

GOVERN OBERT 2014

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**Proactive
Disclosure in the
Transparency,
Access to
Information and
Good Governance
Act: Possibilities
and Shortcomings**

Manuel Villoria

KING JUAN CARLOS UNIVERSITY



Generalitat de Catalunya

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Introduction

We live in times marked by political disaffection, which is translating into greater distance and mistrust between the public and political activity, politicians and the various levels of government.

We in the Government of the Generalitat feel as if we are being asked for explanations: required to reflect on and identify the causes of this political disaffection, in order to understand it and seek new ways of recovering the necessary public faith in the health of our democratic system.

Driven by this need, the Government wanted to produce the Open Government collection, through which various authors will share their knowledge of areas such as transparency, open data and citizen participation.

These contributions and conclusions will surely help with analysis of some of the actions taken by the Government towards making our government more open and transparent, which is the intention behind, for example, creating the transparency portal (transparencia.gencat.cat). It will serve as a roadmap for us when building the future state structures that Catalonia requires, with the aim of creating public authorities that are more transparent and open, on the basis of which citizens will be able to involve themselves more actively in and take responsibility for their institutions.

Artur Mas
President of the Catalan Government

Barcelona, June 2014

Proactive Disclosure in the Transparency, Access to Information and Good Governance Act: Possibilities and Shortcomings

Manuel Villoria

KING JUAN CARLOS UNIVERSITY

I. Introduction

The difference between proactive disclosure and the right to access is the stance of the public authorities as regards making data available to the public. With “proactive disclosure”, the government goes out of its way to make data available to the public via web portals and websites, without waiting for citizens to request the information. The “right to access” is more reactive, with the government responding to requests for documents made by the public. Both form part of what is known as “open data” policy, and they are interrelated: the more proactive disclosure, the less need to request documents, the less proactive disclosure, the more requests and disputes. Proactive disclosure, with re-usable data and significant interoperability, is the most appropriate way of creating transparency at the start of the 21st century. Proactive disclosure is not the be-all and end-all of open data, with the right to access also forming part of this policy; however, it is nowadays almost synonymous with making documents open, meaning freely available and re-usable. Open data can be found in the scientific context, and in the private and state sectors. Within the state sector, it includes various types of information and documents: to begin with, information on society itself, such as trends relating to health or diseases, or crime figures; there are also data aimed at facilitating economic activity, such as those relating to transportation or transit; finally, there are data intended to deliver government transparency and accountability, such as public procurement figures. Each data type serves a different purpose.

No discussion of proactive disclosure, as it is understood today, would be complete without considering how the arrival of the new information and communication technologies (NICTs), such as Web 2.0, has revolutionised modern societies. It is now perfectly possible to upload onto digital platforms the immense amount of information stored in paper files by the public authorities, making it available to the public in re-usable formats, which enables each citizen to make what she or he wants from this information. It also allows the public to monitor proposals and information from the government, and vice versa. According to Castells (2010, pp. 50-51), while it is true that the instruments for exercising state power – violence and discourse – are the same now as 2,000 years ago, forms of legitimisation have changed noticeably with new technologies, since the present day is no longer the closed society of printing, but rather the networked society, in which the ability to generate and renew networks, and to transmit information – and discourse – through them constitute the basis of power. Thanks to these new technologies, it has now been possible to move the Official State Gazette (BOE), which was reaching a minimal proportion of the population, to websites that millions of people can follow and at which it is possible – using the appropriate portals – to carry out hundreds of administrative procedures, check how civil servants are operating, monitor whether taxpayers' money is being spent properly, take part in lawmaking and problem definition, play a role in managing public services, and generate knowledge that is shared continuously and ever-more sophisticatedly. The policy of open data and, specifically, proactive disclosure must be set against this sociological and political backdrop to understand and analyse them adequately, and to contextualise them properly.

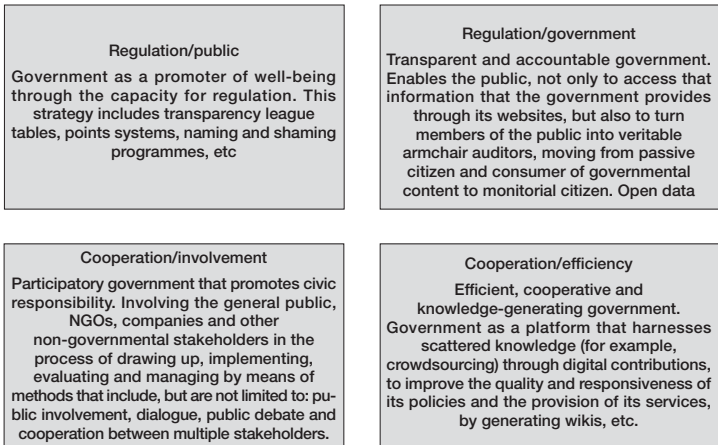
This means it is also positive to distinguish between open government, e-government and proactive disclosure, even though strong links between these are also possible thanks to NICTs. Strictly speaking, “e-government” means “application of the technology necessary for making the procedures and services that state institutions make available to the public as efficient and effective as possible” (Coroján and Campos, 2011, p. 16). In short, e-government can be considered a

technological instrument that makes government action more efficient, whilst rendering interactions simpler and more convenient (Torres *et al.*, 2005). The focus of e-government is enhancing the economy, efficiency, provision and effectiveness of government, while providing services available through several different channels and under various names (government websites, one stop shops, etc.). Efforts in this area have focused on the best possible way of reconciling front office aspects (of service provision) and back office aspects (redesign of administrative procedures, modernisation of structures and functions, etc.) (Criado, 2009). There is general recognition of the value that citizens and the government can derive from more processes that are more streamlined, quicker and more user-friendly, such as online tax returns for almost everyone, the creation of digital platforms for public procurement, and the digital simplification of various procedures relating to essential services like birth certificates and identity cards, amongst many others (Coursey and Norris, 2008). Open data has nothing to do with providing services digitally and simply, but rather with the idea of improving monitoring and accountability as regards public data, and their efficient use.

For its part, “open government” is part of a set of ideas defining good governance as that which: 1) promotes citizenship, integration and public debate; 2) fosters public participation in service design and provision; 3) sets the policy agenda, brings the appropriate players to the table, and provides and manages sustainable solutions for public problems; and 4) disseminates information to enrich public debate and promote a shared vision of public issues (Bourgon, 2007). In more operational terms, then, open government can be considered to relate to improving transparency levels through opening up public data (for society to monitor it and for accountability) and re-use of public sector information (RPSI); to facilitating citizen participation in public-policy design and implementation (and influence over decision making); and encouraging the creation of spaces for the various stakeholders to work together, particularly between public authorities, and between them and civil society and the private sector. The activities that open government comprises (see Figure 1) are: 1) those of government as a promoter

of well-being through capacity for regulation; 2) those of transparent and accountable government; 3) those of participatory government that promotes civic responsibility; 4) those of efficient, cooperative and knowledge-generating government. The former two are based on regulation and the state's role in creating institutions to improve society, while the latter two are based on society's capacity for creating social improvements, both on its own behalf and with the state (Villoria, 2013). All this leads to the conclusion that open data policies are just one part of open government: that connected to the loosest interpretation of the concept, meaning enhanced checks and balances and possible accountability.

Figure 1. *Ideas and possibilities of open government*



Source: author's own

With the concepts clarified, the text that follows will seek to explain the emergence of the Act from a public policy perspective and will set out its key objectives. It will then analyse the Act itself and, finally, will explain whether the current wording of the Act will enable the achievement of its intended objectives or not.

II. Context for the introduction of proactive disclosure

Spain's Law 19/2013, of 9 December, on transparency, access to information and good governance (Transparency Act) emerged in an almost completely digitalised democratic society, a society in which social networks are increasingly structured through new technologies and can, as a result, expand globally and communicate at speeds that are almost instantaneous. In such a society, it would be self-deception to think that paper documentation still constitutes a key element of power and influence, or that information can be parcelled up and channelled into very specific sectors with no grey areas. Unfortunately, the present Spanish Government still has one foot in the 19th century and the other in the 21st, as the Act under analysis proves; the problems that will be experienced with implementing it will provide even more proof of this. In any event, the Act is here and the first thing that must be asked – notwithstanding the fact that the introduction and conclusion tackle this issue – is why it is arriving now and not nearly ten years ago, as some people were advocating at the time. There are three general reasons explaining the causes of the Act, and one specific one explaining why it is arriving now and not during the two Zapatero governments, despite having been in their manifesto from 2004 onwards. In relation to the latter issue, it is important to remember that Spanish government operations have lacked – and still lack – transparency from their very beginnings. Secrecy formed a key element of the set-up and exercise of power in imperial Spain and, subsequently, during the attempts at rationalisation by liberal and technocratic governments. As those who study institutional approaches know well, the result of various critical situations is ending up on the path to dependency, from which it is very difficult to escape (see Pierson, 2000, 2004; North, 1994, 2001). In this case, there has never ceased to be an imbalance in the punctuated equilibrium, with opacity outweighing transparency. In 2004, this proposal was included in the manifesto of the Spanish Socialist Workers' Party (PSOE). It was a sincere desire, which subsequently ran into the domestic reality of a bureaucracy insensitive to the value of transparency, and into political leaders who continued to believe that less transparency meant more power; this led to the continuous

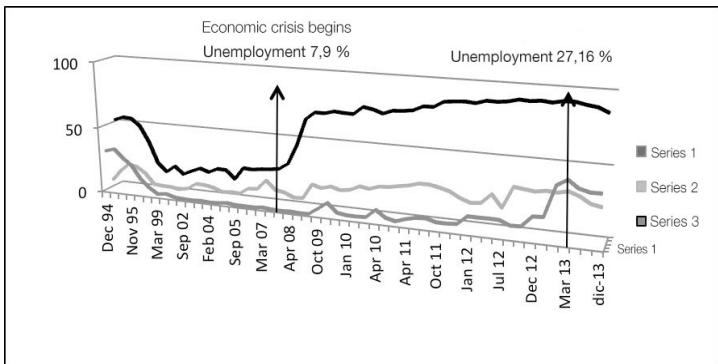
delays with the promised Act being passed. Nevertheless, the promise itself already constituted a major change. To take Kingdon's famous metaphor regarding windows of opportunity (2003), it could be said that transparency was not a major social problem in 2004 and, moreover, that there was a lack of genuine political will to set out a policy in this area; instead, there were only instruments (draft bills, reports) seeking problems when the occasion did arise.

However, a critical situation has emerged in the last decade, along with a coalition – initially weak, but growing in size and strength – of advocates of a change in the *status quo* (see Sabatier, 1998). In the end, it is likely that, even without the critical situation caused by Spain's great economic and social crisis, gradual change and cumulative effects would, little by little, have successfully moved the political model towards access to information and open government; the *idea* of transparency has extraordinary power in present-day democracies, and its influence on discursive processes is increasing (Thelen, 1999, 2003; Mahoney and Thelen 2009). In any event, however, a new government with specific legitimisation needs, external pressures (stronger coalition of advocates and European pressure), certain domestic leaders (the role of the deputy prime minister and her team), the crisis of the economic and political system, and the ever-greater availability of technological instruments for tackling the challenge of transparency meant that all the key elements were in place for the window to open and, once it was open, for the pressure to grow for a transparency policy with all its consequences.

