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**2020 Rule of Law Report
Country Chapter on the rule of law situation in Spain**

Accompanying the document

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
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**2020 Rule of Law Report
The rule of law situation in the European Union**

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ABSTRACT

The Spanish justice system is facing challenges concerning its efficiency, with increasingly lengthy court proceedings. To address this issue, a new Code of Criminal Procedure aiming at accelerating criminal proceedings is in preparation, as well as a draft law on procedural and technological measures. The use of electronic means is well established in the justice system and further improvements are being implemented, while certain issues remain, especially regarding the interoperability among the systems used in different regions of the country. The situation of the Judicial Council is another challenge, in particular given that its new members have not yet been appointed. The relation between the Prosecutor General and the executive is subject to discussion, in particular the regime of the appointment and term of office of the Prosecutor General, as well as the registration of the communications with the Minister of Justice.

Spain has strengthened its anticorruption framework in recent years both on the preventive and repressive dimensions. While Spain has no overarching anticorruption strategy, the National Strategy against Serious and Organised Crime, adopted in February 2019, has the objective to improve investigative capacity and access to financial databases and to improve inter-agency cooperation. Although the Criminal Code and Criminal Procedure Code were revised in February 2019, new draft legislation amending the Code of Criminal Procedure is being prepared. As a result, Spain has put in place an improved legal framework for integrity in the public sector, strengthening the integrity mechanisms in Parliament, as well as reinforcing the regime of asset disclosure, conflict of interest and incompatibilities of high-ranking officials in the central state administration. An extended statute of limitations now exists for serious offences, and corruption-related crimes can be sanctioned more severely, including with a longer period of disqualification from public office. Legislative changes concerning lobbying and strengthening whistle-blower protection, and an omnibus anti-corruption bill have been proposed but not yet adopted. A new ethical code for members of Parliament was adopted in April 2019, establishing a Parliamentary Office of Conflicts of Interests to oversee its implementation.

The Constitution enshrines the rights to freedom of expression and media freedom, as well as the right to information. While the television and radio sectors are subject to reinforced ownership transparency requirements, this is not the case for the print media sector. The information available in the companies' registry (*'registro mercantil'*) is the same as for any other kind of company in Spain and is difficult to understand for the general public. Concerns were raised about new legislation on public security, allegedly restricting the freedom of information and the freedom of expression.

The process for enacting laws foresees guarantees of transparency and the involvement of stakeholders, in particular through public consultations. The transparency framework continues to be implemented and all Spanish regions now have their own legal framework in this area. The Government's legislative initiative and its right to issue decree-laws are subject to the control of Parliament and of the Constitutional Court. The Ombudsman has an extensive mandate, which it can exercise in defence of citizens' rights. The Government has been developing open government policies with the aim of further involving citizens in the development of public policies.

I. JUSTICE SYSTEM

The Spanish judicial system is composed of courts of general jurisdiction¹ and specialised courts², and is structured in accordance with the territorial organisation of the country. The Supreme Court is the highest judicial body in all areas of law. The Constitutional Court has jurisdiction over constitutional matters as well as individual applications concerning due respect for fundamental rights. The General Council of the Judiciary, established by the Spanish Constitution, is the body of judicial self-governance, and ensures the independence of courts and judges³. As such, it does not form part of the judiciary itself. It exercises disciplinary action and is competent to appoint, transfer and promote judges, as well as responsible for the training and recruitment of judges. The public prosecution service is integrated in the judiciary with functional autonomy, and pursues the mission of promoting justice in defence of the law, the rights of the citizens and the general interest. The Prosecutor General is appointed by the Head of State, upon proposal of the Government, following the consultation of the General Council of the Judiciary⁴. The Local Bars are public law organisations of professionals, independent from the public administration and do not depend on the budgets of the public authorities, nor are their assets public. They have competences for the organisation of the profession and professional deontology, and approve their own Code of Ethics.

Independence

The Council for the Judiciary has been exercising its functions *ad interim* since December 2018. According to the Constitution, the Council consists of the President of the Supreme Court (who chairs) and of 20 individuals – 12 judges or magistrates, and 8 lawyers or other jurists of recognised competence with more than fifteen years of professional practice⁵. Parliament is responsible for the appointment of the judicial members of the Council⁶, upon receiving from the Council a list of candidates who have received the support of a judges' association or of 25 judges⁷. The appointment of new members of the Council is subject to a qualified majority of three fifths s. In the context of the two general elections held in 2019, such a majority was not reached and the members of the Council have remained in place *ad interim* until a new Council is elected. Professional associations have called for a renewal of the Council⁸, and have legally challenged the competence of the acting Council to

¹ Covering the fields of civil, criminal, administrative and social law. In total, there are 2269 first instance courts of general jurisdiction.

² Commercial courts, EU trademark courts, Courts with special duties in the matter of criminal sentencing, juvenile courts, courts dealing with violence against women, and other specialised courts that can be created by resolution of the General Council of the Judiciary. In total, there are 1465 first instance courts of specialised jurisdiction.

³ Art. 117 of the Spanish Constitution enshrines the independence of magistrates and judges.

⁴ Art. 124(4) of the Spanish Constitution.

⁵ While the Constitution requires the eight attorneys and other jurists to be appointed by a three-fifths majority in each chamber of the Parliament (four by the Congress and four by the Senate), it does not specify how the members representing judges are to be appointed (Art. 122(3) of the Spanish Constitution).

