Revista catalana de dret públic #60

www.rcdp.cat

THE ROLE OF THE ANTI-FRAUD OFFICE OF CATALONIA IN THE FIGHT AGAINST CORRUPTION IN THE CATALAN PUBLIC SECTOR. ANALYSIS AND SUGGESTIONS FOR REFORM TO MARK ITS 10TH ANNIVERSARY*

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Abstract

The year 2019 marked the 10th anniversary of the founding of the Anti-Fraud Office of Catalonia (OAC, in Catalan). This paper analyses, with the benefit of its ten years of experience, how the OAC has fulfilled its investigative and preventative remit, paying particular attention to significant areas such as anonymous reporting protecting whistleblowers. Secondly, and on the basis of said analysis, it suggests some areas for reform in both the OAC's regulatory framework and its operations, with the goal of assigning the OAC a key role in an effective Catalan integrity and anticorruption system that is still under construction. The main suggestions are to provide greater protection for reporting persons and to clarify the system for making reports to the OAC, to give it the ability to impose penalties in respect of newly-created violations linked with its investigative and preventative activities, to facilitate the formulation of non-binding consultations and to promote the technological modernisation of the fight against corruption in Catalonia.

Key words: administrative law; Anti-Fraud Office of Catalonia; anti-corruption agencies; good government; corruption.

EL PAPER DE L'OFICINA ANTIFRAU DE CATALUNYA EN LA LLUITA CONTRA LA CORRUPCIÓ EN EL SECTOR PÚBLIC CATALÀ. ANÀLISI I PROPOSTES DE REFORMA AMB MOTIU DEL SEU 10È ANIVERSARI

Resum

L'any 2019 es va celebrar el 10è aniversari de la posada en funcionament de l'Oficina Antifrau de Catalunya (OAC). En el treball s'analitza, en vista d'aquests deu anys d'experiència, quin ha estat el funcionament de l'OAC en les seves funcions investigadora i preventiva, amb especial atenció a aquells àmbits de major rellevància, com ara les denúncies anònimes i la protecció de les persones denunciants. En el segon bloc del treball, sobre la base de l'anàlisi prèvia, es plantegen línies de reforma en el marc regulador i en el funcionament de l'OAC, amb l'objectiu d'atribuir a l'OAC un paper central en un sistema d'integritat i anticorrupció català efectiu encara en construcció. Les principals propostes són reforçar la protecció de les persones denunciants i clarificar el sistema de denúncies davant l'OAC, reconèixer la potestat sancionadora de l'OAC associada a infraccions de nova creació lligades a les activitats investigadores i preventives de l'OAC, facilitar la formulació de consultes no vinculants i promoure la modernització tecnològica de la lluita contra la corrupció a Catalunya.

Paraules clau: dret administratiu; Oficina Antifrau de Catalunya; agències anticorrupció; bona administració; corrupció.

* This article is a translation of an original version in Catalan. The author would like to express his thanks to those carrying out the blind peer reviews of this article for their always interesting and useful notes on the initial text. He would also like to thank the OAC staff for their willingness to answer the questions arising associated with his work.

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Article received: 01.02.2020. Blind review: 27.02.2020 and 20.03.2020. Final version accepted: 30.03.2020.

Recommended citation: Capdeferro Villagrasa, Oscar. (2020). The role of the Anti-Fraud Office of Catalonia in the fight against corruption in the Catalan public sector. Analysis and suggestions for reform to mark its 10th anniversary. *Revista Catalana de Dret Públic, 60*, 35-64. https://doi.org/10.2436/rcdp.i60.2020.3413

Summary

1 Introduction

The creation of specialist anti-corruption agencies and bodies has become a frequent practice since the 1990s as a tool in the fight against corruption,[1] although the somewhat meagre impact some of them have had upon reducing corruption has led to debate: are such institutions, in fact, irrelevant, or are they necessary bodies in a proper fight against corruption? (Pope & Vogl, 2000; Doig et al., 2006; De Sousa, 2009; Roca, 2019).

This international—indeed, global—debate is by no means irrelevant to Catalonia, which was home to the very first specialist anti-corruption agency to be founded in Spain:[2] the Anti-Fraud Office of Catalonia (OAC, in Catalan) created by Catalan Law 14/2008, of 5 November, on the Anti-Fraud Office of Catalonia (LOAC, in Catalan).

In one of the first published studies on this Catalan anti-corruption body, Professor Judith Gifreu (2010: 229) wondered, with particular regard to the OAC's oversight function, whether this was a further example of duplication of review functions in the public sector. Much more recently, as Roca (2019: 11) notes, the debate regarding and/or questioning the need for them and their effectiveness continues to hover over this kind of bodies. In this regard, we should note that Motion 43/XI of the Parliament of Catalonia, on a zero-corruption republic, of June 2016, states the following: "The Parliament of Catalonia requires of the Anti-Fraud Office of Catalonia: (a) That it focus all its human and material resources on investigating corruption and fraud and *becoming a truly useful tool* in the fight against impunity in these areas".

Additionally, news reports have appeared that may have impacted the image and credibility of the OAC, such as those of conversations between the then director of the OAC, Daniel de Alfonso, and Spain's Minister of the Interior, Jorge Fernández Díaz, whose content led to the former being dismissed from his position,[3] not to mention the acknowledgement of accounting irregularities and issues involving the appointment of new staff during 2015, noted in Report 5/2018, of the Public Audit Office for Catalonia, on the Anti-Fraud Office of Catalonia, FY 2015.

It therefore appears that there are still those questioning whether the OAC is an important player in fostering integrity and preventing corruption in Catalonia's administrations.