From a government perspective, transparency policy – the Act under consideration, specifically – has three core objectives: first, restoring the legitimacy of government action, and reducing mistrust in politics and institutions; second, preventing the corruption that has been hitting the headlines daily in recent years; and, finally, increasing government efficiency, thanks to the incentives and disincentives resulting from transparency. In relation to the first of these, the beliefs that politicians are a problem and that corruption is one of the country's three most serious problems have been growing in the last four years, leading to a

worrying state of affairs as regards public opinion (see Figure 1). At the same time, mistrust in the country's various public institutions would not stop growing, as studies by the Spanish Centre for Sociological Studies (CIS) also show.¹ Moreover, the level of public trust has fallen to historic lows: looking at the CIS series since 1996, Spaniards' political trust has declined by over 20% between then and now: from 50% to 30% (Jiménez, 2013, pp. 132-133). As Figure 1 shows, over the last five years, this has certainly gone hand-in-hand with the perception that governments have been performing poorly in combating the economic crisis; whatever the case, however, this disaffection characteristic of Spain is becoming overwhelming. The Transparency Act has been designed as a lever to help recover legitimacy, so the government has repeatedly linked it with combating political disaffection.

Figure 1. *Percentage of the public who consider corruption (series 1) and politicians (series 2) one of the country's most significant problems, and percentage of the public who consider the economic situation bad or very bad (series 3).*



Source: CIS research and surveys of the active population by the Spanish Institute of Statistics (INE).

Furthermore, various statements also linked the Act to combating corruption. While it is true that, since 1994 (the first year for which there are figures), the majority of Spaniards have perceived political corruption

1. For example, see Study No. 2,984, April 2013.

to have increased or stayed the same during the preceding year (Díez Nicolás, 2013), current perception rates are overwhelming; Spain is also the European country in which the perception of corruption has worsened most (see Table 1).

Table 1. *Perception of corruption in Spain, according to Eurobarometers 325, 374 and 397*

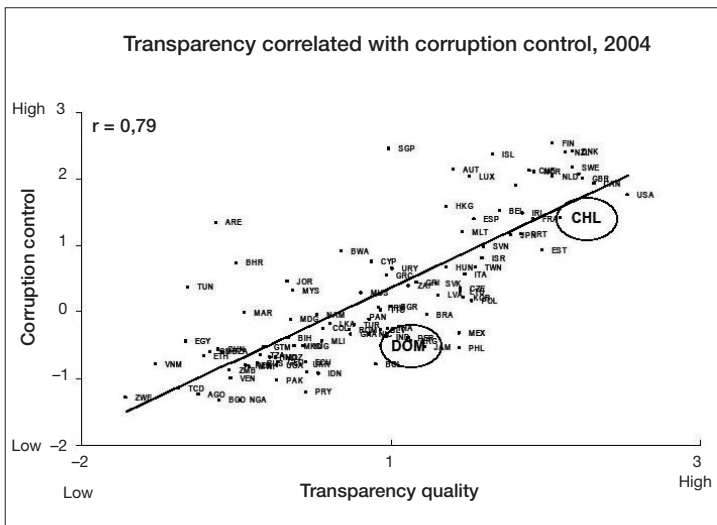
Country	Eurobarometer 325, 2009. Agree with "There is corruption in my country's national institutions"	Eurobarometer 374, 2011. Agree with "There is corruption in my country's national institutions"	Eurobarometer 397, 2013. Agree with "There is corruption in my country's national institutions"
Germany	80%	70%	74%
Austria	66%	85%	73%
Denmark	35%	25%	38%
Finland	68%	50%	51%
France	83%	80%	76%
Greek	98%	99%	97%
Netherlands	56%	39%	57%
Hungary	98%	86%	72%
Italy	89%	95%	93%
Poland	86%	73%	78%
Portugal	91%	91%	86%
UK	76%	73%	72%
Czech Republic	96%	95%	94%
Romany	87%	89%	82%
Spain	91%	93%	95%

Source: Eurobarometers 325, 374 and 397.

The high perception of corruption is related to historical factors; the deeply embedded institutional mistrust (Torcal and Magalhaes, 2010) has been reinforced by the continuous emergence of news stories about political corruption, particularly starting in the late 1980s, with spikes as new scandals emerge (Jiménez and Villoria, 2012; Della Porta, 2000). As corruption is a phenomenon that exists in the eye of the beholder, a pre-existing sense of mistrust in politicians clearly affects answers about

their immorality and predisposes the public to ascribe corrupt motives to their actions (Wroe *et al.*, 2013, p. 176). Furthermore, institutional trust is closely related to interpersonal trust (Inglehart and Wenzel, 2005; Putnam, 1993), and both are closely related to corruption (Rothstein and Stolle, 2003; Rothstein and Eek, 2009; Della Porta and Vanucci, 1997). There is therefore a positive correlation between low levels of inter-subject trust and the perception of corruption (Villoria *et al.*, 2013), so this low level of public trust – a well-established trait in Spain, since measurement of this variable began – could affect the perception of corruption, and vice versa. In any event, the Transparency Act was considered a good antidote to corruption, essentially because it would enable better detection of existing cases, thereby discouraging corrupt activities, particularly if prosecution and punishment follow detection. The empirically demonstrable correlation between transparency and low corruption levels reinforces this belief (see Figure 2).

Figure 2. *Correlation between transparency and corruption*



Source: World Bank Institute, 2004.

Finally, there have been a great many studies on transparency and its beneficial effects on the economy (Ackerlof, 1970; Stiglitz, 2000, 2002).

technologies noticeably increases effectiveness. In the modern day, mobile applications and wikis have lent this process a scale unheard of historically. Open government creates the possibility of incorporating collaboration and wiki-government platforms into regulation systems. Fully operational open government raises the real possibility of data re-use and aggregation, as well as – in addition to generating knowledge – of job creation through the generation of new companies and NGOs to process these data, with the positive effect this synergy would have on the economy. According to the British National Audit Office (2012), opening up data could significantly benefit the British economy (the value ascribed to the existing data is some € 20 billion). In order for this wealth to reach the public, the connection to 7,865 public files with re-usable data had already been made by December 2011 at the data.gov.uk website. In fact, over 47 million members of the public visited the police website on crime-level maps between the months of February and December 2011 alone. In a similar vein, a recent piece of research into public data re-use in the European Union estimated that the value of this information could be around € 140 billion per annum.

In this way, therefore, ideas about the value of transparency for resolving significant problems in the country have gradually consolidated. Ideas are important for clarifying objectives, defining the range of possible actions and helping to select the specific impact desired in the absence of a single solution, but it should not be forgotten that they are also useful for rationalising decisions already made and for institutionalising previous ideas (Majone, 2001, p. 3). Ideas exist within three areas: policies, programmes and philosophies; moreover, there are two kinds: cognitive and normative. A discourse is an interactive process of idea transmission, and it takes place in two ways: coordinating discourse, between the stakeholders in a policy, and communicative discourse, between political players and the public. The communicative variety predominates in simple political systems, while the coordinating variety predominates in complex systems (Schmidt, 2008, 2010). Therefore, when studying this administrative reform, it is very important to consider the explanatory significance of ideas in which there are normative explanations of why certain conduct is desirable and necessary, as well

as cognitive assumptions and points of view on how stakeholders and organisations would have to respond to the corresponding problem (Powell, 1991, pp. 27, 31). In other words, the discourse of the coalition of advocates became sophisticated enough to reduce resistance to change. It can therefore be concluded that the Transparency Act is, above all, the consequence of the consolidation of a series of ideas, articulated in coordinating and communicative discourses; in response to a window of opportunity, these ideas triumphed and were accepted as good by key players in the creation of Spain's public policy, and by the public in the country.

Table 2. *The Transparency Act as regards proactive disclosure*

What the Act requires	Who is obligated
Institutional, organisational and planning information: <ol style="list-style-type: none"> a. Roles that they play, the legislation applicable to them, and their organisational structure. b. Annual and multiannual plans and programmes. 	Public authorities (PAs) (Art. 2.1 a to d): a and b. Other public and constitutional institutions (PCIs) (Art. 2.1 e to i): only a. Parties, trade unions, chambers of commerce (PUCs) (Art. 3a): only a. Subsidised private bodies (SPBs) (Art. 3.b): only a.
Legally relevant information.	Only PAs (Art. 2.1 a to d).
Financial, budgetary and statistical information: <ol style="list-style-type: none"> a. Contracts b. Agreements signed c. Subsidies and public grants awarded d. Budgets e. Annual accounts f. Remuneration of senior officials and top-ranking figures g. Decisions authorising or recognising compatibility h. Annual statements of the assets and activities of local representatives i. Statistical information necessary for evaluating the level of compliance and quality of public services j. Reporting of any real property that it may own 	PAs (Art. 2.1 a to d): all subsections. Other PCIs (Art. 2.1 e to i): all subsections except h and j (to a large extent, g would not apply to those of section 2.1 f). PUCs (Art. 3.a): only a, b and c (when they are contracts or subsidies with PAs) (the rest uncertain). SPBs (Art. 3.b): only a, b and c (when they are contracts or subsidies with PAs) (the rest uncertain).

Source: author's own

III. An analysis of proactive disclosure in the Transparency Act

The following pages will analyse the Transparency Act on the following basis: what is and is not required under the Act, who is obligated, and what are the consequences for failing to comply with it. Table 2 summarises the key elements of the Act.

How it must be published	Consequences of failure to comply	Exceptions
<p>Periodically and as updates.</p> <p>At the relevant virtual offices or websites.</p> <p>In a way that is clear, structured and comprehensible for interested parties, preferably in re-usable formats.</p> <p>Access, interoperability, quality and re-use of the published data must be facilitated, in addition to identifying and locating them.</p> <p>The information must be comprehensible, easily available free of charge, and accessible by disabled people.</p>	<p>Repeated failure to meet regulated proactive publication obligations will be considered a serious offence.</p> <p>Only affects the public authorities of the Spanish Central Government Administration (AGE).</p>	<p>Limits on the right of access to public information provided for in section 14, particularly that derived from personal data protection, governed by section 15.</p>
Idem	Idem	Idem
Idem	Idem	Idem

There follows a slightly more detailed analysis of what these sections mean for the institutions bound by these obligations. In any event, it is very important to stress that, as Barrero *et al.* (2014) indicate, the information required is the minimum necessary, and nothing prevents the incorporation of more information than required by the legal text, quite the contrary.

Institutional, organisational and planning information

The Act starts the list of obligations with those most closely linked to information that could help to make the public sector most efficient (in its broadest sense) and would enable citizens receiving the information to clarify their rights and obligations, and to simplify their interactions with public entities. There follows a more detailed analysis.

a) Roles that they play, the legislation applicable to them, and their organisational structure. In this regard, an up-to-date chart of the organisation's structure must be included, which must identify the heads of the various bodies, their profile and their work history.

All institutions bound by the obligations of sections 2.1 and 3 must provide this information on their websites or in their virtual offices. As regards those bound by section 2.1, the functions they perform will be closely associated with the legislation that allows them, hence their relevance. In general, well-structured information on these matters will make it easier for the public to know their rights and obligations in relation to each public body, and whom to contact should they need to interact with these bodies. It is true that, if the concept of applicable legislation is interpreted to the letter, it will mean almost all institutions bound by these obligations publishing generally applicable legislation, such as the Autonomous Process Act; however, in view of the existing "legislative diarrhoea", some state institutions will, in some cases, have to conduct a highly sophisticated investigation just to find out everything that is applicable. It is to be supposed that the most important legislation would have to be published, rather than the obsessive publication of any law that could affect them; as previously noted, doing this would be fairly complicated.