⁶ Of the 12 members who must be Judges or Magistrates, 6 are elected by Congress and 6 by the Senate, from a list of 36 candidates proposed by associations of judges or by non-associate judges (Art. 567 of Organic Law 6/1985).

⁷ Figures 51 and 52, 2020 EU Justice Scoreboard. To be noted that according to Council of Europe recommendations, not less than half the members of such councils should be judges chosen by their peers (Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe states, para. 27).

⁸ El Pais, *Los jueces exigen al ministro la renovación cuanto antes del Poder Judicial*, 20 February 2020.

continue with appointments for top judicial positions⁹. While the law foresees that the Council remains fully functional until a new one is in place¹⁰, the Council decided, in January 2020, to suspend the appointments for judicial positions¹¹. However, in May 2020, the Council restarted the appointments¹². The acting president of the Council has repeatedly brought to the attention of Parliament the need to proceed with the nomination of the members of the Council¹³. The acting president has also referred to the current circumstances as an ‘institutional anomaly’, and warned that the prolongation of this situation could discredit the Council¹⁴. The Council of Europe has noted that these developments confirm the importance of ensuring that the Council is not perceived as being vulnerable to politicisation¹⁵.

The level of perceived judicial independence is average. Since 2016, citizens’ and companies’ perception of independence of courts and judges has fluctuated considerably. In 2020, there was a slight improvement in comparison to the previous year, both among the general public (44% perceive it as ‘very good’ or ‘fairly good’) and companies (42% perceive it as ‘very good’ or ‘fairly good’)¹⁶.

The relation between the Prosecutor General and the executive is being discussed. The Prosecutor General is appointed by the Head of State, acting on a proposal of the Government, from among eminent Spanish jurists with more than fifteen years of effective practice. Before proposing a candidate, the Government must have heard the General Council of the Judiciary, and the candidate’s suitability must have been assessed by the corresponding committee in the Congress of Deputies¹⁷. The Supreme Court can exercise an *ex post* control of the legality of the appointment. The Government has no powers to dismiss the Prosecutor General. However, the Prosecutor General’s mandate ends at the same time as the Government’s mandate¹⁸. This system has been subject to criticism considering in particular that the coincidence in the term of office may affect the perception of independence¹⁹. The Council of Europe has highlighted that, for public confidence, it is not only crucial that prosecution is, but also appears to be impartial, objective, and free from any influence, particularly of political nature²⁰. The Council of Europe acknowledged that this issue had been duly considered, but urged the authorities to take more substantiated improvements to provide for greater autonomy of the prosecution service, in particular, with respect to transparency of communication with the Government²¹. The Prosecutor General acts in an

⁹ Order of the Civil Section of the Supreme Court, of 5 June 2019.

¹⁰ Art. 570, Organic Law No. 6/1985, of 1 July. The Council in functions *ad interim* is not limited in its competences, except as regards the possibility to elect a new President.

¹¹ Press release of the Council of the Judiciary of 16 January 2020.

¹² The appointments were then discontinued in July. The Council announced that they would be resumed in September.

¹³ Press release of the Council of the Judiciary of 15 July 2020.

¹⁴ Press release of the Council of the Judiciary of 23 December 2019.

¹⁵ GRECO, Fourth Evaluation Round – Corruption prevention in respect of members of Parliament, judges and prosecutors, Second interim compliance report, Recommendation v. (para 29 and 32 relating to the need to remove the selection of the judicial shift from politicians).

¹⁶ Figures 44 and 46, 2020 EU Justice Scoreboard. The level of perceived judicial independence is categorised as follows: very low (below 30% of respondents perceive judicial independence as fairly good and very good); low (between 30-39%), average (between 40-59%), high (between 60-75%), very high (above 75%).

¹⁷ The opinions of the Council and of the Congress of Deputies are consultative.

¹⁸ Art. 31(1)(e), Law No. 50/1981 of 30 December.

¹⁹ GRECO Fourth Evaluation Round – Evaluation report, para 126.

²⁰ GRECO (2013), Fourth Evaluation Round – Corruption prevention in respect of members of Parliament, judges and prosecutors, Evaluation report, para 126.

²¹ GRECO (2019), Fourth Evaluation Round – Second Interim Compliance report, para 54.

independent and impartial manner, and cannot receive instructions or orders from the Government or any other administrative or judicial body. However, the Government can draw the Prosecutor General's attention to relevant actions in defence of the public interest²². While the law determines that all the communication between the executive and the prosecution services should be conducted between the Minister of Justice and the Prosecutor General²³, it does not require this communication to be made public, nor the obligation to register such communications in writing. This has also been raised as a concern by the Group of States against Corruption (GRECO)²⁴. It appears, however, that there is a practice to publish some of these communications via press releases on the webpage of the Ministry of Justice²⁵. Stakeholders draw attention to the importance of ensuring this publicity, in order to dispel any impression of political interference of the executive in the prosecution, and reinforce public trust in criminal justice²⁶.

Quality

Draft legislation amending the Code of Criminal Procedure is being prepared. In April 2020, the Ministry of Justice initiated the procedure for the revision of the Code of Criminal Procedure. In particular, a significant change to the investigative phase is being considered, which will allow the judicial investigation to be led by prosecutors. Currently, the system confers on the investigative judge the power to lead the investigation, while prosecutors can only demand the adoption of precautionary or investigative measures to be taken by the judge²⁷. Stakeholders criticise the current system, linking it to the lack of efficiency of criminal procedures²⁸. In July 2020, Article 324 of the Code of Criminal Procedure was already revised with a view to extending the time limits for the investigations. Stakeholders had called for this revision, as the strict time limits to the investigation were said to be incompatible with the diligence needed when investigating complex cases²⁹.