It is my belief that it is very much worth the while asking this question at the current time, for the purposes of analysing the role played by the OAC, as well as the one it could or should play in the promotion of integrity and the prevention of misconduct in Catalan government.[4]

This backward- and forward-looking review is timely for two reasons: first, the 10th anniversary of the founding of the OAC which, although created by law in 2008, did not become operational until the middle of 2009, with the taking up of office of its first director, David Martínez Madero (26 May 2009);[5] and, second, the process of reforming the Law governing the OAC, initiated some time ago[6], but which, even today, is, given its still-unresolved status, the topic of news and debate.[7]

1 Worthy of highlighting is the European Anti-Fraud Office, OLAF (*Office de Lutte Anti-Fraude*), established by the Comission Decision of 28 April 1999. According to the OLAF in figures report for 2010-2018, available on the Office's website, over said period, it had "concluded over 1900 investigations, recommended the recovery of over €6.9 billion to the EU budget, issued over 2500 recommendations for judicial, financial, disciplinary and administrative action to be taken by the competent authorities of the Member States and the EU". Cf., with regard to the OLAF, amongst others, Fuertes (2014) and Ordóñez (2016).

2 This initiative was followed by those of a number of Spain's other Autonomous Communities, such as the Balearic Islands (Law 16/2016, of 9 December, on the creation of the Office for the Prevention of and Fight against Corruption in the Balearic Islands), Valencia (Law 11/2016, of 28 of November, of the Government of Valencia, on the Agency for the Prevention of and Fight against Fraud and Corruption of the Autonomous Community of Valencia), Galicia and Navarre (Regional Law 7/2018, of 17 May, on the creation of the Good Practices and Anti-Corruption Office of the Autonomous Community of Navarre), and also at a local level with agencies such as those of Barcelona and Madrid or the Transparency Agency of the Barcelona Metropolitan Area. With regard to the local sphere, of particular interest is Ponce (2016).

3 Viewable on the Parliament's website.

4 On the OAC's scope for action, cf. Art. 2 LOAC.

5 For a more detailed explanation of the OAC's operational start-up, see its 2009 report.

6 The initial news can be viewed online, and, for more information on the white paper, you can consult the background files.

7 For example, a number of media outlets (e.g, *La Vanguardia*) have given coverage to the repeated demands over the course of 2019 by the OAC's director for a series of powers that he feels the OAC should be given in the reform of its governing law.

Given this two-fold circumstance, now is a good moment not only to analyse the OAC with regard to its past and present workings, but I believe that it is also worth considering how it might become a key player in building a strengthened Catalan integrity system that seeks to prevent and efficiently detect misconduct such as corruption.[8]

With the above goal in mind, this paper structures its content around two axes: firstly, it will analyse the role of the OAC in its different functions—those of investigation and prevention—based on data supplied by the OAC itself on its workings (with a primarily descriptive focus), pointing to the strengths and weaknesses detected in some actions; and, secondly, I shall set out the role that should be played (in my opinion) by the OAC in an effective anticorruption policy in line with the most recent suggestions and recommendations, both academic and those made by leading anticorruption authorities, including a reflection upon the need to reform the Office's regulatory framework in order to achieve this objective.

2 The OAC's investigative functions

In this section, I shall set out some key information and other factors around the investigations carried out by the OAC, in light of the global data on its actions and, particularly, provide a more detailed analysis of its more recent actions, so as to provide an image of the entirety of the Office's 10 years of operations, without failing to provide a more specific idea of the current or more recent situation regarding corruption and the OAC's anticorruption work.

2.1 The OAC's investigative function: some general figures

If we think of the OAC as an oversight body, its investigative aspect is probably the first thing that would come to mind, a perception that would, to an extent, seem to be confirmed by its current staff structure: 10 people belong to the Prevention Directorate (including seven specialist staff) whilst Analysis and Investigations boasts 19 (of whom 13 are specialists).[9] It would appear that this is also the perception held by the Parliament of Catalonia[10] when, in its Motion 43/XI, on a zero-corruption republic, it demanded that the OAC "focus all its human and material resources on investigating corruption and fraud and becoming a truly useful tool in the fight against impunity in these areas".

According to Article 4 LOAC, the Office has the power to "investigate or inspect any possible cases of the improper use or allocation of public funds, as well as conduct contrary to probity or the principles of objectivity, effectiveness and full submission to the law and rights", which it can exercise at its own initiative, due to a report or as the result of a reasoned report from another body, always carrying out a preliminary review for plausibility. In an earlier paper, published in this same journal (Capdeferro, 2016), I provided a detailed account of the OAC's investigative function. I would therefore refer readers to this earlier paper for an account of this function and its internal procedures, as well as of the informational tools the OAC provides.[11]

Investigation is obviously an important function of the OAC, but the Office forms part of a web of already-existing bodies and undertakings, such that the room given for its own investigations is quite limited.

In particular, corruption, defined as unlawful personal enrichment arising from the powers or privileges of public office, work or service, is, generally speaking, a criminal offence. Or, at least in the most serious and

8 The current newsworthiness of and interest in corruption in Catalonia are evidenced, to mention but two important recent actions, by the Catalan Parliament's passing of 38 resolutions as part of the general debate on corruption held on 7 February 2020 (see the news article and the documents) and in the Strategy in the fight against corruption and the bolstering of the public integrity of the Government of Catalonia, which, following a participative process, was passed by means of a new Government Resolution of 20 January 2020.

9 As can be seen, this is almost double the number of staff. Information viewable on the OAC website.

10 It is important to note the perception held of the OAC by the Parliament, as we should remember that, pursuant to Art. 1 LOAC, the OAC is an independent body, a public law undertaking with its own legal personality and the full ability to act, reporting to the Parliament of Catalonia, to which it is accountable with regard to its operations by means of an annual report (Arts. 22 & 23 LOAC); and that it is the Parliament that appoints and dismisses its director on any of the grounds established in the Law (Arts. 9 & 11 LOAC).

11 Viewable on the OAC website.

important cases, it is (Gómez, 2017). So, when the OAC detects, during the course of its investigations, that certain actions constitute an offence, or are the subject of a criminal investigation by the Public Prosecutor or a judicial authority, it must cease any involvement in the investigation, and may under no circumstances penalise the corrupt practice.[12] It could therefore be said that it plays a merely ancillary role in the task of investigating and punishing corruption.

Bearing this in mind, one way of gauging the OAC's impact in detecting cases of serious corruption (or, at least those appearing to be of criminal significance) is by the number of cases referred to the Public Prosecutor's Office or the judicial authorities, given that, as we have seen, the Office has no power to punish corruption.