It seems logical that all this information will achieve maximum efficiency if it goes hand-in-hand with a good e-government system. What is not so clear is what is understood by “body” and the extent of the obligation to identify its senior figures, since this is a fairly ill-defined concept. If taken to mean what the Central Government Administration Act calls “administrative bodies” (a term impossible to apply to the institutions bound by section 3 and to some of those bound by section 2.1), a large number of entities could be affected.² Moreover, profile and work history are information that could be given in either very great or very little detail; in any event, however, there is a need for enough information to know who runs the most important state institutions and what work-related abilities (knowledge, skills, attitudes) they have. It remains to be seen how this information will squared with the limitations resulting from data protection, in accordance with section 5.3. Excessive data protection will render this provision of the Act useless. Whatever the case, in addition to all the above, it may have been advisable for the Act to require full publication of the job details report (RLT) and how it links to organisational charts; of the advertising of vacancies at the corresponding public authority and how its recruitment is undertaken and implemented; or of information about the processes for selecting staff members (rules for and composition of the panel, accepted and rejected lists, examinations, etc.).

As regards institutions bound by section 3, the aim of the obligation set out in section 6.1 could be to provide the public with information on the essential characteristics of parties, trade unions and associations in receipt of public grants, as well as of their organisational structure. In general, all institutional websites already include this information. However, a few of the requirements that the Act lays down are worth highlighting: essentially, those relating to the profile and work history of the heads of bodies. “Heads of bodies” is understood to mean those at both national and autonomous-community level, and even local lea-

2. Section 5.2 of Law 6/1997, of 14 April, on the organisation and workings of the Central Government Administration defines administrative body as “any administrative units with allocated functions that have a legal impact on third parties or the actions of which are binding in nature”.

ders, in the case of national and larger-scale unions. As regards private entities in receipt of public grants, particularly smaller ones, they must incorporate their websites into public portals, so that they can have available information data that give better idea of which are in receipt of public grants.

b) Annual and multiannual plans and programmes in which specific targets are set, and the activities, resources and time set aside for achieving them. Compliance level and results will have to be subject to periodic evaluation and publication, along with measurement and appraisal indicators, as determined by each competent authority.

This obligation can only be required of public authorities. This, in itself, could already represent a genuine organisational revolution within a government like that of Spain, which measures little and poorly. It is a shame that this section was not drafted using the most modern organisational terminology and the concepts characteristic of policy analysis. It actually seems related to the terminology characteristic of the planning, programming and budgeting system. While that is not negative in itself, it would have been better to mention strategic planning, and policies and programmes, as well as to incorporate references to quality plans and quality evaluation.

The ideal would have been to require all state organisations to conduct a strategic reflection, to have been able to verify the extent to which all stakeholders were consulted, to have been able to know who the groups of experts were and why they were selected, and to have required explanation of how strategic decisions were made, in addition to what has already been established as regards management indicators.³ This would help with the evaluation, not just of public services' effectiveness, but also of the quality of Spanish democracy and whether or not there is balance in decision making and a level playing field for the stakeholders in every public policy and programme. Lack of political

3. As an example of how a strategic plan is set out and what it involves, see: alcobendas.org/recursos/doc/Planificacion/922214304_432014221934.pdf.

equality is one of the most significant problems with contemporary democracies, in which the presence of very powerful interest groups and their corresponding lobbies can profoundly unbalance decision making and create a political system that repeatedly favours the best-organised with the greatest resources, often to the detriment of the general public. This means that the schedules of the most significant state figures being covered by transparency obligations, along with transcripts of their meetings with interest groups, could have helped to improve Spanish democracy a great deal. An adequate wording of these obligations would certainly have required part of this subsection to apply to the legislature, since monitoring what is known as the “legislative footprint” is not limited to the executive: monitoring of the legislature too is important, even in Spain, where parliamentary discipline makes it less necessary for lobbyists to turn to assembly members and senators to seek wordings in line with their interests. It is a shame that there was no understanding of what lies behind these laws, the scope of which is not limited in better-quality democracies. It is to be hoped that regulation of lobbying will itself incorporate these ideas.

Ideally, quality management would also have been included in the transparency requirements, along with an obligation to publish quality plans, quality indicators, services charters and self-assessments, as well as the external evaluations of the AGE by the Spanish Evaluation and Quality Agency (AEVAL). Although section 8.i mentions statistical data for “evaluating service compliance and quality”, the wording is very ambiguous, given how well-known it is that statistics can say either everything or nothing. The most serious criticism of the text is the lack of reference to evaluating policies and programmes using the most advanced methodologies, and the failure to mention AEVAL. The AGE’s inclusion of evaluating compliance indicators with budgetary plans and programmes in service audits is perfectly compatible with more scientific evaluations of public policies and programmes, and of quality. These days, evaluation of policies and programmes is a matter of routine in the more advanced governments, while the Spanish system still does not give any teeth to an agency created for that very purpose. Furthermore, evaluation of the compliance of state agencies’ plans and programme-

contracts cannot be left in the hands of ministries' audit services, if the Central Government Agencies Act and the role set aside for AEVAL are to be respected. Finally, the new public governance emphasises, not just the effectiveness of programmes (meaning whether they meet their objectives), but also the efficacy of their impact. There are programmes that meet their objectives but do not achieve development results or impact positively on the society at which they are directed. To evaluate their efficacy and, above all, their impact, sophisticated competencies are required, as well as great objectivity on the part of the corresponding body. That is why AEVAL was created.

With it so important that organisations' attitudes and behaviours change, this situation really shows how badly a more demanding system of monitoring and penalties than the Act lays down is needed. Will all information that is required serve to re-legitimise government action and to combat corruption? That is not likely in the short term, but it could happen in the medium term, if the clarifications made here are considered. In any event, however, it could be a major step forward in terms of efficacy and, perhaps, efficiency if those affected respect it.

Legally relevant information

Legally relevant information could be a very important instrument for improving the quality of Spanish democracy, provided that the wording of legislation relates to means of public participation and cooperation. Revealing information about what legislation will be like without the possibility of public involvement in the process could even be counter-productive, further de-legitimising the public authorities. The following is what the Act lays down as duly publishable.

a) Directives, instructions, agreements, circulars or responses to consultations requested by private individuals or other bodies, insofar as they involve interpretation of a law or have legal effect.

However, as Barrero *et al.* (2004) indicate, the Public Authorities Act already required publication of some provisions (see section 37.10 of

the Autonomous Process Act); this Act makes two changes. The first is that agreements and circulars are added to instructions, as well as any responses that have legal effect, and the second is that they must be published on the website. Unfortunately, the legislature seems to have forgotten to include the reports by the Central Government Legal Service (AE) or the Central Government Audit Service (IGAE), which would be very useful for finding out the decision-making process as regards matters of public interest. In any event, this publication contributes to improving legal certainty, and is therefore to be welcomed.

b) Any draft bills and draft legislative decrees for initiatives corresponding to the relevant consultative body, whenever its opinion is sought. Where no opinions are binding, publication will take place at the moment of its approval.

Once again, the question arises of what the point of publishing this is if it does not enable citizens to have an impact on improving texts or making their voices heard. Texts are published in this way in numerous countries, with the aim of democratising the drafting of legislation; this enables all citizens, interested or otherwise, to have their voice heard by the public authorities. Since the better-organised interest groups have surely already had access to the text and communicated their opinions – or even imposed their own interests – before the public hearing, it becomes more urgent to balance the democratic game and enhance political equality using this modest means that, while not substantially changing the rules of the game, does enable an improvement. Historically, the Administrative Procedure Act of the United States has already been opening up these means of participation for over twenty years, but open government policy and new technologies are now expanding these possibilities. Publishing, on the website, a draft bill already submitted to the Council of State for its report does not improve legislative decision making much, particularly when the Council's report is already the end of the pre-legislative stage. In this case, as indicated above, a genuine open government policy would, as well as publication, have added some means for public participation and cooperation that would improve the quality of Spanish democracy and, in tandem with other

measures, perhaps reduce the present disaffection. As section 40 of the Extremaduran Open Government Act states, the appropriate time for publication and participation could be the stage prior to the hearing procedure. In any event, such participation would have to respect a procedure requiring acknowledgement that each citizen's proposal has been received and an individual response to it.

c) Any draft regulations for which the initiative corresponds to them. Whenever the request for opinions were not binding, publication would occur once they had been requested from the corresponding consultative bodies, without that necessarily involving the launch of a public hearing procedure.

In this case, the Act is even clearer and demonstrates that there is no benefit from turning the publication of regulations into a type of public hearing, which it is assumed will have already taken place with the most directly involved parties at the previous stage, before requesting the opinion of the competent body, as per the Central Government Administration Act. From an open government perspective, this option is incomprehensible, since openness, alongside participation and cooperation, always contribute to legitimisation if conducted in a high-quality way that respects public opinion, by acknowledging receipt, for example, and by responding, positively or negatively, but with the due explanation.

Moreover, the Act fails to indicate when there is a need to publish the draft regulation in any cases where there is no need to request the opinion of a consultative body.

d) Any records and reports that form the supporting materials for drafting legislative texts, particularly the report analysing the legislation's impact regulated by Royal Decree 1083/2009, of 3 July.

In this case, mere publication will provide useful information for understanding the strengths and weaknesses of the Act, and the possibility of improving the legislative procedure. The important thing, in this case,

is that governments meet the requirements of the decree, which is something not observed clearly enough when Spanish governments are drafting legislation (the lack of financial and budgetary impact studies for many draft bills is evidence enough of this). Furthermore, this is only applicable to the AGE, since there may be far more demanding systems for drafting legislation in the autonomous communities.

e) Any documents that, in accordance with the sectoral legislation in force, must be subject to a public scrutiny period while being processed.

In this case, the innovation as regards environmental or town-planning procedures is that publication takes place online, which is always more convenient and favours immediate interaction, if this possibility is opened up on the corresponding portal, and if the clarity, re-use, etc. requirements are met. Ideally, as Barrero *et al.* (2014) state, the public scrutiny period would become more widespread, as per section 86 of the Autonomous Process Act, and the public would be more aware of how government decisions were taken. In line with this reasoning, it seems necessary to publish, online and in a clear and re-usable way, the regional- and island-organisation plans (where applicable) and town-planning documents of autonomous communities, etc., along with the latest approved amendments, town-planning agreements and other instruments, environmental protection and natural resource-organisation plans (and similarly named documents).

Financial, budgetary and statistical information

This sort of data is most important for preventing and combating corruption, although this sort of public information could also have great efficiency benefits. In general, institutions bound by section 2.1 will have to publish the administrative/management documents with financial or budgetary impact detailed in section 8. The following is what the Act requires to be published.

a) Contracts. All contracts, indicating the subject, term, bid and award amount; the procedure used for drafting and instruments via which,

where applicable, it has been published; the number of bidders participating in the procedure; the identity of the successful bidder; and any amendments to the contract. Decisions to waive and terminate contracts must also be published. Information about smaller contracts must be published quarterly. Furthermore, statistics must be published on what percentage of the budget has gone on contracts awarded through each of the procedures provided for in legislation on public procurement.