The use of ICT tools is well established in the justice system and investment in digitalisation continues. In particular, the project 'Justicia Digital', with a strong focus on administrative modernisation and the use of digital solutions in the administration of justice, has been fully implemented. However, interoperability between the management systems used in different autonomous regions remains an issue. The project 'Justicia 2030' plans to integrate ICT services in the field of justice more efficiently³⁰. The purpose of this project is to set a new model of communication with citizens, providing services automatically and

²² Art. 8, Law No. 50/1981 of 30 December. When the Prosecutor General receives a communication from the Government, he/she decides on the viability or appropriateness of the actions requested after hearing the Board of Chamber Prosecutors of the Supreme Court in this respect, and he/she presents his/her decision to the Government in a reasoned manner.

²³ Art. 8(2), Law No. 50/1981 of 30 December.

²⁴ GRECO (2019), Fourth Evaluation Round – Second interim compliance report, recommendation ix.

²⁵ This practice was welcomed by GRECO (GRECO Fourth Evaluation Round – Second interim compliance report, para 57).

²⁶ See, for instance, Asociación de Fiscales (2020), *Contestación de la Asociación de Fiscales a la consulta realizada por la Comisión Europea para el 'Annual Rule of Law Report - stakeholder consultation' (Informe Anual sobre el Estado de Derecho)*.

²⁷ Art. 5, Law No. 50/1981 of 30 December.

²⁸ Asociación de Fiscales (2020), *Contestación de la Asociación de Fiscales a la consulta realizada por la Comisión Europea para el "Annual Rule of Law Report - stakeholder consultation" (Informe Anual sobre el Estado de Derecho)*.

²⁹ Asociación de Fiscales (2020), *Contestación de la Asociación de Fiscales a la consulta realizada por la Comisión Europea para el "Annual Rule of Law Report - stakeholder consultation" (Informe Anual sobre el Estado de Derecho)*.

³⁰ Input from Spain for the 2020 Rule of Law Report.

proactively. The project also includes the development of alternative means for dispute settlement. While digital transformation of justice in Spain needs to be further improved, the country shows a high level of availability of ICT for case management³¹. Spain is also among the Member States that put in place most arrangements for producing machine-readable judicial decisions³². Spain received support from the European Commission to increase the accessibility and the quality of justice by promoting the implementation of cyber justice through a strategic and knowledge-centred approach, as well through a comprehensive change of management and unification or full interoperability of respective ICT systems deployed by the Ministry of Justice and the Autonomous Regions. Spain also received support from the European Union and the Council of Europe for improving the collection of judicial statistics and enhancing the capacity of the office in charge of the victim's support (ICT and institutional support)³³. In the second and current phase of the project, the Council of Europe will support some of the projects of Justicia 2030, such as the feasibility of electronic procedural norms and a handbook on the implementation of digital projects.

The COVID-19 pandemic has had an impact on the functioning of the justice system. Spain declared the state of alarm on 14 March³⁴. Consequently, the activity of courts was limited for the three months during which the state of alarm was in force, with procedural acts being maintained only in urgent procedures, and procedural deadlines being suspended. Stakeholders have voiced concerns that these measures may have an impact on the capacity of the justice system to deal with the backlogs generated and the foreseeable increase in litigation, especially in light of the challenges with efficiency that the system already experienced³⁵. Efforts are undertaken to minimise the impact of the COVID-19 pandemic on the justice system. In particular, new legislation has been enacted, foreseeing special procedural and organisational measures³⁶, but also specific norms for bankruptcy procedures³⁷. The measures envisaged also include a wider use of digital technologies for procedural acts.

Efficiency

The duration of court proceedings in Spain is increasing. The disposition time in civil, commercial and administrative cases in first instance has been increasing since 2016³⁸. It is particularly lengthy for civil and commercial cases in the Supreme Court, where it exceeds 600 days³⁹. Moreover, the rate of resolving cases is also decreasing. In civil and commercial

³¹ Figure 40, 2020 EU Justice Scoreboard.

³² Figure 29, 2020 EU Justice Scoreboard.

³³ Cooperation Programme of the European Union and the Council of Europe, Promoting cyber justice in Spain through change management and improvement of data collection, phase I (November 2018- November 2019, budget: EUR 250,000) and phase II (June 2020- February 2022, budget EUR 370,000).

³⁴ Royal Decree 463/2020, declaring the state of alarm as a result of the health crisis caused by COVID-19.

³⁵ Information received in the context of the country visit and of the consultation process for the preparation of the report; see also press release of the professional association Juezas y Jueces para la Democracia, of 18 May 2020. The Commission has also addressed this issue in the context of the European Semester. Recital 28, Council Recommendation on the 2020 National Reform Programme of Spain and delivering a Council opinion on the 2020 Stability Programme of Spain. https://www.consilium.europa.eu/en/press/press-releases/2020/07/20/european-semester-2020-country-specific-recommendations-adopted/?utm_source=dsms-auto&utm_medium=email&utm_campaign=European+Semester+2020%3a+country-specific+recommendations+adopted.