According to the OAC's own figures,[13] it received 1,445 reports between 2011 and 2019. Of these, the majority were shelved (762, or 52.73% of the total) and some (79 or 5.47%) suspended on discovering that the cases were also being investigated by the Public Prosecutor's Office, judicial police or the judicial authorities or given their possible criminal significance (per Art. 7.2 LOAC). So, only 573 complaints (less than 40% or, more specifically, 39.65%) were fully investigated.

Specifically, with regard to concluded investigations (so excluding the figures for 2019), the OAC's different reports (OAC 2019: 51-52; OAC 2013: 112) indicate that a total of 57 notifications were issued to the Prosecutor' Office.

Qualitatively speaking, the OAC's reports include information on the repercussion of their investigative actions, which clearly helps us gain a better grasp of the impact of said actions (OAC, 2019: 66ff.).

More particularly, in 2018, there were seven jurisdictional actions in the field of criminal law arising from OAC activities, including one in which, "as the result of this Office's actions, a Barcelona criminal court sentenced a senior management figure, the director of a public sector undertaking of the Government of Catalonia, to six month's suspension from office", another where "a Tarragona Investigating Court ordered the initiation of judicial hearings against a mayor and nine further individuals, including the municipal technical staff, amongst them the authority's Secretary-Comptroller, finding evidence of an offence in the adjudication of two public works contracts" and another in which, "as the result of an investigation by this Office into the alleged embezzlement of public funds, an elected member of the municipal council will be tried for the offences of embezzlement and misappropriation of funds", and one in which "a Lleida criminal court has admitted as evidence a reasoned report issued by this Anti-Fraud Office with regard to activities concluded in 2015 and associated with the administration of temporary staff by a supra-municipal body". So, as we can see from this information in the annual reports, some of the notifications issued to the Public Prosecutor's Office ended up providing the basis for criminal complaints by the latter, others we even admitted as evidence in the resulting trials and, on occasion, it is these investigations that uncover irregularities that end up being subject to criminal sanction.[14]

Although, as we have seen, qualitatively speaking, OAC investigations may be of importance with regard to subsequent sanctions in more serious cases of corruption, we cannot ignore the fact that, quantitatively, in comparison with the total number of reports submitted to it and of investigations, few reasoned reports are forwarded to prosecutors and still fewer cases are followed up by prosecution in the courts, concluding in a criminal sanction. So, if the argument is that the best way to fight corruption is the hunting down and

12 Art 7.2 LOAC states: "The Anti-Fraud Office may not carry out the functions pertaining to the judicial authority, the Public Prosecutor's Office or the judicial police, nor may it investigate the same events the object of their investigations. In the case that the judicial authority or the Public Prosecutor's Office initiate proceedings to determine the criminal significance of events also constituting the object of an Anti-Fraud Office investigation, the latter must suspend said actions at once and immediately forward all the information it possesses, as well as providing the necessary support to the competent authority".

13 Viewable on the OAC website.

14 In particular, the 2018 report notes that the OAC is aware of seven criminal proceedings arising from its investigations. These can be grouped as follows: 1 criminal conviction arising from an OAC investigation; 1 criminal trial under way (the opening of a judicial hearing is mentioned); 1 admission of an OAC report as evidence in hearings (which could probably also be included in the previous group of unconcluded trials initiated as the result of OAC actions); and the filing of four criminal complaints by the Public Prosecutor's Office.

punishing of the corrupt, given these figures, one could say that the OAC is not particularly effective in this area.

If we take a brief look at the data on less serious cases of corruption, the object of disciplinary, penalty or control procedures, six actions are mentioned, including the opening of "disciplinary measures against a civil servant for an alleged violation of the regulations on incompatibilities", the initiation of "procurement prohibition proceedings" against a company by a local body and, amongst others, it indicates that "as the result of information forwarded by this Office, the Catalan Competition Authority initiated penalty proceedings […]. In July 2018, the Catalan Competition Defence Tribunal issued a resolution deeming proven the uncompetitive practice" and "resolved to impose a penalty for a total cumulative amount of 58,000 euros" (OAC, 2019: 70).

Obviously, this standpoint ignores at least half the potential effectivity of the OAC's investigation activities. The Office is designed not only to have an impact upon the fight against corruption by providing other bodies with tools for levying more effective sanctions (thereby reducing the degree of impunity of corruption),[15] but also, pursuant to its current normative design, it was also created to have a direct impact on the day-to-day workings of the public sector organisations by means of the issuing of reasoned reports arising from investigations, featuring recommendations and proposed corrective measures for the investigated body.

It is therefore once again worth carrying out a brief analysis, both qualitative and quantitative, of this second facet of the investigation function.

In this regard, according to the OAC reports, we can see that the number of measures adopted as the result of Office investigations range between 17 and 19 a year, although it appears that this number may be on the rise, as one can see a significant increase in the latest report, which notes that the number of measures adopted of which the OAC is aware is 28,[16] a figure that, if we subtract those penalised and commented on previously, falls to 14. For example, information is provided on six ex-officio administrative review procedures, for, amongst others, the declaration of nullity of a public procurement contract or to establish whether certain payments to elected officials contravened the legally-established remuneration system.[17] With regard to this link between the OAC's actions and ex-officio reviews, one can only conclude that it is a highly successful part of its activities, as it fosters compliance with Article 34 of the United Nations Convention against Corruption, which contemplates the annulment of acts arising from corruption.[18]

Aside from those resulting in ex-officio reviews, in 2018, the OAC's investigation actions also gave rise to three preventative measures adopted by investigated bodies, including the incorporation of "guidelines for the processing and management of the procurement file in small-scale procurement contracts to prevent and detect possible irregularities" in a local body, improvement in internal control and oversight mechanisms in a town council and the promotion of the decision to internally disseminate within a Ministry of the Government of Catalonia the interpretative criteria on the authorisation of compatibilities, as well as the adoption of organisational measures to ensure proper compliance with resolutions in this area.