To a large extent, disclosure of contracts is already required under current legislation (on the profile of contracting parties, see section 53 of Legislative Royal Decree 3/2011, of 14 November, approving the recast text of the Public Procurement Act, or the requirements derived from the central government procurement platform, from section 334 of the same Act, which already made a great deal of data available online), but the Act does expand the information required for contracts and, above all, extend the disclosure requirement to small contacts, providing more monitoring and oversight possibilities. Specifically, it will be easier to detect the well-known practice of breaking up contracts, which sidesteps disclosure and enables the awarding of major contracts on the basis of personal contracts, as became clear in the Gürtel case in the Community of Madrid. In any event, it is hard to see why the minutes of the procurement committees were not included: these could have provided information relevant for monitoring purposes. Specifically, as the Council of State was proposing, this would have given us information about the number of bidders, how much they had tendered and what score each was awarded. It seems obvious that publishing the composition of procurement committees, how the members were appointed and their selection processes would help with detecting conflicts of interest and incompatibilities, but that has not been required either (fortunately, many public bodies already do it regularly).⁴

This obligation can be required of all public authorities, and also other public and constitutional bodies, but only for administrative contracts,

4. See Transparency International España's transparency indexes for local authorities, autonomous communities and provincial governments: <http://www.transparencia.org.es>.

not for any civil or commercial ones that public bodies and authorities may conclude in their property transactions (Barrero *et al.*, 2014). As regards institutions bound by section 3, the obligation only relates to any contracts entered into with public authorities. Logically, the obligation to publish the number of bidders participating in the procedure does not apply to these institutions, nor that to publish decisions regarding the waiver or termination of any contracts to which they are party, or procurement figures.

As regards preventing corruption, the most important question that can be asked is: to what extent can publication be a good instrument for discouraging corrupt or immoral practices in this area? The best way of answering this is to analyse the risks identified by the business owners interviewed in Spain for Eurobarometer 374, on EU companies' attitudes to corruption (2014). Companies in the construction sector are generally those with the highest perceptions of corruption throughout Europe, but particularly in Spain, where infrastructure construction and waste management are the fields best-known for corruption. For 54% of Spanish companies, corruption is a problem when making deals (European average: 43%); patronage is also a problem for 46% (European average: 41%). Spain leads Europe for companies that consider procurement corruption widespread: 83% at national level, 90% at regional and local level (European averages: 56% and 60%, respectively). Spanish – along with Greek – companies hold the European record for perception of corruption: 97% (European average: 75%). In general, the bad practices that Spanish companies observe are: favouring friends and family when making deals, nepotism, clientelism in government, and lack of transparency in party funding. Of Spanish companies, 91% believe money and politics are too closely linked (European average: 80%); 93% believe corruption and favouritism damage business (European average: 73%); and 78% believe bribes and connections are the simplest way of obtaining public services (European average: 69%).

Perhaps for that reason, Spanish companies – along with Cypriot ones – have the lowest rates of participation in public procurement: 11% over the last three years (European average: 29%); 42% of those that have

taken part believe corruption prevented their bid being accepted (European average: 32%). The problems found in relation to procurement are set out in Table 3.

Table 3. *Main problems with public procurement, according to companies. Percentage of companies that consider the matter in question a problem.*

Problems	Specifications tailor-made for certain companies	Conflicts of interest	Collusive bidding	Unclear selection criteria	Bidder involved in designing specifications	Abuse of negotiated procedures	Amendments	Abuse of emergency grounds
UE	57	54	52	51	46	47	44	46
Espanya	80	79	71	72	56	72	69	64

Source: Eurobarometer 374.

Taking account of these figures and linking them to the Transparency Act, it can be seen that, if the data published by governments are accurate and genuinely re-usable, and if there is interoperability, there is more chance of uncovering improper amendments and abuses of emergency grounds, perhaps abuse of negotiated procedures and, with a great deal of effort, collusion. Since the minutes have not been included in what is published, unclear selection criteria, bidder involvement in designing specifications and specifications tailor-made for certain companies are harder to uncover. Unfortunately, conflicts of interest in procurement require very complex investigations, since little is published in the way of data (statements of the assets and activities of local elected officials). If the obligation to publish price and term changes had been included, monitoring of contracts after their conclusion – the cause of so much fraud – would have improved: for example, either the obligation to publish the specific date envisaged for completing the most significant work, or the specific date for starting and finishing that work; an alternative would be publishing any extensions, where applicable. In any event, all this monitoring is dependent on the emergence of an active and vigilant civil society prepared to analyse and check data, and on the development of e-procurement, so successful in numerous countries.

b) Agreements signed. Reporting of agreements signed, mentioning the signatories, the subject, the term, any amendments made, obligations to provide services and, where applicable, any financial obligations agreed on. Any management-delegation agreements signed must also be published, indicating the subject, budget, term, financial obligations and any subcontracting that will take place, as well as naming the successful bidders, setting out the procedure followed for its award and stating its value.

Until recently, it was very common practice to sign memoranda of understanding or management-delegation agreements, in order to avoid public procurement and submission to the principle of competitive bidding. Disclosure of memoranda of understanding with all the requirements set out, and of management-delegation agreements, could reduce the chance of this. As with contracts, memoranda of understanding are legally binding agreements regarding intentions between the interested parties. However, unlike with contracts, the obligation that each party enters into with a memorandum of understanding does not relate to the provision or promise of a good or service to the other, as occurs with the onerous contracts covered by the recast Public Procurement Act; instead, it relates to the achievement of a goal shared by the parties and, as at least one of these must be a public authority, this goal must be in the public interest (FIASEP, 2013, p. 61). That is why it is important to know the subject of any memorandum of understanding and any amendments that may have been made to it.

As regards management-delegation agreements, there are two types: those covered by section 4.1.n) of the recast Public Procurement Act, and those governed by section 15 of the Public Authorities and Common Administrative Procedure Act. In both cases, they are mechanisms intended for internal procurement. According to reports by the Court of Auditors and the Competition Commission, the regulations regarding management-delegation agreements should be changed to prevent them becoming an instrument for sidestepping public procurement, and one that is also clearly inefficient. The Court of Auditors therefore suggests that the supporting documentation for management-

delegation agreements include an exhaustively detailed justification of the need to use them, as well as an explanation of why this method is more economical and efficient than open procurement. Just as with contracts, it must also be demonstrated that choosing a management-delegation agreement over a contract represents selection of the most financially beneficial bid; that profit margins are being removed, and that margins for covering unforeseen events are also settled and duly justified; or, finally, that the possibility of subcontracting is limited. Following this analysis of the Court's recommendations, it is clear that the Transparency Act represents a step forward with monitoring this method, although there is also a need to know the composition of entities awarded management-delegation agreements, since they are sometimes not purely public bodies, but rather mixed entities involving banks or other types of private company, which means the instrument is no longer one of internal procurement.

As with that detailed above, this obligation affects all institutions covered by sections 2.1 and 3; the difference is that, in the latter case, this only applies to agreements with public authorities. The idea is that management-delegation agreements cannot be entered into with bodies covered by section 3.

c) Subsidies and public grants awarded. First of all, it is important to stress that it is not only the subsidies and grants covered by the General Subsidies Act that need to be published, but also any others received, even those whose disclosure is not required by the aforementioned Act and not regulated by it (Barrero *et al.*, 2014). Legislation on subsidies already lays down that they must be subject to the principles of competitive bidding and published in the BOE, and the Transparency Act now requires their disclosure on websites or in virtual offices, including those issued to specific named recipients and those of less than € 3,000; furthermore, contributions not regulated by the General Subsidies Act must also be published, such as those received by parties in government.

This obligation affects all those subject to section 2.1, as well as to section 3, but only relates to any subsidies received from public

authorities. In the latter case, both parties will publish them: both successful bidder and recipient. The only exception is any private entities in receipt of public grants or subsidies totalling less than € 100,000 or making up less than 40% of their total annual income. In such cases, the Act does not require them to publish subsidies; that does not prevent the awarding public institution from publishing them, quite the contrary.

In relation to political parties, it is important that the disclosure of subsidies take place completely independently, in such a way that it is known how much they receive from each public institution, from the central government down to every last municipality. This is because, pursuant to section 14 of Organic Law 8/2007, of 4 July, on the funding of political parties, “consolidated annual accounts shall cover the central, autonomous-community, county and provincial governments”; that means that local authorities are not included, with all the corruption problems known to have existed in Spanish municipalities. Unfortunately, it does not seem that this provision of the Transparency Act will be able to rectify the lack of available information about private donations at local level, as will be seen below.

d) Budgets, with descriptions of the main budgetary items, as well as up-to-date and comprehensible information on progress with their implementation and on compliance with public authorities’ budgetary stability and financial sustainability targets.

According to the Open Knowledge Foundation’s aforementioned Open Data Index (accessed 10 March 2014), Spain only meets 55% of the Foundation’s requirements for having completely open budgets; specifically, the crucial failings of the Spanish budget relate to the formats in which they are published, which cannot be re-used in a spreadsheet and are not published under an open licence. Again according to the Open Data Index, Spain scores zero out of one hundred in the government spending transparency category. According to the index, there are not enough data, they cannot be accessed by the public (or in a digital format), they cannot be re-used, etc.

Further, back in 2005, the IMF report on budgetary transparency in Spain set out the need, inter alia, for publication of up-to-date sub-central government budgets; for explanation of the methodology and calculations for budget forecasts; for development of medium-term budgetary frameworks; and for increased transparency in the criteria used for defining the relationships between public authorities, on the one hand, and state-owned companies and other public institutions, on the other. Further still, on 30 June 2011, the plenary session of the Court of Auditors adopted its first – and, to date, only – report on the results of the investigation into transparency as regards financial management, which was very critical of the way the Ministry of Economy and Finance operated (Sesma Sánchez, 2012, p. 78 et seq.), stating that it was inappropriate that the “multiannual budgetary scenarios” were not published on the Ministry’s website, and that they were not provided on request. It also criticised the failure to publish in the BOE the ministerial order on drawing up multiannual budgetary scenarios 2007-2009, which makes implementation of section 28 of the General Budgets Act mandatory. In relation to the various books (19 books, divided into 51 volumes), grouped into series (red, green, yellow and grey), that act as supporting documentation when submitting central government budget bills to the Spanish Parliament, the Court of Auditors questioned the information and expressed the view that it is not complete or organised, but disparate, unclear and unsystematic as regards provision of information on the public sector as a whole (at central, autonomous-community and local levels); it also specified the responsibilities of each level and the resources that it needs to meet them. As regards disclosure and dissemination of this documentation, the Court of Auditors is especially critical of the fact that the BOE only publishes summary statements of revenue and expenses, rather than the full text of central government budget bills. Furthermore, it takes the view that this form of limited official disclosure contravenes section 91 of the Spanish Constitution. Finally, with respect to the reliability of all this documentation, the Court of Auditors report states that it is not audited by an extra-governmental body before its submission to parliament, as proposed by the fourth pillar of the IMF Code of Good Practices on Fiscal Transparency: Assurances of Integrity. In this regard,

the Court of Auditors report is merely in line with international and European recommendations that budget forecasts be audited by independent institutions or bodies with functional autonomy from governments.