³⁶ For example, 11 to 31 August were declared working days for procedural purposes.

³⁷ Royal Decree-Law No. 16/2020 of 28 April.

³⁸ Figure 5, 2020 EU Justice Scoreboard.

³⁹ Figure 7, 2020 EU Justice Scoreboard.

litigious cases, the clearance rate fell to 86.7% in 2018⁴⁰. The clearance rate in administrative courts of first instance has also been falling, faring below 100%. As more cases enter the system than those that are solved, this generates a backlog of cases, which is increasing⁴¹. Spain has a good level of efficiency in some specific areas of EU law. In particular, as regards EU trademark infringement cases, the length of proceedings decreased by half in 2018⁴². Regarding consumer protection, the average length of judicial review is short and remains stable⁴³.

Spain is taking measures to increase efficiency in courts. In particular, proceedings to establish a new Code of Criminal Procedure are ongoing, which aims to accelerate criminal proceedings. The Ministry of Justice is also working on a draft law on procedural and technological measures and the implementation of alternative dispute resolution procedures. These measures seek to speed up judicial proceedings, improve its effectiveness and implement measures enabling the current system of the administration of justice to respond in a reasonable and useful manner to the judicial protection sought by citizens⁴⁴.

II. ANTI-CORRUPTION FRAMEWORK

The competences and responsibilities for the development and implementation of anti-corruption policies as well as for preventing, detecting, investigating and prosecuting corruption are shared between several law enforcement authorities. The Office of Conflicts of Interest, established in 2015, is responsible for controlling the asset declaration, while the Council of Transparency and Good Governance, established in 2014, monitors the access to information and compliance with transparency obligations and good governance.

Spain scores 62/100 in the Transparency International 2019 Corruption Perceptions Index and ranks 10th in the European Union and 30th globally⁴⁵. 94% of respondents to the 2020 Special Eurobarometer survey on corruption perceive corruption as widespread (EU average 71%)⁴⁶ and 58% feel personally affected by corruption in their daily lives (EU average 26%). 34% of people find that there are enough successful prosecutions to deter people from corrupt practices (EU average 36%). Almost nine in ten Spanish companies (88%) consider that corruption is very or fairly widespread (EU average 63%).⁴⁷ More than half of the companies responding to the survey (52%) consider that corruption is a problem when doing business (EU average 37%), while 21% of companies believe that people and businesses caught for bribing a senior official are appropriately punished (EU average 31%).

Spain has strengthened its legal framework to cover extensively the criminalisation and prosecution of corruption-related offences, as well as the criminal liability of legal entities for bribery and corruption in international commercial transactions. Two major reforms took place as regards the amendments to the Criminal Code in the last five years. The definition of trading in influence with respect to foreign public employees was amended, and the scope of the offence of private commercial bribery was extended to persons accepting the

⁴⁰ Figure 11, 2020 EU Justice Scoreboard; Figure 11, 2020 EU Justice Scoreboard Quantitative Data Factsheet.

⁴¹ Figure 13, 2020 EU Justice Scoreboard.

⁴² Figure 18, 2020 EU Justice Scoreboard.

⁴³ Figure 19, 2020 EU Justice Scoreboard.

⁴⁴ Input from Spain for the 2020 Rule of Law Report.

⁴⁵ Transparency International Corruption Perceptions Index (2019).

⁴⁶ Special Eurobarometer 502 (2020).

⁴⁷ Flash Eurobarometer 482 (2020).

promise of benefit or advantage⁴⁸. Furthermore, corporate criminal liability was extended to the crime of embezzlement of public resources⁴⁹, and therefore to those legal entities who manage public resources or are responsible for such public resources. An extended statute of limitations now exists for serious offences, and corruption-related crimes can be sanctioned more severely, including with a longer period of disqualification from public office.

There is no dedicated overall anti-corruption strategy in place. However, the Strategy against Organised Crime and Serious Crime adopted in February 2019 establishes fighting corruption as a priority. The Strategy defines, among others, the need to strengthen the access to financial data, cooperation and coordination between the different actors involved in the fight against this form of crime, and to implement measures provided for in the Criminal Convention on Corruption. This issue has also been highlighted by GRECO, which noted that law enforcement authorities, especially the Police and the Civil Guard, could increase their coordination and collectively develop an anti-corruption strategy designed to reinforce internal compliance mechanisms⁵⁰.

The investigation and prosecution of corruption offences is divided between several law enforcement authorities. The Special Prosecution Office against corruption and Organised Crime (ACPO) within the Public Prosecution Service has as main competences to investigate all major cases related to economic offences or any offences committed by public officials in the exercise of their official duties related to corruption⁵¹. Apart from carrying out prosecutorial investigations, ACPO can intervene directly in criminal proceedings in specific corruption crime cases, such as embezzlement of public funds, crimes of influence trafficking, foreign bribery that fall under its jurisdiction.⁵² The investigative work is well supported by the analytical capacities of four units, which include tax inspectors, controllers, law enforcement and specialised police officers. The remainder of cases are dealt with by other prosecution departments and territorial units⁵³. As regards resources, ACPO has 29 prosecutors, including the chief prosecutor. In view of the lack of resources identified in the 2018 annual report⁵⁴, the Government has strengthened the capacity of ACPO with nine further positions in April 2019⁵⁵. As regards the staff allocation, GRECO raised concerns regarding the autonomy of the Prosecution and the Anti-corruption prosecution office, given that the Ministry of Justice decides on staff allocation⁵⁶. According to the data published by the General Council of the Judiciary, 91 (71%) of the cases in 2019 for crimes of corruption were convictions and 26 (29%) were acquittals.