Here, we can once again see that, despite the low number of resulting measures, they are—qualitatively speaking—highly significant, as in the case of the improvement of internal controls. Furthermore, if we bear in mind the number of small procurements a local authority may make each year (which may, of course, vary depending upon the size of the authority and its budget), the amount of cases subject to normal internal

15 It has been said that the likelihood of detection has a greater deterrent effect against unlawful conduct than the severity of any contemplated penalty (Paternoster, 2010) such that, if the OAC is regarded, with its investigations, as only contributing to the probability of detecting and subsequently sanctioning corruption, this would in itself be a significant effect.

16 "Over the course of 2018, 28 measures adopted by the different affected undertakings and competent authorities have been reported. This is the year that has seen adoption of the greatest number of measures arising from the work of the Anti-Fraud Office" (OAC, 2019: 66).

17 However, it must be said that one of the cases of investigation dates from 2017 and that, in another, it is only stated that the mayor of the municipality under investigation "has commenced preliminary work for the initiation of the ex-officio review".

18 This states that: "With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action".

controls in a town hall and the staff that may work throughout an entire Ministry of the Government of Catalonia, we can confidently state that, although few in number (only three), these measures may well impact on a significantly high number of administrative procedures and public servants.

Lastly, there are measures resulting from OAC investigations that its report classifies as those of a "corrective and/or restorative" nature (OAC, 2019: 67), of which we have found a total of five in 2018. Amongst these—which are admittedly wide-ranging in character—are measures with an obviously positive impact upon the budgets of public undertakings, for example where it states that, as the result of an OAC investigation, a local body "has resolved to declare as an improper payment compensation paid over to an elected official and has requested its repayment", when it tells us that another local body "has ceased to pay over allowances for attending the Local Government Board to elected officials who are not formally members of this body", or when it notes that, due to a breach of incompatibility rules, a local body issued a ruling and nullified the awarding of a service contract. Other measures adopted along these lines are the dismissal of a university vice rector who did not meet the requirements for holding the position and the creation of an advisory committee in a local body with regard to the construction of a municipal facility.

As can be seen, these measures have a far more isolated and limited impact than the preventative ones, given that they cannot be expanded to encompass similar situations in the future. They are actions that seek to remedy specific misconduct that has already been detected, without this involving or implying any change in the practices, protocols or actions followed for carrying out the procedures that have led to the committing of the misconduct. Nevertheless, as we have been able to see, despite the lesser impact of this kind of measures, the consequences can be significant, since not only do they eliminate a violation of the legal order (something that is always required, as the public administration must always act in full accordance with the law, pursuant to Article 103.1 of the Spanish Constitution), but that they also, on occasion, lead to savings of the administrations' limited public funds.

2.2 Reporting: providing a space for anonymous whistleblowing

According the OAC's own figures,[19] from 2011 to 2019, the Office received a total of 1,445 reports (complaints). Of these, the majority referred to misconduct in municipal councils (61.94%), followed, at some distance, by complaints against the Government of Catalonia (15.85%). Additionally, we can see that the largest number of reports were lodged by individuals outside of the public sector (40.9%), followed by anonymous tip-offs at 22.2% (in other words, it is impossible to identify which of the other groups the complainant belongs to) with 19.45 % coming from political groups: Finally, reports filed by public servants did not reach the 7% mark.[20]

At this point, it is worth examining one aspect of reporting that the OAC has been stressing recently: anonymous reporting.[21] Of the total number of complaints between 2011 and 2019, only 321 were anonymous. Their distribution over time is as follows: 2011, 20 complaints; 2012, 16; 2013, 15; 2014, 17; 2015, 12; 2016, 19; 2017, 21; 2018, 113; and 2019, 161.

Note that, by 2018, the figure had risen from 17 anonymous reports a year to 113, a number that grew even more in 2019 (with its 161 anonymous tip-offs). This shift is due to the opening, in December 2017, of the Office's anonymous whistleblower mailbox (*bústia anònima*),[22] which meant that, from the start of 2018 on, it has been possible to lodge, completely anonymously and securely, reports of alleged misconduct via the Internet. According to the OAC's report for 2018 (OAC, 2019: 38) this complaint system meant that 2018 saw a very significant increase in the total number of reports, both anonymous and not, submitted annually (it talks of a rise of more than 40% in total cases reported compared with the average for 2011-2017), with a total of 218 complaints, a figure that continued on an upward trend in 2019, with a total of 262 complaints.[23]

19 Viewable on the OAC website.

20 Academic literature makes constant mention of how the number of public servants reporting irregularities is extraordinarily low (Taylor, 2018).

21 Part of the general material is to be found on the OAC website.

22 By means of Resolution OAC/DIR/652/2017, approving the creation and establishment of the anonymous tip-off service of the Anti-Fraud Service of Catalonia.

23 It should be noted that anonymous tip-offs provide less information: the OAC is necessarily unaware of the complainant's profile

The figures speak for themselves: since the opening of this channel for anonymous reporting, the number has increased dramatically.[24] And this is no mere increase in baseless accusations: many of them have led to subsequent investigations.[25] This increase in the total number of reports lodged annually may have an explanation. According to the latest poll published by the OAC (OAC, 2018), in answer to the question: "For which of the following reasons would you not report a case of corruption of which you became aware?", the greatest number of respondents stated that the reason would be the difficulty of obtaining evidence (48.2%), followed by the fear of reprisals (30%), the uselessness of reporting due to impunity (26.9%) and unawareness of where they could make any report (17.4%). Although the channel used would have little effect upon evidence-gathering, it should be noted that the new tip-off service has a direct impact upon the second-greatest impediment to would-be complainants: fear of reprisals.