The IMF Code of Good Practices on Fiscal Transparency, revised in 2007, sets as the principles of fiscal transparency the clear definition of roles and responsibilities, the existence of transparent budgetary processes, public access to information and the existence of assurances of integrity. Moreover, European Council Directive 2011/85/EU, of 8 November 2011, on requirements for budgetary frameworks of the Member States, in addition to requiring comprehensive and consistent accounts for all sub-sectors of general government along with internal checks and public audits, also requires the dissemination of budgetary data, laying down the following specific requirements regarding their regularity: monthly for central government, autonomous communities and social security subsectors, and quarterly for local authorities.

Therefore, in light of the preliminary appraisals and the obligations acquired, the possibility that the Transparency Act opens up – if complied with – of having clear information online about budget implementation and public spending will be extremely important for the effectiveness of the system and for the improvement of systems for society to monitor spending. In reality, what the Transparency Act does is make mandatory the inclusion on websites of documentation – clear and re-useable, it is to be hoped – that current legislation already requires, particularly since the adoption of Organic Law 2/2012, of 27 April, on financial sustainability and budgetary stability, and their subsequent regulatory development. This Organic Law has improved financial transparency and toughened up information requirements for all public authorities by establishing terms and the way in which the information to be provided is to be submitted, and by providing for its publication. Specifically (Alcalde, 2012, p. 28 et seq.), the Organic Law already requires (for submission to the Ministry of Finance and Public Authorities) financial information from autonomous communities and local authorities relating to their staff and cashflow plans, detailed information on their outstanding debt, and more complete budgetary information, since it

includes information on budgetary frameworks and key budget lines at the various stages of drafting, adoption and implementation them. Information on the approval and monitoring of financial plans must also be provided, as must rebalancing and adjustment plans, and monitoring reports, which are already published. In relation to disclosure, in order to go further with compliance with the transparency principle, the Ministry of Finance and Public Authorities has set out tables summarising its measures and a synthesis of the data, in order to facilitate standardising and overseeing them, as well as to systematise their monitoring, with a precise and published timetable. Finally, there is a requirement for the provision and monthly publication of information on the autonomous communities' monthly budgets, in both budgetary and national-accounts terms. Another new addition is the obtaining of budgetary and financial information from local authorities.

The key, therefore, is that all this information is put on the Ministry of Finance website, and that all public authorities (and public bodies affected by this Organic Law) meet their respective obligations, also publishing on their websites or in their virtual offices the data required by the Transparency Act in a re-usable, clear, systematic and structured way that is comprehensible for interested parties. To begin with, this creates an obligation for the AGE itself; despite having demanded extraordinary information from sub-national authorities, it has itself repeatedly failed to meet its obligation to provide clear, comprehensive and checked information on how it puts together its macroeconomic scenarios and multiannual forecasts, and on the quality of its data.

In conclusion, a brief reflection on applying this subsection to institutions bound by section 3 of the Transparency Act: according to the Ministry of the Presidency's responses to information requests by private entities bound by the Act, the whole of section 8 applies to them, with the logical exceptions of subsections g, h and i. In the opinion of this author, subsection d of this section is very hard to apply to these private entities with the current wording, without them interpreting it very loosely and taking the view that all they have to do is to publish their budgets, with nothing else. To begin with, no one is interested in

whether a private entity's budgetary implementation is good, bad or average, and far less in whether it complies with budgetary stability requirements (it is in its own interests not to make mistakes). What is of interest is whether public funds received have been used pursuant to the subsidy requirements, but not whether private funds are meeting their private budgetary targets or not. The same can be said of trade unions and employers' associations, which have to explain how budgets are spent to their members, but not to the general public (except for public subsidies received, which they have to demonstrate that they have spent on the purpose for which they were awarded, for which end the relevant government audits take place). In short, therefore, this author does not share the view that they are bound by the Act, although their constitutional role means they have an obligation to civic responsibility and, above all, to seeking good governance within their own organisations (in order to improve internal accountability and encourage monitoring of their members). In any event, there is a need to clarify how trade unions need to structure their budgets, since they are not government bodies but cannot be treated the same as public limited companies.

Political parties are a different matter. In Spain, they receive, on average, 80% of their available budget from the public authorities, while part of the other 20% comes from private donations that could affect the actions of their representatives at the various levels of government. It is therefore very important that the parties, in addition to the obligations set out in the paragraph below, which are those providing truthful information about their financial and property situation, also publish their budgets on their websites; this is something that the Funding of Political Parties Organic Law does not, as yet, require.

e) Any annual accounts need to be submitted, and any auditing and inspection reports in relation to them issued by external monitoring bodies.

While the technical quality of budgets at the sub-national government level has improved since the Financial Sustainability and Budgetary

Stability Organic Law, it is true that annual accounts already give more accurate information than has happened at the budget stage in the past, since the actual income and expenses are known. It is therefore crucial for financial transparency that annual accounts be published online in a re-usable format. What is not very easy to understand is why only external inspection reports are included under proactive disclosure and not those for internal inspections or audits, which are increasingly important in the public sector (see the International Organisation of Supreme Audit Institutions, or the Committee of Sponsoring Organisations).⁵ Furthermore, the genuine monitoring of compliance with public authorities' targets intended by section 6.2 of the Transparency Act would have to be linked to the IGAE (and the autonomous communities' audit services) conducting wide-ranging operational audits, alongside which their publication would complement this section with more assurances than those derived from leaving this up to audits by internal services.

The wording given to section 136.4 of the General Budgets Act by the Central Government Budget Act for 2013 lays down that central government-level public sector entities not obliged to publish their accounts in the Business Register will be obliged to publish their audit report in the BOE annually, along with their balance sheet, accounting profit/loss statement and a summary of their annual accounts (which was already mandatory). This measure made it possible to know the auditors' opinion on the reasonableness of the figures and data included in the annual accounts of public entities. The Third Final Provision of the Transparency Act has now amended this Act, adding this obligation for "any entities that have to apply public accounting principles" as well; this enables the internal audits of a large number of public entities to be seen. Unfortunately, however, they are only published in the BOE, not in re-usable formats and without the clarity requirements imposed by the Transparency Act. Furthermore, reports relating to the continuous financial monitoring and audit services of public authorities are not published in any format, and nor are the audits of the IGAE

5. Abundant information is available in Palomar and Garcés (2013).

(or similar ones by the autonomous communities' audit services) for autonomous authorities and bodies (as distinct from "entities", which are those institutions covered by section 2.1.c, d and g of the General Budgets Act). In any event, given the principles of concomitance and concurrence that audit services and continuous financial monitoring involve (Garcés, 2013), it is understood that reports could be published once a given period has elapsed since its delivery to the corresponding body (for example, three months).

In conclusion, it should be remembered that the auditing and the external management conducted by the Court of Auditors cannot be required of all institutions, only those covered by section 2.1 of the Court of Auditors Organic Law. This makes it doubtful that the Court could audit constitutional bodies, although the internal regulations of some have been enabling this to happen, for example the General Council of the Judiciary (CGPJ, allowed by rules 33 and 114 of its regulations), the Constitutional Court and the Council of State. However, neither Parliament nor the Parliamentary Commissioner are audited (Aznar, 2013). It is a curious quirk that some autonomous community-level external audit services do audit their respective regional parliaments (Castile-La Mancha and the Valencian Community). In short, external audits do not exist for some of the institutions bound by the Act, making it difficult for them to be published.

This subsection again considers the problem of its application to institutions bound by section 3 of the Transparency Act. As shown above, the Ministry of the Presidency has deemed that this subsection should apply to all institutions bound by section 3. It should again be stated that this author has doubts about applicability to private entities, especially because disclosure would have to focus on monitoring public subsidies and on Court of Auditors reports on the proper use of this income, and nothing more. Furthermore, in the case of trade unions, for example, it is difficult to apply accounting procedures for public limited companies to them fully, since they enjoy the use of public property free of charge (so that they can carry out their constitutional function); this cannot be calculated as their own property, since that

would cause auditing distortions. In any event, as has been indicated, in order to improve internal accountability and transparency towards their members, publication of these data in the most simple, comprehensive and coherent way possible would be a good thing.

Once again, political parties are a very different matter. Parties must be completely transparent towards the public (and not just towards their members, although that is also necessary) regarding their sources of funding and how they put them to use; the key reason is that these organisations can – when their militants are in the relevant government – be pressured to adopt policies and programmes that benefit their backers and are against the public interest. They must also explain how they use the public funds they receive. Therefore, the Transparency Act could be an instrument that enhances their publishing and accountability obligations (since it requires the use of online data that are re-usable and clear, etc.), along with the Funding of Political Parties Organic Law itself, which already requires disclosure of a fairly extensive range of data, as shown below.

Section 14 of Organic Law 8/2007, of 4 July, on the funding of political parties states that political parties must “submit detailed books of accounts that provide, at any time, knowledge of their financial and property situation, and of their compliance with the obligations laid down in this Law”. Moreover, pursuant to generally accepted accounting principles, the cashflow books, inventories and balance sheets must include:

- a) Annual inventory of all goods.
- b) Revenue statement, which must include the following income categories, as a minimum:
 - Total members’ fees and contributions.
 - Revenue derived from its own property.
 - Revenue derived from the donations mentioned by section 4 of this Organic Law.
 - Public subsidies.
 - Profit derived from the party’s activities.

- c) Expenses statement, which must include the following expenses categories, as a minimum:
 - Staff expenses.
 - Expenses on acquisition of goods and services (current).
 - Financial expenses from loans.
 - Sundry administrative expenses.
 - Expenses from the party's own activities.

- d) Capital transactions relating to:
 - Credit or loans from financial institutions.
 - Investments.
 - Debtors and creditors.

Further on, it states that: “The annual accounts shall include the balance sheet, the profit and loss account, and a report explaining both. In any event, this report shall include the report on public subsidies and private donations received from natural or legal persons, with specific reference, for each of them, to any elements enabling identification of the donor and indication of the amount of capital received. The report shall also be accompanied by an annex specifying, in detail, the contractual conditions stipulated for any credits or loans of any nature that the party maintains with any credit entities. The annex shall identify the awarding entity, the amount granted, the interest rate and amortisation term of the credit or loan, and the outstanding debt at the end of the financial year in question, indicating any relevant contingency on compliance with the agreed-on conditions.”

Today, as a consequence of the adoption of Organic Law 5/2012, of 22 October, amending Organic Law 8/2007, a subsection 8 has been added to section 14 of that Law, which is worded as follows:

“8. Once the Court of Auditors has issued the audit report corresponding to a given financial year, political parties shall be obliged to publish, preferably on their website, the balance sheet, the profit and loss account and, in particular, the amount of credits that have been awarded to them, the rate of the awarding entity and the debt cancellations

corresponding to that financial year, in such a way that this information can easily be accessed at no charge by citizens.”

Therefore, if the Transparency Act is being observed and parties are publishing their annual accounts online, clearly and in re-usable formats, the public can carry out rigorous checks on their sources of funding, and ensure that the activities of the governments they run particularly favour those who generously fund them. If, in addition, the data of their local associations were added, this would constitute a definitive step towards transparency.

Also with a view to greater transparency, Organic Law 5/2012 amends section 15 of Organic Law 8/2007, laying down that:

“Political parties shall provide for a system of internal checks that ensures adequate auditing and accounting in any documents from which rights and obligations with financial content are derived, in accordance with their constitution. The report resulting from this audit shall accompany the documentation to submit to the Court of Auditors.”