The rules on asset disclosure, conflict of interests and incompatibilities are not consistent across various levels of Government and categories of officials. As regards the prevention of corruption, the regional and local level lack tailor-made preventive strategies. The asset declaration regime is in place and requirements regarding the disclosure of assets,

⁴⁸ Art. 286bis, Law 1/2019.

⁴⁹ Art. 435, Law 1/2019.

⁵⁰ GRECO Fifth Evaluation Round – Evaluation report.

⁵¹ Law 10/1995, of 24 April, amending Law 50/1981, of 30 December, which regulates the Organic Statute of the Public Prosecutor's Office and creates the Special Prosecutor's Office for the Repression of Economic Crimes Related to Corruption: <https://www.boe.es/buscar/doc.php?id=BOE-A-1995-10066>.

⁵² Section 19.4 of the Organic Statute of the Public Prosecutor's Office.

⁵³ OECD, Specialised Anti-Corruption Institutions – Review of Models, Anti-Corruption Network for Eastern Europe and Central Asia.

⁵⁴ Anti-Corruption Prosecutor's Office (2018), Annual report 2018, p. 468.

⁵⁵ Royal Decree 255/2019, of 12 April 2010.

⁵⁶ GRECO, Fourth Evaluation Round – Second interim compliance report.

interests and incompatibilities for senior officials and members of the Government are laid down in the Law 3/2015 of 30 March 2015. The Office of Conflicts of Interest (*'Oficina de Conflictos de Intereses'* – OCI) was established in 2006 and reinforced in 2015. It is responsible for controlling the asset declaration, incompatibilities and conflicts of interest of political appointees, as well as for managing the incompatibility regime of State public employees. The OCI is attached to the Ministry of Territorial Policy and Civil Service, and according to the legislation, it acts with full functional autonomy⁵⁷. The powers of the Office of Conflicts of Interest have increased over the years. There is no permanent mechanism of regular cooperation with similar structures at regional level. However, the OCI assists regional offices upon request⁵⁸.

The Council of Transparency and Good Governance monitors access to information, compliance with transparency obligations and good governance. The Council faces challenges regarding financial and human resources, as noted by GRECO⁵⁹. Some regional pieces of legislation require high-ranking officials to publish their agendas.

Provisions on ethics and conflicts of interests have been established as regards Government and senior officials. Apart from these provisions⁶⁰, however, there is no stand-alone Code for all elected officials. GRECO noted in this regard the need to for a single code of conduct which is accessible to the public and has among others practical measures for implementation⁶¹. On 28 February 2019, the Congress approved its first Code of Conduct⁶². The Code of Conduct establishes the principles governing the behaviour of deputies and determines that the Deputies must take all necessary measures to avoid that they get themselves into situations of conflict of interest. A Parliamentary Office of Conflicts of Interest has the responsibility to verify the content of the statements included in the Register of Interests. Among the changes incorporated in this Code of Conduct, each Deputy must publish his or her institutional agenda in the Transparency Portal of the Congress. This includes meetings held with the representatives of any entity that has the status of an interest group. The Code has also contains a procedure for the imposition of sanctions on deputies in case of infringements.

Whistle-blower protection and lobbying regulation require attention. While the protection of witnesses and experts provides safeguards for those who feel physically at risk,⁶³ Spain lacks a general whistle-blower protection framework, despite some sectorial regulation. In 2019, a new legislative proposal was envisaged to address some of the shortcomings of the system through the Whistle-blower Protection Act, which has not yet been enacted. In June 2020, the Government started working on new draft legislation to protect whistle-blowers. As for lobbying, Spain has no specific legislation in this domain. However, some autonomous regions and municipalities have adopted specific regulations on lobbying practices⁶⁴. This issue has also been raised by GRECO⁶⁵.

⁵⁷ According to Law No. 3/2015.

⁵⁸ European Commission, 2018 Country Report Spain, SWD(2018)207 final.

⁵⁹ GRECO, Fifth evaluation round - Evaluation Report.

⁶⁰ Law 3/2015 and Law 19/2013.

⁶¹ GRECO, Fifth evaluation round - Evaluation Report: p.16.

⁶² Press release of the Congress of deputies, of 2 April 2019.

⁶³ Law 19/1994.

⁶⁴ In addition, a number of public national entities and companies have adopted codes of conduct which address aspects related to lobbying.

⁶⁵ GRECO (2019), Fourth Evaluation Round – Second interim compliance report.