The reprisals suffered by those reporting corruption are no laughing matter.[26] As Parramon (2019) notes, illustrating the point with numerous examples, many whistleblowers in Spain have suffered workplace harassment and what the author dubs "procedural harassment", defined as a "high degree of judicial conflict" (Parramon, 2019: 1) with multiple legal claims for criminal or civil liability, for example through suits for damages to public image or moral damages from the alleged perpetrators, or criminal suits for disclosure of secrets or for defamation and libel. In this regard, if we view a completely anonymous reporting channel as preventing these frequent and prejudicial consequences of lodging a corruption complaint, it would appear that the tool could well lead to an increase in cases reported.[27]

Despite the importance that anonymous reporting may have in uncovering cases of corruption (UNODC, 2015: 50-51), it must be noted that this remains a controversial and disputed system within the Spanish legal system, which one could think prohibits it by virtue of Article 62 of the country's Law 39/2015, of 1 October, on the Common Administrative Procedure for the Public Administrations ("LPAC"), which is applicable, as basic legislation, to all manner of administrative procedures initiated on an ex-officio basis.[28]

The provisions of Article 62 PLAC are also of importance to the OAC, which is subject to them, as it must be remembered that the Law is applicable to the OAC's actions as a complement to its own regulations, contained in the LOAC. This was the view of the Advisory Committee (*Consell Consultiu*) in its Opinion number 274, of 2006 on the draft law for the creation of the Anti-Fraud Office of Catalonia (*Projecte de llei de creació de l'Oficina Antifrau de Catalunya*, PLOAC), which explicitly noted the "materially administrative" character of the OAC's actions;[29] and this is also the opinion of the Legal Advisory Committee (*Comissió*

(if a public sector worker, private individual, etc.) (OAC 2019: 44-45).

24 Something that has also had an impact upon the OAC internally, evidencing its lack of human resources to deal with this increase in reporting: "the serious accumulation of the number of investigation cases due to the increase in reporting and the lack of resources assigned to this area of activity" (OAC, 2019: 38).

25 According to available figures, in 2018, 46 anonymous complaints were investigated and 67 shelved. For 2019, the figures are as follows: 44 anonymous complaints investigated and 107 shelved. For comparative purposes, in the case of non-anonymous ones, 32 were investigated and 55 shelved. In 2018, for its part, 62 non-anonymous reports were investigated and 38 were shelved.

26 With regard to the protection of whistleblowers, cf. OECD (2016), and on their relationship with corruption, in particular, Schultz & Harutyunyan (2015), Ragués (2018), Gosálbez (2019) and Chordiya et al. (2020).

27 Notwithstanding the possible benefits in terms of encouraging complaints, particularly when potential complainants mistrust the institutions before which they are reporting or those which will be carrying out any subsequent investigations, disadvantages have also been noted, pointing to a preference for other systems, such as confidential reporting channels (UNODC, 2015: 51-52).

28 Art. 62.2 LPAC states that complaints "must place on record the identity of the reporting person(s)".

29 It states that: "it can be said that the OAC's investigation and oversight actions are channelled on the basis of a case file and a procedure, as made clear in Articles 14.3 and 19 PLOAC which, we believe, is materially administrative (we are dealing with a public law undertaking) and that does not conclude with an administrative sanction […]. Article 14.3 PLOAC governs the investigated party's right to access the case file or document associated with the activity investigated, unless the effectiveness of the actions or the integrity of the background facts of interest to the procedure call for restricted access. With regard to this matter, it should be remembered that, as we have previously noted, we are dealing with a materially administrative case file and, therefore, the main outcome of this fact is that the citizens' rights concerning their relations with the public administrations listed in Article 35 of Law 30/1992, of 26 November, on the legal system for the public administrations and common administrative procedures (LRJPAC) are transferrable to the case under review. As are, with the relevant qualifications, the principles of common administrative procedures, amongst them the right of the interested parties to make representations, submit documentation and to a hearing (art. 79 i 84 de la LRJPAC). […] Furthermore, as we have said, given that it is a materially administrative investigation, it will have to observe the legal requirements regarding citizens' rights in their dealings with the public administrations and, if applicable, common administrative procedures, contemplated in basic applicable legislation, pursuant to Article 149.1.18 of the Spanish Constitution" (Opinion 274 of the Advisory Committee, of 18 July 2006, requested by the Parliament of Catalonia with regard to the Opinion of the Committee on

Jurídica Assessora), when it stated in its Opinion number 235/2017, that the nature of the OAC could be included under the concept of "independent administration"[30] and that, accordingly, its actions would be subject, generally speaking, to administrative law.[31] The same criteria is applied by the courts of justice, in holding that an OAC act was a legally-null administrative act pursuant to Article 47.1.*e* LPAC and that the revision of Article 106 of Law 39/2015 was appropriate,[32] and this criteria is also followed by the OAC itself when, for example, it carries out ex-officio reviews of its resolutions[33] or when applying Law 40/2015 and Catalan Law 26/2010 for agreeing on the delegation of powers.[34]

Despite the prohibition contained in Article 62 LPAC, as Pérez (2019) correctly notes, the courts and even legislators and regulators in some fields have accepted anonymous reports before government bodies, an area in which we should not ignore proposals and recently-passed regulations on the protection of reporting persons (Garrido, 2019, and Vestri, 2019). Furthermore, in view of the international legal framework for corruption, it must be stated that the possibility of anonymous reporting before anti-corruption bodies (like the OAC) is imposed by Article 13.2 of the 2003 United Nations Convention against Corruption.[35]

With regard to jurisprudence, it is particularly important to make mention of the Judgement of the Madrid High Court of 3 April 2018 (appeal 233/2017). In this case, the court reviewed the possible nullity of the Regulations of the Municipal Anti-Fraud and Anti-Corruption Office ("OMFC"), approved by the plenary session of Madrid City Council. The appeal filed by Spain's General State Administration sought, amongst other measures, a declaration of legal nullity of the Regulations' Article 26.2, permitting anonymous reporting, in that it contravened Article 62.2 LPAC.

the Organisation and Administration of the Government of Catalonia and Local Government on the Draft Law on the creation of the Anti-Fraud Office of Catalonia).

