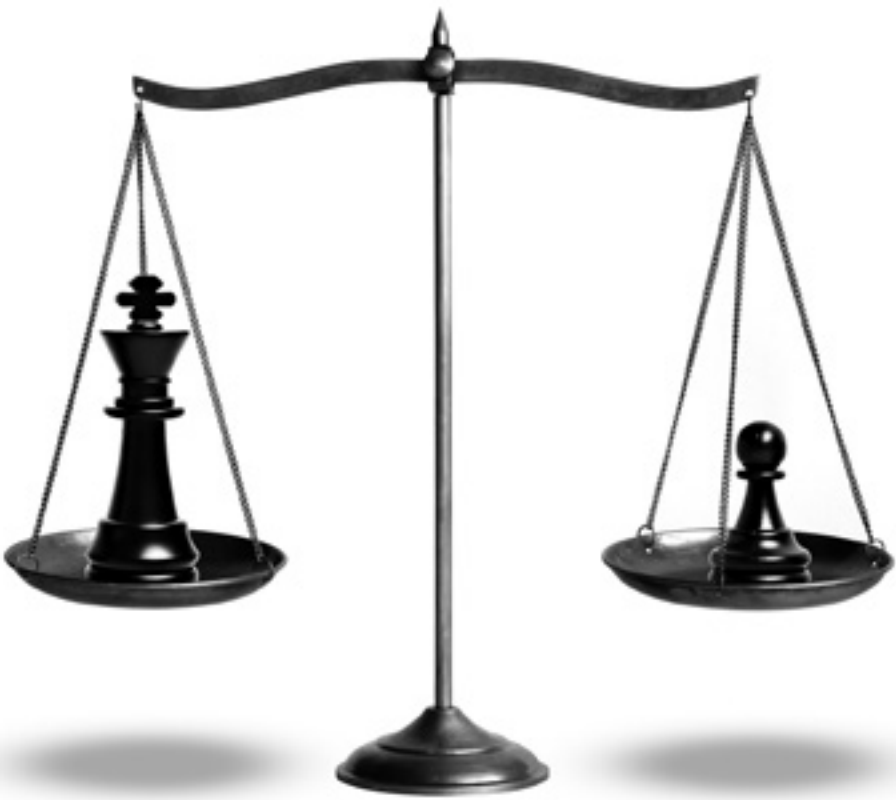
It is not that they do not love their children, but they are a burden that hinders their integration and their development. Young mothers often come from unstructured families and disadvantaged backgrounds that do not offer them the help they need. The midwives of the maternity centres for adolescents find themselves acting as therapists who advise them on managing their new lives:

they help them to continue studying, recommendations for their relationships and help to establish links with institutions to accompany them in this process. Maternity centres teach them how to become mothers, but it is hard for them to learn what they may not have experienced at home if their background is as unstable as the one they have just created.

It has been proven that if teenagers can talk to their doctors and nurses about intimate matters, it is also easier for them to start doing so with their partners. Therefore, it is necessary to establish a more effective network of prevention in adolescents at risk. It is necessary to innovate in sexual education in all fields, because up to now there have been some people missing from this story: the fathers. The majority of teenage mothers end up being also single mothers. And many complain that they feel rejected when they try to establish new sentimental relationships: the burden of a baby puts people off.

The mothers in the photo are the protagonists. They were in a maternity centre with their babies on their laps one summer afternoon. They have taken on a role ahead of time, unaware of the path they have chosen. They were responsible for contraception and the ones who had to make the decision. They feel practically obliged to put an end to the other facets of their lives in order to bring up their children. They feel the disapproval of a society that pushes them to grow up and then rejects them. When a teenage mother was asked about her future and that of her son, she only replied: "When I am 30, he will be 15." This irrelevant fact in a life project is what she is looking forward to. When she is thirty, will she be able to bring up another teenager?

Mònica Planas



JORDI DURÓ

CONTRIBUTORS

Contributors to this issue

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Gemma Calvet is a lawyer with a Master's Degree in Social Policies and Human Rights from the University of Barcelona and postgraduate studies in Diplomatic Law from the Barcelona Bar Association. She is now director of the Barcelona Metropolitan Area (AMB) Transparency Agency. Since 1991, she has practised as a lawyer and consultant in the fields of criminal law and human rights. She has been an independent MP in the Catalan Parliament, where she was rapporteur of the Transparency Law. She has written several books and has contributed for over 14 years in many media. She is a member of the association European Democratic Lawyers.

Jordi Duró is a graphic designer. He has worked in the USA, at Louise Fili's prestigious studios, and later on as a contributor to Pentagram in Paula Scher's team. He is co-founder of the magazine Scope, and founder and creative director of the design and branding studio Duró. At present he also teaches at Pompeu Fabra University and EINA School of Design. He has been vice-president of the Art Directors and Graphic Designers Association (ADG-FAD). He has had his own graphic opinion section in the newspaper Ara since it was founded.