Ideally, this report would also be published, as is already done with the Court of Auditors when it audits parties, and both would be published on the website of the corresponding party. Under the Transparency Act, it is currently only obligatory to publish that of the Court of Auditors.

It is also important to state that political parties obtain income from their foundations and enterprises. With respect to the former, the aforementioned Organic Law 5/2012 sets out greater monitoring and transparency, and Organic Law 5/2012 therefore amends the Seventh Additional Provision of Organic Law 8/2007, of 4 July, on the funding of political parties, which is worded as follows:

“Seventh Additional Provision.

1. Any contributions that foundations and associations linked to political parties represented in parliament shall be subject to auditing and

monitoring mechanisms, and to the system of penalties provided for, respectively, in Titles V and VI of this Law, notwithstanding any of their own regulations that may be applicable to them. [...] 5. The foundations and associations regulated by this additional provision shall be obliged to formulate and adopt their accounts under the terms laid down in the legislation in force and to conduct an audit of their annual accounts. Once the Court of Auditors has issued the audit report on the contributions to which subsection 1 of this section refers, they shall be obliged to publish, preferably on their website, their balance sheet and profit and loss account, in such a way that this information can easily be accessed at no charge by citizens. [...] 6. The foundations and associations regulated by this additional provision shall be obliged to inform the Ministry of Finance and Public Authorities annually of all donations and contributions received, for which purpose a ministerial order shall be published, indicating the content, scope and structure of the information to be provided. Furthermore, the Court of Auditors shall be informed of all donations from legal persons within a period of three months.”

As a foretaste of possible compliance with the Transparency Act, it would be a good idea to audit the compliance of political parties and their foundations with funding legislation relating to transparency (after all, it is now almost two years since the reform passed in 2012). The Commitment and Transparency Foundation did just that in 2012 (Barrio *et al.*, 2012). It checked the websites of Spain’s largest parties and the results are not very encouraging: except for Union, Progress and Democracy (UPyD) and, to a lesser extent, United Left (IU), compliance is still fairly poor (out of a maximum of six points,⁶ the average is 0.65).

f) Remuneration received annually by senior officials and top-ranking managers of the entities falling under the scope of this Title. Where applicable, compensation received on leaving a post must also be included.

6. The six points relate to: balance sheet, profit and loss account and report (1 point); details of main sources of income (1 point); details of main sources of expenses (1 point); loans received and cancelled (1 point); internal audit report (1 Point); and Court of Auditors report (1 point).

To begin with, it would be good to know what the concept of “remuneration” constitutes; that is, whether it only covers fixed compensation or variable too. “Productivity” is a remuneration concept that has had to be published since the Civil Service Act (30/84); nevertheless, numerous ministries do not do so. Furthermore, it is important to know how productivity is divided up by ministers (in any autonomous communities where this add-on exists, these ideas are also applicable), on the basis of what criteria, and how and why they are divided between the lucky employees and officials. Disclosure of these data would be of universal benefit. Compensation received on leaving a post applies in few cases, but it is still good to know when it is given and accepted (following the 2011 elections, the majority of senior AGE officials entitled to compensation waived it). For all those reasons, proactive disclosure of this information would be positive. Finally, there is the payment of expenses, which does not constitute remuneration, strictly speaking, so it does not have to be published. In principle, it is hard to understand the reasons why expenses have not been included in the Act; it is public money and there are too many abuses with how they are handled not to demand transparency. That is not only the case for the former Chair of the CGPJ, but also for many other cases of senior officials flying home at the weekend and repeatedly claiming expenses (if it is necessary to pay travel costs for senior officials who live outside the national or autonomous community capital, it should be done, but repeatedly compensating them should be avoided). The same also happens with the Foreign Service, remuneration for which is not transparent enough and must be reformed (without denying the need to compensate state employees for living outside the country).

In relation to the people about whom this information has to be provided, it can be made clear who the senior officials are in central government (with reference to the Conflicts of Interest Act, 5/2006), and even who the top-ranking managers of central government-owned *entities* are, following Royal Decree 451/2012, which regulates the remuneration of these managers; however, each of the autonomous communities has, or has not, clarified the concept using its own criteria, and local authorities do not have a general definition for it. It would be a good

idea to apply an interpretation of the AGE model to all sub-national governments, except where proscribed by autonomous community-level legislation. Next, however, comes the problem of elected officials, especially parliamentarians, who are neither senior officials nor top-ranking figures (only the speakers of the various parliaments can be considered as such); nor can members of the CGPJ, Council of State or Court of Auditors be considered officials or managers (except, again, the chair of each body), although they are similar in some cases to senior officials as regards incompatibilities (Council of State). In short, the scope of the Act remains unclear in this respect, although it is to be hoped that a sensible interpretation would lead to the assumption that all elected officials and senior figures in constitutional bodies (and their equivalents in the autonomous communities) accept the obligation to be transparent with regard to their remuneration.

Finally, institutions bound by section 3 also pose problems as regards implementing this subsection. It is understood that political parties have to publish all the fixed and variable remuneration, and the compensatory payments received by members of their executive committees at national, autonomous-community and local levels, and by their senior staff at national and autonomous-community level (managers, chiefs of staff, etc.). This will affect few people outside the major parties. In any event, it is a personal decision linked to the principle of internal and external transparency and accountability, rather than to what the Act stipulates, which could be met by publishing the “remuneration” of the general secretary and/or chair, who are the top-ranking figures (legally, there are no senior officials in political parties).

In relation to trade unions and employers’ associations, accountability regarding their own remuneration is part of the duties of their “senior officials” and top-ranking figures; this can be considered positive. It could be understood that the remuneration that has to be published is that of members of their national, regional and local managers, also including that of members of the executives of trade union federations. Once again, the general public does not have a “right” to know how much the top-ranking figures in these organisations earn, unless it is

accepted that they serve a constitutional purpose and, therefore, should receive sufficient transparent state subsidies to perform this role; this does not happen in Spain. That said, since there is legislation permitting time off for trade union duties, it would be positive if members knew whether the “officials” of the executives were collecting any additional income for their dedication, expenses paid for staying away from home, etc., simply in order to monitor related abuses. Although, obviously, if this remuneration is put up on their websites, any interested person will be able to consult it, these organisations’ obligation can essentially be considered to be to their members, given their democratic nature, as laid down in the Constitution. In any event, if trade unions and employers’ associations decide simply to comply with the Ministry of the Presidency’s loose interpretation of the Act, they would only have to put online the remuneration of their top-ranking figures, meaning their general secretaries.

Finally, all the above is also applicable to private entities in receipt of subsidies, although the idea of proactive disclosure naturally becomes more relevant in cases where almost 100% of the funds are public money.

g) Any decisions authorising or recognising compatibility that affect state employees, as well as any authorising senior officials to undertake private work when they resign from their posts in the AGE or similar public authorities, depending on autonomous-community or local legislation.

This section, naturally, only affects institutions subject to Article 2.1; despite the very strange way in which it is laid out, it represents a step forward in transparency terms. That is also the case with the following subsection, *f*, which also concerns the same subject. Once the Act comes into force, the Conflicts of Interest Office (and its equivalents in the autonomous communities) will have to upload to the relevant website all decisions authorising the compatibilities of state employees. It is not clear whether this includes senior officials, even though, according to central-government legislation, compatibility is unlikely for

senior officials.⁷ Also, it is somewhat unclear what constitutes a senior official in local government, and in some autonomous communities. What is clear is that it does not include elected officials, the heads of constitutional bodies, or judges and public prosecutors. This leaves out a significant proportion of the people with the greatest problems in this regard: mayors, and councillors and assembly members. Spain has made serious legislative errors in this regard, as several international authorities have stated (including the Group of States against Corruption, GRECO): elected officials have a very poorly regulated system for conflicts of interest and incompatibilities and, even worse, a system that lacks significant monitoring but includes enormous loopholes. That monitoring of the conflicts of interest of mayors and councillors is in the hands of municipal secretaries is a disgrace, as is allowing assembly members themselves, through the relevant committee, to grant compatibilities that are openly illegal or, at best, immoral. At least, in the unlikely event of compliance with the Transparency Act, it will be possible to find out about local governments' compatibility decisions for state employees, which are sometimes openly illegal, or those the national parliament grants its officials (since they are civil servants). However, it will not be possible to find out about compatibility decisions for mayors and councillors (is there such a thing?), or for assembly members and senators. Judges and public prosecutors (even though the latter are not affected by the Act, because an incomprehensible error means the Public Prosecutor's Office is not bound by the Act) are not a problem, since their system is very strict and thoroughly checked.

However, as well as all the possibilities encompassed by conflicts of interest legislation, only one of the pieces of information important for

7. Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration: "Section 5. Exclusive dedication to public office. The senior officials included under section 3 shall be exclusively dedicated to the performance of their roles and may not combine their activities with the performance, themselves or through a substitute or other proxy, of any other position, post, representation, profession or activity, whether public or private, on their own behalf or that of another, nor may they receive any remuneration from the budgets of the public authorities or related entities answerable thereto, nor any other payment originating, directly or indirectly, with private-sector activities."

preventing corruption is published: that known as “post-employment quarantine”, relating to private-sector work following resignation.⁸ In addition, this obligation again covers only senior officials (above all in central government; in some autonomous communities, this situation is not even regulated), so it excludes elected officials, who can in no way be considered “senior officials”. Unfortunately, moreover, this situation is not regulated for assembly members or senators, nor for judges or public prosecutors, nor for the overwhelming majority of the members

8. Specifically, section 8 of the Conflicts of Interest Act (5/2006) states:

“1. In the two years following their resignation date, the senior officials to which section 3 refers may not perform their services in private enterprises or companies relating directly to the competences of the post occupied. For these purposes, there is considered to be a direct relationship when any of the following conditions apply:

- a) The senior officials, their superiors, on their recommendation, or the heads of bodies reporting to them, by delegation or substitution, have reached decisions relating to the aforementioned enterprises or companies.
- b) They have taken part in the sessions of collegiate bodies at which some agreement or decision has been reached relating to the aforementioned entities.

2. Any senior officials regulated by this Act who, prior to occupying these public offices, were professionally active in any private company that they wish to rejoin shall not be deemed incompatible, as defined in the previous subsection, when the activities they are to carry out will be in positions that are not directly related to the competences of the public office occupied and that cannot make decisions affecting it.

3. For the period of two years referred to in subsection 1 of this section, they may not conclude, on their own behalf or that of companies in which they hold a greater than 10% stake, directly or indirectly, contracts for technical support, services or similar with the public authorities, directly or through contracted or subcontracted enterprises.

4. Any persons who have worked as one of the senior officials covered by section 3 shall, for the period of two years mentioned in subsection 1 of this section, make a statement, to the Conflicts of Interest Office provided for in section 15, regarding any activities that they are to undertake, prior to commencing them. Within a period of one month, the Conflicts of Interest Office shall reach a judgment about the compatibility of the activity to be undertaken, and shall give notice thereof to the interested party or to the enterprise or company to which he intends to provide his services.

5. When the Conflicts of Interest Office takes the view that the private-sector activity that a person who has formerly been a senior official wants to undertake breaches the provisions of subsection 1, it shall give notice thereof to the interested party or to the enterprise or company to which he intends to provide his services, who shall formulate any statements that he considers appropriate. Having analysed the statements, the Office shall issue whichever decision is applicable.