30 "The term "independent administration" embraces those undertakings that, whilst being public administrations in that they have their own legal personality, a public nature, a public function and defend the public interest, and are subject to administrative law and their acts to contentious-administrative jurisdiction, are given autonomy and act independently of the Government, take their decisions on a neutral basis and have been allocated a significant number of public powers, including, in the case of the OAC, the appointment of its director by a three-fifths majority of the plenary session of the Parliament (Art. 9 of Law 14/2008) and its investigation and sanctioning powers (Art. 14 Law 14/2008)" (Opinion 235/2017, of 7 September, of the Legal Advisory Committee. Ex-officio review mandated by the Anti-Fraud Office of Catalonia for the declaration of legal nullity of a resolution of the Office's director, of 20 June 2012, recognising the services provided by a civil servant attached at to the Office at the time to the Information Technology Limited Company of the Autonomous Community of La Rioja (SAICAR) for the purposes of the payment of three-yearly bonuses). One negative aspect of this classification of the OAC as an independent administration should, however, be noted: provided that its action requires, compulsorily, the involvement of the Legal Advisory Committee (for example, in ex-officio review procedures, cf. Art. 8 of Catalan Law 5/2005, of 2 May, on the Legal Advisory Committee), the OAC may not request the opinion directly, but will have to request of the President of the Government of Catalonia that it be the person holding this office, and not the OAC director him or herself, who makes the request for an opinion, pursuant to Arts. 10 of Law 5/2005 and 26.4 of Decree 69/2006,of 11 April, approving the Regulations on the organisation and operations of the Legal Advisory Committee, a factor that may entail a reduction in the degree of the OAC's independence of the Government, and which would require a reform of said Committee's regulatory framework or a specific provision in the LOAC.

31 In particular, in the case covered by the Opinion, the possibility of the OAC reviewing, on an ex-officio basis, and applying the rules of legislation on the legal system and administrative procedures, its own acts, is evaluated. In this regard, the Committee states that: "it is clear that the Anti-Fraud Office can review on an ex-officio basis its own acts, which are subject, generally speaking, to administrative law, and in this regard are subject to the oversight of the contentious-administrative jurisdiction" (Opinion 235/2017, of 7 September, of the Legal Advisory Committee).

32 In the Judgement of Barcelona Contentious-Administrative Court 13, of 23 May de 2018, no. 104/2018, upheld by the Judgement of the Catalonia High Court (Contentious-Administrative Division) of 16 July 2019, appeal no. 300/2018.

33 Resolution OAC/ADM/542/2017, of 26 September, on the ex-officio procedure for the review of the Resolution issued by the director of the Anti-Fraud Office of Catalonia, of 20 June 2012, recognising services previously rendered.

34 Resolution delegating powers of the director of the Anti-Fraud Office of Catalonia, of 2 November 2016.

Nevertheless, it should be noted that the OAC's own standpoint on this issues is more restrictive than that placed on record (more correctly, in my opinion) by the Consultative Committee and, especially, the Legal Advisory Committee, since the OAC appears to be limiting the application of administrative law to its personnel-related actions (in this regard by express reference to Art. 53 of the Operating and Internal Procedures of the Anti-Fraud Office of Catalonia) and those regarding administration and asset management.

35 This is a treaty that, it should be remembered, has been ratified by Spain, via the *Instrument of Ratification of the United Nations Convention against Corruption, made in New York on 31 October 2003*, published in the Official Gazette of the Government of Spain, the BOE, no. 171, of 19 July 2006.

In its defence of the Regulations' validity, Madrid City Council argued that the Office investigated on an "extra-procedural" basis, such that investigations arising from anonymous reports were regarded as preliminary actions rather than investigation procedures.[36]

In its Judgement, the High Court rules that the anonymous report is admissible, but, in order to be able to initiate an ex-officio administrative procedure (be this an investigation, the levying of a sanction or any other kind) there would be requirement for the performance of preliminary verification actions, within the framework of the so-called preliminary actions contemplated in Article 55 LPAC, and that, for this reason, initiation of the ex-officio procedure would be regarded as being on the Office's own initiative, such that Article 62 would not be applicable and that, in its place, such initiation would be governed by Article 59 LPAC (on initiation on the competent body's own initiative).[37]

In my opinion, these two interpretations that anonymous reporting is possible could be problematic, as they may lead to a series of consequences prejudicial to reporting and reported persons alike.

Firstly, the High Court's interpretation could potentially be prejudicial to any reporting persons who are identified. Its judgement states that if preliminary actions are carried out prior to the initiation of the procedure to ensure the *prima facie* verification of the reported acts, any subsequent procedures (be this investigation/inspection or penalty) are regarded as being on its own initiative, meaning that, in excluding Article 62 LPAC in its entirety, reporting persons lose their rights to any eventual exemption from or reduction in the penalty, or even the right to notification as to whether the report has resulted in the initiation (or not) of any procedure. It thus appears that any action prior to initiation of a procedure designed to ascertain, on a preliminary basis, the plausibility of the report, would entail the inapplicability of the privileged legal status of the reporting person contemplated Article 62 LPAC.[38] For some idea of the scope of the prejudicial nature of this interpretation, it should be noted that the decision to initiate (or not) an investigation or penalty procedure entails the exercising of a discretional power[39] that requires due grounds (Art. 35.1.*i* LPAC). Unless this is based on purely formal or superficial aspects (such as the report suffering from systematic contradictions, being unintelligible, referring to impossible acts or that the persons and institutions concerned are unidentifiable), it appears that a minimum amount of preliminary verification work[40] is required to justify, in every given case, the initiation (or not) of a procedure. In practice, this could mean that some of the reporting persons' rights contained in Article 62 LPAC could not be enforced under almost any circumstances.

Secondly, it may be prejudicial towards those accused in a report to regard, as the OMFC argued, this kind of inspection or review activities arising from anonymous reports as falling fully within the definition of so-called "preliminary actions", outside of administrative procedures. Verifying reported deeds should not

36 Specifically, it argued the following: "the OMFC shall not embark upon any administrative procedure whatsoever, such that Article 62.2 is not applicable under any circumstances whatsoever. The nature of its activities falls under the scope of the preliminary actions contemplated in Article of the same LPAC. […] the OMFC carries out its actions within the scope of preliminary actions, not administrative procedures. Therefore, the identity of the reporting person(s) is not instrumental, given that these are facts of which the OMFC is made aware so that at it may decide whether investigate them or not, on the basis of the different types of actions contemplated in its Regulations".

37 Specifically, it states the following: "When the Administration encounters an anonymous report, it may not, obviously, decide on the basis thereof to initiate a procedure. Nevertheless, when the report appears truthful and credible, nothing prevents the Administration from carrying out certain investigations by means of the performance of specific actions aimed at verifying, on a *prima facie* basis, the unlawful acts of which it has been made aware. In such situations, any decision on the initiation of a procedure shall not be by virtue of or based on the anonymous report, but rather on the preliminary information, which is what truly determines the initiation of the penalty procedure. In this way, the decision to initiate the procedure shall be adopted on its own initiative, which is one of the forms of ex-officio initiation of procedures contemplated in Article 58 LPAC".