III. MEDIA PLURALISM

The Constitution enshrines the rights to freedom of expression and media freedom. In addition, Spain adopted progressive legislation and developed a comprehensive legal framework for ensuring media pluralism. An independent multi-regulatory body assumes the role of audio-visual regulator. Spain has a National Registry of Audio-visual Communication Service Providers, which can be accessed freely by the public and contains information on owners with significant participation in the capital of service providers.⁶⁶

Regulatory powers for audio-visual media services are entrusted to the CNMC (National Commission of Markets and Competition). The CNMC is a ‘multi-regulator’ created by law⁶⁷ in 2013, with the purpose of consolidating a number of existing regulatory bodies into one entity, responsible for overseeing several fields (competition, energy, telecom, postal services, audio-visual media, as well as railroads and airports). The rationale of this unification was to enhance the respective bodies’ independence, and to provide legal certainty and institutional trust by adopting an inclusive view from regulatory and competition standpoints, aiming to promote the modernisation of the economy to the benefit of consumers. The CNMC has four investigatory directorates (Competition, Energy, Telecommunications and the Audio-Visual Sector, as well as the Transport and the Postal Sector) that report to the President. The relevant investigative Directorate undertakes practical case handling of audio-visual media matters. The CNMC consists of two governing bodies: the Council and the President, who chairs the Council. The Council is the CNMC’s collective decision-making body. It consists of ten members appointed by the Government amongst individuals of renowned prestige and professional competence in the Commission’s areas of activity. Their appointment must be approved by the Parliament upon assessment of their suitability and any potential conflicts of interest. Their term lasts six years, is not renewable, and is subject to strict eligibility requirements. The reasons for termination of the mandate are listed in article 23 of the 2013 law⁶⁸. In accordance with the 2013 law, the regulatory authority is autonomous and fully independent of the Government, public authorities, and all business and commercial interests⁶⁹. The CNMC has earned a solid reputation, and is deemed fully effective and independent in its work. Accordingly, the Media Pluralism Monitor (MPM 2020) report for Spain⁷⁰ considers there is a low risk to the independence and effectiveness of the media authority.

Provisions regarding the transparency of media ownership are enshrined in the General Law for Audio-visual Communication⁷¹. This law creates a National Registry of Audio-

⁶⁶ Spain appears in the 29th position in the 2020 World Press Freedom Index, the same position as in 2019. See Reporters without Borders (2020), World Press Freedom Index – Spain.

⁶⁷ Law 3/2013 of 4 June 2013 creating the National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*).<https://www.cnmc.es/file/64267/download>.

⁶⁸ Law 3/2013, Art. 23, Amongst them “f) Due to removal, ordered by the Government, on account of a serious breach of the duties inherent in their office or breach of the obligations on incompatibility, conflict of interest and the duty of confidentiality. Removal shall be ordered by the Government, independently of the penalty rules that may, as the case may be, apply, following an investigation by the Minister of Economy and Competitiveness”.

⁶⁹ Law No. 3/2013, Preamble and Art. 2.

⁷⁰ 2020 Media Pluralism Monitor.

⁷¹ Law. No. 7/2010 (*Ley General de la Comunicación Audiovisual*). The preamble identifies as one of its main objectives ‘to protect the citizen from dominant positions of opinion or from restrictions of access to universal content of great interest or value’ [...] ‘guaranteeing also pluralism and the protection of civic rights; while establishing clear rules of transparency and competition in a context of coexistence of the public and private sector and liberalization of audio-visual activity’.

visual Communication Service Providers⁷², which can be accessed freely by the public⁷³. As regards shareholding, Article 33.2 of this law dictates that owners of *significant participation*⁷⁴ in the service providers should also appear in the Registry with an indication of the percentage of capital owned. Information is also available in the Company Registry (*‘registro mercantil’*), but it is not exhaustive. MPM 2020 considers that it is difficult even for experts to have a clear idea of who exactly is behind each company and identifies medium risk to media pluralism under this indicator⁷⁵.

Legislative provisions regulate the contracting of state advertising and institutional campaigns⁷⁶. The Secretary of State for Communication verifies that media plans follow objective criteria in the distribution and weight of the different media. The Directorate General for Rationalisation and Centralisation of Procurement of the Ministry of Finance (DGRCC) centralises the contracts of media plans and campaigns proposed by the different administrative bodies and agencies of the State central administration. Occasionally, in function of specificities related to the target public or aims of the campaign, different criteria may be established as long as these do not generate inequalities, in line with the doctrine established by the Constitutional Court rulings 104 and 130/2014.

Media freedom is protected by law. As regards the framework for journalists’ protection, the Constitution provides the baseline, as it enshrines the freedom of the press, the right to freedom of expression, as well as the right to access documents held by public authorities. In addition, Spain adopted progressive legislation and developed a comprehensive legal framework for ensuring media pluralism. Imprisonment is among the envisaged sanctions for serious defamation against some members of the Royal family while carrying out the duties of office⁷⁷. Moreover, in recent years instances of hostility towards journalists have been registered, including situations where journalists were the targets of threats or violence⁷⁸.

Civil society has raised concerns as regards the protection of freedom of information. Aspects of the 2015 reform of the Criminal Code⁷⁹, Organic Law 2/2015, as well as the Organic Law on the protection of public security⁸⁰ are contested by NGOs as restrictions to the freedom of information⁸¹. Moreover, Reporters Without Borders points out that there is a growing tendency on the part of the judicial authorities and the police to override the protection of journalists’ sources and to obstruct investigative journalism⁸². Obstacles to effective access to information, such as targeted denial of media accreditation by a political party, and instances where the safety of journalists has been affected, such as physical assaults, are also reflected in the alerts concerning Spain in the Council of Europe’s Platform

⁷² Regulated by the Real Decreto 847/2015.

⁷³ The registry can be accessed at <https://sedeaplicaciones.minetur.gob.es/RuecaListadosPublicos/>.

⁷⁴ Significant participation understood to represent directly or indirectly: a) 5% of the capital, b) 30 of the voting rights, or less if it would allow to designate in the 24 months following the acquisition more than half of members of the management board.