6. For two years following their resignation date, persons re-entering public service and providing services reimbursed with charges, fees or any other sum of money to natural or legal persons private in nature shall abstain from any private-sector activities relating to the competences of the senior position occupied.”

of constitutional bodies;⁹ mayors and councillors, for whom it is regulated, would not be affected by this Act.¹⁰ In any event, the regulation introduced by the Land Act – not before time – is not worth the paper it is printed on, since no one monitors or makes decisions regarding this sort of situation involving mayors and councillors, or even local managers affected by the ban,¹¹ with the possible exception of Catalonia, thanks to the creation of the Catalan Anti-Fraud Office (OAC). In

9. See GRECO (2013) in this regard.

10. Item 4 of the Ninth Additional Provision of the Land Act caused the inclusion of a new subsection 8 in section 75 of the Local System Act, which states: “8. During the two years following conclusion of their term, any of the local representatives referred to in subsection 1 of this section who have had executive responsibilities in the various departments into which the local government is organised shall, within the territorial scope of their competences, be subject to the limitations on the exercise of private-sector activities laid down in section 8 of Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration. For these purposes, local authorities may provide financial compensation during that period for any who, as a result of the incompatibilities system, are unable to carry out their professional activities, or receive financial remuneration for other activities.”

11. Fifteenth Additional Provision of the Local System Act: “System for the incompatibilities, and the activities and assets statements of local managers and other staff in the service of local entities”, which lays down that: “1. The heads of management bodies shall be subject to the incompatibilities system laid down in Law 53/1984, of 26 December, on the incompatibilities of persons in the service of public authorities, and any other applicable national- or autonomous community-level legislation. Nevertheless, they shall be subject to the limitations on the activities of private individuals laid down in section 8 of the Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration, pursuant to the terms laid down in section 75.8 of this Act. For these purposes, the heads of any bodies that perform higher-level management or enforcement functions shall be considered managers, and they shall comply with the general guidelines set by the governing body of the Local Authority, adopting, for this purpose, the relevant decisions, and enjoying a measure of autonomy within these general guidelines.

2. The system provided for under section 75.7 of this Act shall be applicable to any local managers and central government-authorized employees of local authorities who, pursuant to section 5.2 of the Second Additional Provision of Law 7/2007, of 12 April, on the fundamental status of public employees, occupy in local entities any posts provided for through free designation of the executive nature of their roles, or any specific responsibilities they accept.”

In summary, therefore, managers and central government-authorized employees have to declare their assets and activities, and this statement has to be public. However, the two-year post-employment quarantine is not applicable to these central government-authorized employees, since it only affects local managers.

conclusion, this author believes it would be very beneficial to publish, not just authorisations to work in an area linked to a position, but also rejections; the absence of this information makes it more difficult to apply strictly the Public Procurement Act, one of whose prohibitions on engaging the services of companies (section 60) states that:

“Having engaged the services of any persons cited in the *Official State Gazette* as being in breach of section 18.6 of Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration by having performed their services in private enterprises or companies relating directly to the competences of the post occupied in the two years following their resignation date. The prohibition on engaging the services of the enterprise shall remain in force during the period for which said person remains within its organisation, up to a maximum of two years from his resignation date.”

In addition to what is set out in the Transparency Act, what could and should be published (ideally), as regards conflicts of interest? Where appropriate, statements of family members' income and property should be published; a statement of any private interests that could be relevant and could influence decision making or advice; access to privileged information; competitive appointments outside government (e.g. parties, non-governmental organisations, foundation boards); and declarations of abstention and of the arrangement of blind trusts (engaging a registered financial entity to handle shares in companies without being able to give it instructions during that period). All this would provide relevant information about senior officials and members of the government, which would surely discourage corruption.

h) The annual statements of assets and activities of local representatives, pursuant to Law 7/1985, of 2 April, regulating the local system. When regulations do not set the terms within which these statements have to be made, those laid down in the legislation relating to conflicts of interest in the AGE will be applied. In any event, data relating to the

specific location of real property are omitted, and the privacy and safety of its owners are ensured.

Subsection 3 of the Ninth Additional Provision of the Land Act amends section 75.7 of the Local System Act, laying down that:

“Local representatives, as well as non-elected members of the Local Government Cabinet, shall draw up statements of causes of possible incompatibility, and of any activity that provides or could provide them with financial income. They shall draw up statements of their property assets, and of their stakes in companies of all types, with information on companies in which the latter have a stake, and on their income tax (IRPF), property tax (IBI) and, where applicable, corporation tax (IS) payments. These statements, drawn up pursuant to the models approved by the relevant plenary sessions, shall be made prior to starting the role, in the event of resignation and at the end of the term, as well as whenever the facts change. Annual statements of assets and activities shall be published annually and, in all cases, at the end of the term, pursuant to municipal bylaws. These statements shall be recorded in the following public registers of interests: a) The statement of causes of possible incompatibilities, and of any activity that provides or could provide financial income shall be recorded in the Register of Activities constituted in each local entity. b) The statement of property assets and rights shall be recorded in the Register of Property Assets of each local entity, pursuant to the relevant bylaws.”

Unfortunately, there are several very significant problems with implementing this provision: first, no one monitors whether what it states actually happens; second, disclosure does not have to be transparent, for example in an internal newsletter that no one reads; and, finally, many local authorities have passed bylaws regulating this obligation, to avoid it applying to them. The Transparency Act therefore represents a major step forward in this regard: if publication takes place online, in a way that is clear, structured and comprehensible, regardless of whether or not it is included in the bylaws, many members of the public will be

in a position to check the accuracy of these statements, which will discourage false statements and possible corruption.

The question now is: why only publish those of local representatives? Should those of assembly members, senators, constitutional officials and senior officials of all types not be included? The obvious answer is yes, but legislators know, in the case of assembly members and senators, who have been obliged since 2011 to publish their statement on their website, that failure to comply (particularly with the statement following resignation) is not leading to legal action being brought, and that no one checks whether activities and property statements are accurate, missing relevant information, etc. (see the GRECO report, 2013). Furthermore, this statement obligation does not apply to the vast majority of constitutional bodies and, in relation to senior officials, the Transparency Act has simply expanded the obligation to publish, in the BOE, the content of property assets statements for all those bound by the Conflicts of Interest Act, meaning those in the AGE;¹² in the latter case, it is hard to see why in the BOE rather than on websites.

Overall, adequate information about the property assets of senior officials and their families could help greatly with discovering procurement conflicts of interest: it should not be forgotten that the procurement-related prohibitions set out in section 60 of Legislative Royal Decree 3/2011, of 14 November, approving the recast text of the Public Procurement Act include the following:

12. "Second Final Provision. *Amendment to Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration.*

Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration, is hereby amended as follows:

Subsection 4 of section 14 is worded as follows:

"4. The content of the statements of property assets and rights of members of the government and of secretaries of state and other senior officials provided for in section 3 of this Act shall be published in the Official State Gazette, pursuant to the regulations. As regards property assets, a comprehensive statement of the property holdings of these senior officials shall be published, omitting details relating to their location, and safeguarding the privacy and safety of their owners."

“A natural person or the director of a legal person in breach of one of the provisions of Law 5/2006, of 10 April, regulating conflicts of interest for members of the government and senior officials of the Central Government Administration, or of Law 53/1984, of 26 December, on the incompatibilities of persons in the service of public authorities; or any of the elected officials governed by Organic Law 5/1985, of 19 June, on the general electoral system, pursuant to the terms thereof. The prohibition shall affect any legal persons in whose capital they own a stake, pursuant to the terms and values laid down in the aforementioned legislation, the staff and senior officials of any public authority, and the elected officials in the service thereof. The prohibition shall also extend, in both cases, to the spouses, persons linked by an analogous relationship of cohabitation and descendents of the persons mentioned in the foregoing subsections, provided that said persons enjoy legal representation of the latter.”

i) Statistical information necessary for evaluating the level of compliance and quality of public services.

By its very nature, this obligation is not applicable to institutions bound by section 3 and what it means is very difficult to define *a priori*. Every authority and body will define how to evaluate the compliance and quality of public services. Nonetheless, it seems obvious that meeting the obligation requires an investigation of sufficient quality to be able to *evaluate*, rather than *estimate*, compliance. To that end, the AEVAL conducts fairly reliable and rigorous work in this area, and its model could prove suitable for other authorities at autonomous-community level; in local authorities, meanwhile, the ideal would be for them to cooperate with the AEVAL itself on thoroughly assessing the quality of their services. As well as the data provided by the AEVAL or its equivalents in the autonomous communities, each public body could and should have an appropriate system for monitoring its more specific services. As regards the environment, for example, data or indexes on the quality of inland waterways (lakes, rivers, reservoirs, etc.) in each region are very important, as are data on national and regional greenhouse gas emissions, and on Kyoto Protocol compliance. In relation to health,

regular publication of data on the number of hospitals, healthcare centres and hospital places/beds per inhabitant would be advisable, as would regular data on waiting lists at the various health centres, and catalogues of the various public services and conditions for accessing them (hours, prices, etc.).

It would be more complicated for institutions covered by section 2.1.f¹³ to carry out this task, but it would be very significant and useful to move closer to compliance with this obligation. For example, the CGPJ could prepare statistics on the various types of offence, the sentences for them, the length of trials, etc. The same could be said of the Public Prosecutor's Office, except it is not covered by the Act; this constitutes an inexcusable error, since the Public Prosecutor's Office has legal personality.

j) Reporting of any real property that it may own or over which it may hold some right in rem.

This obligation, linked to that of having an inventory of all the goods and rights comprising its property (section 32 of the Public Authorities' Property Act), is very positive. The only possible complaint is that this report does not cover movable assets, which is not very logical when one considers, for example, the huge artistic riches that public authorities own and the looting that could take place due to lack of checking.

Penalties

The question now arises of what happens if any of these obligations are breached. As will be seen, the conclusions are not very optimistic. Section 9 of the Transparency Act states:

13. The Household of His Majesty the King, the Congress of Deputies, the Senate, the Constitutional Court and the CGPJ, as well as the Bank of Spain, the Council of State, the Parliamentary Commissioner, the Court of Auditors, the Economic and Social Council and analogous institutions in the autonomous communities, in relation to their activities subject to administrative law.

“1. Compliance by the Central Government Administration with the obligations laid down in this chapter shall be subject to checks by the Transparency and Good Governance Council.

2. In the exercise of the competence provided for it the foregoing subsection, the Transparency and Good Governance Council, pursuant to any procedures laid down in the regulations, may issue decisions setting out any measures that may need to be adopted to become compliant, and launching the proper disciplinary measures.

3. Repeated breaches of the proactive disclosure obligations regulated by this chapter shall be considered a serious offence for the purposes of applying to the responsible parties the disciplinary measures provided for in the corresponding regulatory legislation.”

The following reflections can be drawn from this section. First, as Barroero *et al.* (2014) state, section 9 – including all its subsections – have the status of “basic legislation”, which means legislation the provisions of which the autonomous communities can choose whether or not to apply. Each community is therefore free, if it so chooses, not to set any penalty for its own authorities and for the local authorities governed by its legislation.