38 The same argument could be applied to ex-officio initiations of procedures at the reasoned request of other non-hierarchically superior administrative bodies to the competent one for the initiation of a procedure (Art. 61 LPAC). Indeed, as with a report, a reasoned request does not compel the competent body to initiate a procedure. Transferring this situation to the jurisprudential interpretation under review, it could be said that, if the competent body carries out preliminary actions to check for indications of the plausibility and truthfulness of the acts the subject of the request, we would not be dealing with the scope of Article 61, but rather Article 59 and that there would no longer be any obligation to provided reasoned notice to the body making the request of the decision to initiate or not the procedure.

39 This is the case with both the ex-officio procedures initiated on the basis of a report and those initiated at the reasoned request of another non-hierarchically superior administrative body to the competent one for the initiation of a procedure (Art. 61 LPAC).

40 For example, verifying whether the reporting person actually provides their services to the administration indicated in the report, or whether they did so at the time that reported acts took place.

be the object of preliminary actions, since, as in the case of the anti-corruption agencies and bodies under review, it is precisely the review of unlawful acts that is the core objective of the body's inspection and verification procedures (cf. Art. 17 LOAC). It is therefore worth remembering the key point that Article 75 LPAC notes that the mission of a procedure's investigation stage is just that of performing activities aimed at determining, understanding and verifying the acts by virtue of which the resolution must be issued. So, reclassifying a key task of the procedure—the checking of the facts of a case—as an extra-procedural step, entails, *de facto*, it being carried out on informal basis, in a parallel procedure with none of the guarantees or rights applicable to investigated persons during a procedure (e.g. Arts. 18 and 19 LOAC).

Whilst I may disagree with the aforementioned arguments, I do concur with the central issue here: anonymous reporting is possible within our legal system. I do believe, however, that the justification needs to be different, and less prejudicial to both potential reporting and reported persons.

One solution that is perhaps more apposite is to hold that the administration may initiate procedures (for verification, penalties or of any other type) in different situations, to which different systems are applicable, adapted to the different circumstances leading to the initiation of said procedure. In any case, irrespective of the type initiated, the administration may carry out advance preliminary actions. This type of action, which must be limited and not represent a *de facto* substitution of the core part of the procedure, is not necessarily linked to any one type of initiation and, therefore, using it does not mean that the procedure whose initiation is being sought does not arise or is not based on a previous report—anonymous or otherwise—or a reasoned request. So, even if there are preliminary actions aimed at an initial review of the report, we would be dealing with a procedure initiated on the basis of a report, unless it is legally impossible to say that we are dealing with a report pursuant to the provisions of Article 62 LPAC. If this is the case, and it proves impossible to apply Article 62 due to an absence of one or more of its requirements, one could, and always on an alternative basis, regard the administration as commencing the procedure on its own initiative due to it becoming "indirectly aware" of the circumstances, conduct or acts giving rise to the procedure (Art. 59 LPAC).[41]

Article 62 LPAC establishes the administrative legal system governing one specific kind of action. This action is the report, the notification of facts to the administration.[42] In order to be legally regarded as a report and to be able to apply the legal effects detailed in Article 62 LPAC, this notification of facts must meet a series of requirements, which are accumulative in nature: that the facts or acts notified must provide grounds for the ex-officio initiation of an administrative procedure (Art. 62.1 LPAC), that express mention is made of the accused person(s) and of the facts/acts reported (Art. 62.2 LPAC) and that, if the facts/acts reported may constitute an administrative violation, it indicates the date committed and, if possible identifies the alleged parties responsible (so, only the date is a necessary prerequisite, whilst identification is only required if it is possible to know the identity) (Art. 62.2 LPAC).

If disclosure to an administration fails to meet these requirements, irrespective of whether it is described internally as a "complaint", "report" or "notification", it is not, for legal purposes, a report governed by Article 62 LPAC and, accordingly, it is not subject to the legal system associated therewith, which is characterised, above all, by entailing a range of obligations upon the administration with regard to the reporting person:

- The duty to notify the reporting person of the decision on whether to initiate the corresponding procedure when the report alleges harm to the administration's net worth (Art. 62.3 LPAC).

41 Based on this interpretation, the administration could, without any need to carry out preliminary actions prior to the investigation and based only on the information contained in the anonymous report, discretionally decide to initiate an investigation or penalty procedure, regarded as being on its own initiative on the basis of indirect knowledge (gained, in this case, from the anonymous report or notification) of the acts it wishes to review, a task that—as I have noted—forms an inherent part of the investigatory stage of an inspection or review procedure. It should be noted, however, that this is not the interpretation that is being made in jurisprudence, since the aforementioned Judgement of the Madrid High Court states that "an anonymous report shall under no circumstances be sufficient grounds for the competent administrative body deciding to initiate an administrative procedure. In other words, an anonymous report does not meet the requirements for it being given leave to proceed".

42 Pursuant to Art. 62.1 LPAC, "a report is defined as the act by means of which any person, whether or not in compliance with a legal obligation, makes an administrative body aware of the existence of a specific act that may provide grounds for the ex-officio initiation of an administrative procedure."

- The duty to motivate any non-initiation of the corresponding procedure when the report details harm to the administration's net worth (Art. 62.3 LPAC).

- Mandatory exemption from any penalty imposed for the reporting person when they are the first party to provide evidence that permits initiation of the procedure or confirmation of the violation, provided that the administration itself does not previously have sufficient evidence to do so and the harm caused has been made good, and provided that the reporting person ceases to participate in the violation and has not destroyed evidence associated with the object of the report (Art. 62.4 LPAC).

- Reduction in the penalty, again compulsorily applicable by the administration, when the conditions for exemption are not fulfilled but the reporting person has provided evidence that entails significant added value in comparison with that previously in the administration's possession, provided that the reporting person ceases to participate in the violation and has not destroyed evidence associated with the object of the report (Art. 62.4 LPAC).