⁷⁵ 2020 Media Pluralism Monitor.

⁷⁶ Law No. 29/2005 of 29 December, on Institutional Advertising and Communication, and Real Decreto No. 947/2006.

⁷⁷ Centre for Media Pluralism and Media Freedom (2019), Decriminalisation of Defamation – Factsheet.

⁷⁸ Reporters without Borders (2019), Alarm about growing violence against reporters in Catalonia.

⁷⁹ Organic Law 1/2015.

⁸⁰ Organic Law 4/2015. These three laws are commonly referred to as the ‘Gag Law’.

⁸¹ PDLI et al., 2019, quoted in 2020 Media Pluralism Monitor.

⁸² Reporters without Borders (2020), World Press Freedom Index – Spain.

to promote the protection of journalism and safety of journalists⁸³. Six alerts were posted in 2019, and three in 2020⁸⁴.

IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

Spain is a parliamentary monarchy, with a bicameral Parliament (*'Cortes Generales'*)⁸⁵. Spain is a decentralised unitary state where the State and the Autonomous Regions (*'Comunidades Autónomas'*) have both exclusive and shared competences⁸⁶. The Constitutional Court is competent to review the constitutionality of laws. Both chambers of the Parliament – the Congress and the Senate – have legislative competence, which they can delegate to the Government, subject to certain limitations⁸⁷. The Government, the two Chambers of the Parliament, the assemblies of the autonomous regions, and a group of at least 500.000 citizens have the right of legislative initiative.

Spain has a mixed regime for the constitutional review of laws. The Constitutional Court has exclusive competence to review the constitutionality of legislation. In general, a declaration of unconstitutionality by the Court triggers the nullity of the law *erga omnes*, and produces retroactive effects. Ordinary courts may also exercise the control of constitutionality of infra-legislative, such as governmental regulations. In the latter case, the effect of the review is limited to the declaration of the inapplicability of the norm in the concrete case. However, there is also a specific judicial procedure that allows the declaration of nullity of the norm in certain circumstances. The possibility to seek constitutional review before the Constitutional Court is open to the Head of Government, the Ombudsman, fifty Deputies, fifty Senators the Public Prosecutor's Office, the Autonomous Regions and courts. Individuals can bring a case to the Constitutional Court, but they cannot appeal legislation⁸⁸. The possibility to seek constitutional review was used in May 2020 by a group of over fifty Deputies, who challenged before the Constitutional Court the constitutionality of several legal provisions adopted in the context of the state of alarm declared to manage the health crisis caused by the COVID-19 pandemic⁸⁹.

Stakeholders are involved in the legislative procedure, and there are safeguards for transparency. In particular, the law foresees the obligation to conduct public consultations, for which a minimum period of 15 days is foreseen⁹⁰. Moreover, draft legislation should be accompanied by a regulatory impact analysis report, which should include a summary of the submissions received in the context of the public consultation. The law also determines the

⁸³ See also the Recommendation CM/Rec(2016)4 of the Committee of Ministers of the Council of Europe.

⁸⁴ Council of Europe, Platform to promote the protection of journalism and safety of journalists. Alerts on the Platform are placed by NGOs and other agents concerned. As of August 2020, 16 alerts remained “active”, out of which in seven the source of threat is ‘non state’ or ‘unknown’. The authorities have already submitted a reply to six of them.

⁸⁵ It consists of the Congress of Deputies (the lower house), and the Senate (the upper house). Both are directly elected.

⁸⁶ Autonomous Regions have political and financial autonomy, having an institutional organisation based on a Legislative Assembly, a Governing Council with executive and administrative functions and a President, elected by the Assembly from among its members. Autonomous Regions hold the power to pass laws on a wide range of areas over which they have exclusive competence, but also secondary legislation in certain matters that are competence of the State, as well as the execution of State regulations.

⁸⁷ Art. 82 of the Spanish Constitution.

⁸⁸ Individuals can apply to the Constitutional Court in case of alleged violation of fundamental rights, after all other remedies have been exhausted.

⁸⁹ Constitutional complaint No. 2054-2020. The case is currently pending.

⁹⁰ This period can be reduced to seven days, when motivated by special circumstances, or when an urgent legislative procedure applies.

concrete cases in which the General Council of the Judiciary and the Prosecution Council must be consulted during the legislative process. The Congress and the Senate publish all the information concerning the legislative initiatives and proposals on the respective portals. All Spanish regions have their own legal framework on transparency⁹¹.

Emergency powers were used in the context of the COVID-19 pandemic. The state of alarm was declared by the Government⁹², and subsequently communicated to the Congress of Deputies⁹³. The Congress of Deputies authorised six prorogations of the state of alarm⁹⁴. The Constitution also confers on the Government the right to legislate via decree-laws in cases of extraordinary and urgent need, and within a defined material scope⁹⁵. The Government is subject to the obligation to present such a decree-law to the Congress, the latter having the prerogative to derogate from it. The Constitutional Court may also control if the Government exceeded its margin of discretion in the definition of the urgent need invoked, and assess the connection between the enabling circumstances and the measures adopted.