Second, it does seem like there is monitoring of AGE compliance from the Transparency and Good Governance Council (CTBG), which can use the relevant decision to start procedures intended to require compliance and, in the case of repeated breaches, to open disciplinary proceedings. However, what constitutes “repeated breaches”? To begin with, there would be no penalty merely for a breach, but rather for the fact of it being repeated; it being *repeated* means that the relevant data have not been included, even after this has been highlighted several times, which would take at least a few months. On the other hand, could there be a mild penalty for breaches that are not repeated? It is not clear, since the Act only mentions severe penalties and repeated breaches. Who, moreover, is responsible for the penalty? This is a fairly complex problem: it needs to be stated that the relevant undersecretary

should be responsible from now on, rather than the head of the citizen service facility, who has no internal powers to demand information from the relevant directorates-general. If it is the undersecretary, however, how should she or he be penalised? There are no penalties included in good governance legislation for breaches of the proactive disclosure obligation. Under section 28.k of the Transparency Act breaches by senior officials and similar of the obligations to publish or provide the information required under budgetary and financial legislation are considered a very serious offence, but these obligations do not extend further than publishing the data in official gazettes or supplying them to the competent body, and do not require them to be published online. Section 29 of this Act also establishes the – supposedly “undue” – publication of any documents to which the post gave access or resulting from negligent keeping of official secrets as a very serious offence. This constitutes a real contradiction that could create obstacles to the provision of information, without it being known, in the end, which criteria to follow in case of doubt. In relation to state employees, there is still no penalty in the “relevant” disciplinary legislation, so its implementation could be deferred until it is incorporated into the AGE’s state employee regulations, where existent and applicable. Finally, it is assumed that the CTBG is not the body that will launch the relevant proceedings, but will instead urge the competent body to do so. If that latter does not do this, it is unlikely that the CTBG will be able to demand that its proposal be respected, but it will be able to demand an explanation, similarly to the provisions of section 38.2 of the Transparency Act.

Third, what happens with any institutions covered by the Act that are not public authorities? In fact, their breach is subject to society’s condemnation, if that. The CTBG is not competent to penalise bodies coming under section 2.1.f, naturally, but it is not clear what is for entities that are, strictly speaking, distinct from the AGE if following the general criteria of the Act, which repeatedly makes the distinction. In relation to institutions covered by section 3, political parties must be set apart from the rest, because they could incur responsibilities and penalties for proactive disclosure breaches under their own funding legislation. In reality, it is a purely hypothetical situation that is unlikely

to arise for the moment, since the Funding of Political Parties Organic Law only mentions serious offences, which this is not. As the Organic Law does not include classifications of offences or a coherent system of penalties, it will be necessary to wait and see how it ends up being amended to enable the Court of Auditors to penalise those in breach. As regards other institutions covered by section 3, no method has been established for requiring their compliance, so it does not go beyond condemnation by society.

How the information must be published

As stated above and laid down in section 5 of the Transparency Act, information must be published:

1. Periodically and as updates. The truth is that this precept, if taken seriously, requires continuous and daily updates starting when the Act came into force, excluding obvious exceptions. Failure to do so could harm interested parties, which would have to be compensated. It is very important to stress that the principle does not just affect institutions covered by section 2.1 and that, along with all the other sections of chapter II, it aims to ensure the transparency of the activity relating to the operations and monitoring of state activities. It is also essential to stress that the information required by the Act is a bare minimum, since the scope of the transparency obligations included in chapter II is without prejudice to the application of relevant autonomous-community legislation or any other specific provisions that provide for a wider-ranging set of disclosure rules.

2. On the relevant websites or web pages. Virtual offices are linked to e-government and enable public interaction to carry out government processes, while websites do not necessarily have a virtual office. This implies that all institutions affected by the Act would have to have their own website or “virtual office” (if they are public authorities). As some very small municipalities and private entities may lack the resources to maintain their own website, there is the possibility of cooperation and collaboration. For that reason, “in the case of any not-for-profit entities

that exclusively pursue socially or culturally beneficial ends and that have a budget of less than € 50,000, they can comply with the obligations derived from this Act using the electronic means made available to them by whichever public authority is the source of the majority of the state grants or subsidies received” (section 5.4, Transparency Act). For public bodies, meanwhile, section 10.3 of the Transparency Act states that: “The Central Government Administration, the authorities in the autonomous communities and the cities of Ceuta and Melilla, and the entities comprising the local authority can adopt other complementary and collaborative measures for compliance with the transparency obligations laid down in this chapter”.

3. Information must be published in a way that is clear, structured and comprehensible for interested parties, preferably in re-usable formats. Access, interoperability, quality and re-use of the published data must be also facilitated, in addition to identifying and locating them. Finally, the information must be comprehensible, easily available free of charge, and accessible by disabled people. All that is very laudable, even when it remains to be seen how it will be implemented. Logically, following approval of the Transparency Act, Law 37/2007, of 16 November, on the re-use of public sector information, and of Royal Decree 1495/2011, of 24 October, applying that Act at central-government level, would be amended to encompass re-using information, not just documents, and ensuring that the process is free of charge.

In conclusion, it is important to highlight the intention for the AGE to set up a transparency portal, for which the Ministry of the Presidency will be responsible. It should facilitate public access to all the information regarding the scope of its activities referred to in sections 6, 7 and 8. This portal will function in accordance with the following technical principles:

a) Accessibility: structured information will be provided on the documents and information resources, in order to facilitate information identification and searches.

b) Interoperability: the information published will conform to the National

Interoperability Model, approved by Royal Decree 4/2010, of 8 January, and to technical interoperability standards.

c) Re-use: publication of information in formats enabling re-use will be encouraged, pursuant to Law 37/2007, of 16 November, on the re-use of public sector information and its implementing legislation.

If it managed to interconnect all AGE information, this portal would be a major step forward, but it is a shame that it was not understood that the portal could have been a major open government portal, incorporating possible ways for the public to cooperate and participate, as well as connecting virtual offices and providing public users with high-quality services.

Limitations

Since there will be further texts dedicated to this subject in subsequent publications, it will simply be noted here that section 5.3 states that, where appropriate, limitations will be applicable to the right to access public information provided for in section 14, in particular that derived from personal data protection, as set out in section 15. In this respect, whenever the information contains specially protected data, disclosure will only take place once these data have been removed.

Given these limitations' compatibility with comparable legislation (Guichot, 2014), extensive use of them, once accepted, could render proactive-disclosure legislation practically ineffective. It is therefore important to stress that they should be subject to the necessary justification, to proportionality in their invocation, and to weighing up the various conflicting interests, case by case.

Conclusions

Following analysis of the Transparency Act, the most important element of these conclusions is connecting the Act to the objectives consid-

red to have guided its emergence. Consequently, the key question is whether the Act will be able to legitimise state action again, to prevent corruption and to make Spanish public authorities more effective. Naturally, to know whether these noble objectives are being achieved, it will be necessary to conduct an evaluation of transparency policy once the Act has been fully implemented. In order for it to be adequately implemented, a whole range of variables must be in place to enable a positive balance between interest groups and the capabilities of the involved parties, while avoiding paralysing vetoes. Specifically, according to the extant literature on this subject, the following challenges for the effective implementation of a transparency and information-access strategy can be identified:

1. There must be a system of files for storing effective decisions: even with the best will in the world, providing the requested information will not be possible otherwise.
2. A drastic simplification of rules and procedures. Without this simplification, it is unlikely that the information will be clear, structured and comprehensible.
3. Effective interoperability between systems or components for exchanging information and putting the exchanged information to use. In this case, there is more a problem of political will than one of technical issues, since information and communications technology specialists have the solutions to these problems. In light of the history of so many Spanish policies and programmes, overcoming this challenge seems very unlikely. Highly compartmentalised work is fundamental to Spanish organisational culture. Information is not shared within single governments, ministries or even directorates-general, so one can only imagine how little it is shared between different authorities and different parties.
4. A guarantee that information will be provided, processed and updated quickly. This challenge relates to what can be called internal management: every government unit must restructure internal processes to ensure that information is updated and published immediately.

5. A guarantee that data can be re-used at little or no cost, by any or all users who may wish to do so. In order to achieve this, all authorities will have to be committed to this way of presenting data, which is so important for adequate monitoring of government and has many wealth-generation possibilities. For example, in 2012, 75% of the data on the UK Government's www.data.gov.uk website were reusable and had open rights.

6. A system of compliance incentives. To achieve this, transparency prizes or the league tables managed by independent bodies are an excellent way of promoting compliance.

7. An effective system of penalties for non-compliance. The Transparency Act's enormous shortcomings in this regard have already been considered.

8. A good procedure for applications, requests, complaints and resources. This requirement relates principally to the right of access, although monitoring and requests are also important in proactive disclosure, as is quality control in the implementation process.

9. Technical and values training for affected employees. In this regard, the Act requires the development of a related training plan; this author takes the view that this should be complemented with open-government and integrity training.

10. An adequate budget. According to the British National Audit Office, average spending per department on implementing the open data system is £ 53,000 to £ 500,000, which shows that implementing the Transparency Act will require a significant investment, not just in technology, but also in the working hours of the relevant employees.

11. A significant and weighty political body to act as a driving force. In this case, the Transparency Act puts the Ministry of the Presidency at the head of the AGE. It is a good idea, given the extraordinary amount of work the Ministry of the Vice-Presidency has to undertake in government and its coordination.

12. A body to manage the system with sufficient resources, independence, transparency and accountability that ensures the integrity of its members. It remains to be seen how the CTBG will be structured, but its independence does not currently seem completely assured.

Furthermore, the results of international research into open data reveal some of the problems that will arise with achieving the aforementioned objectives if a more holistic strategy is not developed. To begin with, Bauhr and Grimes (2013) found that transparency only re-legitimises the government and reduces corruption if accountability is improved at the same time; this is in line with Klitgaard's famous model (1988), which postulates that improved monitoring reduces corruption. If transparency is increased and re-use allowed, civil society will probably uncover inefficiencies and dishonest acts. If, faced with this, the public authorities do not offer adequate explanation and accept due responsibility, the government's legitimacy will not increase, quite the contrary.

Heald (2012) highlighted that not all data published are equal in combating corruption, so it is important to separate out the data relevant for this purpose from those that are not. Finally, based on the UK experience of implementing open government, Worthy (2013) argues that the impact of open data is dependent on the existence of a robust civil society, and on it making sustained use of the possibilities provided by re-use and publishing. It is also dependent on a genuine separation of powers, and on mutual monitoring and reviews.

As regards seeking effectiveness and efficiency through transparency, it is important to take into account that public governance is currently very complex, and is linked to the actions of multiple players, public and private; this suggests that top-down (compartmentalised) departmental monitoring is clearly insufficient. Sound monitoring of results and spending does not necessarily mean "enumerating in detail and quantifying all objectives, indicators and activities to deliver to exercise strict monitoring of and checks on objective achievement" (Zapico, 2013, p. 337). This strategy is leading to dysfunctional behaviours (massaging information, retaining it until the monitoring body does not have time to

conduct effective checks, overloading central bodies with information, etc.). Therefore, according to Zapico (2013) again, it is time to link management by results with open-government policies, and strive, through transparency, for public bodies to monitor results in a coordinated and inter-organisational way; for public participation and collaboration in monitoring objectives and state spending to be sought; for affected parties to participate in evaluating results and impacts; for enhanced transparency in the conceptual and methodological frameworks of policies and spending programmes; and for learning-oriented management of monitoring.

It is to be hoped that all these lessons help to tackle the implementation of the Transparency Act with a strategy sophisticated enough to avoid obstacles, breaches and failures that could be overcome with a good roadmap.

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