Miguel Ángel Gimeno has a Degree in Law from the University of Barcelona and a Postgraduate Degree in Catalan Civil Law from the Open University of Catalonia. In December 1982 he entered the judiciary, where he has assumed numerous responsibilities as a judge and magistrate, including president of the High Court of Justice of Catalonia (TSJC) from 2010 to 2015. In July 2016 he was appointed as director of the Anti-Fraud Office of Catalonia. He has combined his judicial career with teaching at the Police College of Catalonia, the Autonomous University of Barcelona, the University of Barcelona and the Bar Association of Barcelona. He has also been a speaker at a great many workshops, conferences and courses and has written several specialised publications.

Kim Manresa is a European photographer. He has used photography as a tool for social criticism. He has won numerous awards, and his photostories on child prostitution, poverty and female genital mutilation have generated great interest and a new vision of these problems. His photostory "The day Kadi lost part of her life" has been selected by the agency Associated Press as one of the 100 best photostories of the 20th century. He has produced more than 30 books, some of which have been published in several languages (Catalan, Spanish, Basque, Portuguese, French, English, Arab, Turkish and Korean).

Marc Molins Raich is a doctor in law and a lawyer specialised in economic criminal law, probative law and criminal law procedure. He has had the occasion to defend natural persons and both public and private organisations in all kinds of judicial proceedings. He complements his professional practice of law with a commitment to continuing education through the publication of many articles on the discipline in specialised books and journals, participation in fora and debates on the discipline, and holding a stable position as a teacher at the Faculty of Law and in the organisations responsible for training lawyers.

Mònica Planas is a freelance journalist and television critic. At present she writes in the newspapers *Ara* and *El Mundo Deportivo*. She has worked at Catalunya Ràdio, RAC1 and TV3 and has done external contributions at 8tv, *Avui*, *La Vanguardia*, *Sàpiens* and *El Món d'Ahir,* among other media. She has taught Journalism at Ramon Llull University for 10 years. In 2015 she was awarded the Prize for Non-Sexist Communication by the Association of Women Journalists.

Ester Pujol is a historian by education and a publisher by profession. She has been editor of Columna Edicions and editorial director of Grup 62 (from 2011 to 2014). At present she is an editorial consultant and contributes to the radio stations Catalunya Ràdio and RAC1. She is editorial director of the Llibreries division at Enciclopèdia Catalana.

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Francesc Torralba has a PhD in Philosophy from the University of Barcelona (1992) and a PhD in Theology from the Faculty of Theology of Catalonia (1997). Currently he is director of the Athos Chair at Ramon Llull University and chair of several ethics committees. He is a member of the Board of Directors of SOS Children's Villages and a fellow of the Royal European Academy of Doctors. His philosophical work, translated into more than seven languages, includes over 100 titles. His latest book is *Món volàtil* (Volatile World), published by Columna.

SUMMARY

LUX BARCELONA

Light (*Lux, lucis* in Latin). «Physical agent, one of the forms of energy to which eyes react, making things visible».

This magazine, supported by the Barcelona Metropolitan Area, aims to be a converging point for brainstorming and generating useful materials for good governance. It is well aware of the unique opportunity to work for a contemporary humanism which adopts the challenges that the 21st century democracies are facing. Public policies must dig down to the roots for them to guarantee the future of an ethical and fair society. In this matter, the metropolitan administration is a governance tool for cities, and thus it cannot disregard the democratic transformation. This series of texts intend to lead this transformation and shed light on the idea of good governance that had illuminated the world during the Enlightenment.

The director of the Transparency Agency, **Gemma Calvet**, begins this second volume of the magazine *Lux Barcelona* with a reflection on how the obstacles of bureaucracy, administrative habits and difficulties on public-private collaboration can affect transparency and how the *Code of ethics and conduct for senior officials of the AMB and related bodies*—which is reproduced in its entirety in this issue—can help surmounting these adversities.

In addition to the *Code of ethics*, which is the basic document for good governance, this volume contains two mainstays in this field: *Guide to the identification and prevention of criminal risks in the Metropolitan Area of Barcelona and its associated and dependent entities*, by **Marc Molins Raich**, and the reflection made by **Pau Bossacoma i Busquets** on *Metropolitan funding of political groups, political parties and trade unions.*

The magazine is completed by four insights that, under the heading of "Lighthouse", invite us to reflect from a humanistic perspective. The beam of our lighthouses is shone by **Begoña Román**, **Francesc Torralba**, **Miguel Ángel Gimeno** and **Mònica Planas**. The gaze of the photographer **Kim Manresa** and the illustrations of the graphic opinion leader **Jordi Duró** enrich the global vision sought by the magazine.

AMB Transparency Agency