The protection of fundamental rights is ensured by independent authorities. The Ombudsman (*Defensor del Pueblo*) is the National Human Rights Institution in Spain. In 2018, the Ombudsman was re-accredited with ‘A’ status by the Global Alliance of National Human Rights Institutions (GANHRI) as regards its compliance with the UN Paris Principles⁹⁶. The Ombudsman is appointed by the Parliament, and ensures that the fundamental rights of all citizens in relations with the administration are upheld⁹⁷. The Ombudsman is an independent institution; it does not receive instructions from any authority and carries out its duties autonomously. Every year, it forwards a report to the Parliament on its activity⁹⁸ and may also present reports on any topic that it finds particularly serious or urgent. The Ombudsman is also competent to trigger constitutional review and *habeas corpus* proceedings⁹⁹. For transparency purposes, all relevant investigations and complaints are made public in the Ombudsman’s website in real time.

Spain has developed so-called ‘Open Government Plans’. Since 2013, the Government has implemented open government norms¹⁰⁰ with the aim to strengthen the links between citizens and the authorities, and to develop a permanent dialogue in order to get citizens more involved in development of public policies. In this context, Spain has developed ‘Open

⁹¹ The regional transparency portals and legislative framework can be accessed on https://transparencia.gob.es/transparencia/transparencia_Home/index/MasInformacion/Administraciones-publicas.html#casm.

⁹² Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis caused by COVID-19. The state of alarm is the least severe of the three possible states of emergency provided for in the Spanish Constitution. It does not suspend the general validity of the fundamental rights set out in the Constitution, although some specific freedoms may be restricted.

⁹³ Art. 116(2) of the Spanish Constitution and Arts. 6 and 8 of the Organic Law No. 4/1981, of 1 June 1981.

⁹⁴ While the competence to declare the state of alarm lies exclusively with the Government, its prorogation must be expressly authorised by the Congress of Deputies, which can present proposals regarding the extent and the conditions applicable during the prorogation of the state of alarm. See also Royal Decree 476/2020, of 27 March 2020; Royal Decree 487/2020, of 10 April 2020; Royal Decree 492/2020, of 24 April 2020; Royal Decree 514/2020, of 8 May 2020; Royal Decree 537/2020, of 22 May 2020; Royal Decree 555/2020, of 5 June 2020. The state of alarm ceased on 21 June 2020.

⁹⁵ Art. 86 of the Spanish Constitution.

⁹⁶ ENNHRI (2020), State of the Rule of Law in Europe, Reports from National Human Rights Institutions.

⁹⁷ Art. 54 of the Spanish Constitution.

⁹⁸ Art. 3, Law No. 3/1981.

⁹⁹ *I.e.*, the possibility to challenge a detention.

¹⁰⁰ Law 19/2013, on transparency, access to public information and good governance.

Government Plans’¹⁰¹. These Plans were aimed at simplifying the procedures and improving transparency of information and accessibility to better quality information for citizens, in a broad range of policy areas, including justice. A particular initiative undertaken in this context was the creation of the ‘Open Government Forum’. This forum, composed of representatives of public administrations and civil society, aims at pursuing a dialogue with civil society and making information accessible to citizens. All agreements, minutes, and other documents of the meetings of this forum are published on the Transparency Portal¹⁰². The fourth Open Government Action Plan, to be approved in the third trimester of 2020, has the objective to sensitise the public on the values of the Open Government, contributing to the achievement of the Sustainable Development Goals of the 2030 Agenda¹⁰³. This initiative is also relevant in view of the fact that the civil society space in Spain is considered to be narrowed¹⁰⁴.

¹⁰¹ In 2011 Spain became part of the Open Government Partnership. Spain has so far developed three ‘Open Government Plans’; <https://www.opengovpartnership.org/members/spain/>.

¹⁰² Input from Spain for the 2020 Rule of Law Report.

¹⁰³ See previous note.

¹⁰⁴ Rating by CIVICUS; ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed. See also section III.

Annex I: List of sources in alphabetical order. *

* *The list of contributions received in the context of the consultation for the 2020 Rule of Law report can be found at (COM website).*

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Virtual country visit to Spain in the context of the 2020 Rule of Law Report.

Annex II: Country visit to Spain

The Commission services held virtual meetings in June 2020 with:

- Academic experts
- Association of ‘Abogados del Estado’
- Association of Prosecutors
- College of Registrars
- National Commission of Markets and Competition
- Court of Audits
- European Journalists Association
- FEPA
- General Council of Notaries
- General Council of Spanish Lawyers
- General Council of the Judiciary
- Independent Judicial Forum
- Judges and Magistrates’ Association “Francisco de Vitoria”
- Judges for Democracy
- Madrid Press Association
- Ministry of Foreign Affairs
- Ministry of Justice
- Office of the Prosecutor General
- Platform in Defense of Freedom of Information
- Professional and Independent Association of Prosecutors
- Professional Association of the Magistracy
- Progressive Union of Prosecutors
- Prosecutor’s Council
- Supreme Court
- Technical Cabinet of the Prosecutor General’s Office
- Transparency Council
- Transparency International Spain

* The Commission also met the following organisations in a number of horizontal meetings:

- Amnesty International
- Civil Liberties Union for Europe
- Civil Society Europe
- Conference of European Churches
- EuroCommerce
- European Center for Not-for-Profit Law
- European Centre for Press and Media Freedom
- European Civic Forum
- Free Press Unlimited
- Front Line Defenders
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Press Institute
- Lifelong learning Platform
- Open Society Justice Initiative/Open Society European Policy Institute
- Reporters without Borders
- Transparency International EU