With regard to the OAC, the investigation procedure consists chiefly in verifying the facts and/or acts reported, so we cannot regard the task of verifying those reported anonymously as reasonably falling under the definition of "preliminary actions", as this would once again mean allowing the entirety of the procedural actions, when having the mission of verifying reported acts, to be in essence substituted by informal activities carried on whilst ignoring the guarantees and procedures contained in the regulations governing the procedure. Additionally, in the case of the OAC, there is a kind of unavailable preliminary action included in the governing regulations (Art. 16 LOAC)—the preliminary determination of plausibility—which has to be carried out whether the report is anonymous or not.

In short, I do believe that, obviously, both the OAC in particular and the administrations in general can receive anonymous reports, but these will never give the reporting person the right of exemption from any fine, nor the right to receive a reasoned notice of any shelving of their report if it alleges any harm to the wealth of the aforementioned administrations. As can be seen, this part of the system governing reports, regarding the reporting person's rights, is associated with knowledge of said reporting person's identity, so as to be able to notify them of the lack of initiation of the procedure or exempting them from the penalty. It therefore comes as no surprise that this system for reporting persons' rights is associated with a report made necessarily by a identifiable reporting person (or a number of identifiable reporting persons) and that it is not, accordingly, applicable when said identification is not possible.[43] In this second situation, so as not to apply this system of rights, Spanish legislation deems that, for administrative law purposes, we are not dealing with a report as defined and governed by Article 62 LPAC[44]. However, I would repeat that the fact that a disclosure to an administration does not have this legal nature of a "report" does not mean that it cannot be admitted, nor that it cannot, eventually, provide the grounds for carrying out preliminary verification or plausibility actions and/or the initiation, if applicable, of ex-officio inspection procedures. The only thing that it does mean is that the reporting person will not enjoy the above subjective rights associated with the legally-established figure of the "report". So, an anonymous reporting person may not argue, during any penalty proceedings, that they have filed the (anonymous) report and that they must therefore be exempted from the penalty.

Additionally, as noted above, there are a number of legal provisions that permit anonymous reporting. Mention has already been made of Article 26 of the Regulations of Madrid's Municipal Anti-Fraud and Anti-Corruption Office, and we could add others such as Article 24 of Law 3/2018, of 5 December, on Personal Data Protection and the guaranteeing of digital rights, according to which "it shall be lawful to create and maintain information systems by means of a which a private law undertaking may be made aware, even

43 There is a need to consider, in the very near future, expanding the scope of the system for reporting persons to embrace anonymous reporting persons who are subsequently identified, particularly in terms of governing the rights regarding the protection of reporting persons. This is the focus of the recent Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, which states that "persons who reported or publicly disclosed information on breaches anonymously, but who are subsequently identified and suffer retaliation shall nonetheless qualify for the protection provided for in this Directive, provided that they meet the conditions laid down in herein" (art. 6.3).

44 We should note here that, if it were to be governed in another way, the levying of a penalty could lead to conflict, as each of the alleged offenders could argue that they were the (anonymous) reporting persons, seeking to benefit from the rights of exemption from or reduction in the penalty arising from the associated penalty procedure.

anonymously, of the committing, within it or through the action of third parties contracting therewith, of acts or behaviour that may be contrary to any applicable general or sectoral law". It must be remembered that this provision is also applicable to the public sector, as Section 4 of said Article states that the principles of the preceding sections are applicable to any internal reporting systems that may be created in the public administrations.

Lastly, one should also note that Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union includes a system for protecting persons anonymously reporting or publicly and anonymously disclosing information on breaches of European Union law, although Article 6 thereof notes that the Directive does not oblige public or private undertakings to accept or investigate anonymous reports.[45]

2.3 The real value of the OAC investigative function

As has been repeatedly stated in this and other works (Gifreu, 2011; Capdeferro, 2016), it appears that the OAC's function as an oversight body is limited to conduct and acts that do not fall under the competence of other authorities such as the public prosecutor's office,[46] the Catalan Public Audit Office or even the administrative bodies at each level of authority with the powers to levy disciplinary penalties.[47]

However, this does not mean that its investigative duties are unimportant. Quite the contrary: I believe that there are a number of aspects that point to the importance that this role of the OAC may indeed have:

- The OAC investigates those cases of corruption that, while in contravention of the legal system and public ethics, do not constitute a criminal offence. Not all forms of corruption are punishable under criminal law, and so, in the fight against corruption, it is important to prevent, control and punish all types of corrupt practice, not just the most serious ones.

- The OAC investigates cases in which internal controls have failed to work. It is sometimes the case that bodies responsible for said controls participate in the misconduct or do not exercise their duties properly for some other reason. In such cases, internal reporting of misconduct is of no use in detecting, verifying or controlling them and there needs to be an outside body, such as the OAC, the courts or the public prosecutor, to carry out an investigation.

- The OAC allows the filing of anonymous reports, which are taken equally into account and may give rise to investigative actions. There are not many public bodies with investigative or inspection powers that accept and process anonymous reports and, as we have said, anonymity may foster the filing of reports by people who might otherwise not do so due to fear of reprisals, as anonymity works, to an extent, as a protection measure for reporting persons: if nobody knows who has lodged the report, no reprisals can be taken against them.

- It is useful in helping the OAC gain a first-hand, in-depth understanding of corruption in the Catalan public sector, providing knowledge that will necessarily inform the Office's prevention and consultative or advisory activities. The analysis of the administrative function performed during the investigation of cases is used not only to provide the competent bodies with grounds for any penalising of the improper conduct,[48] but also furnishes the technical staff carrying out prevention and advisory work with highly valuable information.

45 "Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches. Persons who reported or publicly disclosed information on breaches anonymously, but who are subsequently identified and suffer retaliation shall nonetheless qualify for the protection provided for in this Directive, provided that they meet the conditions laid down in herein."

46 With regard to relations with other authorities and bodies, particularly the public prosecutor's office, of particular interest is González (2017).

47 Since it is precisely the investigation and establishment of the facts/acts and those responsible for them that constitutes, together with the establishment of the corresponding penalty, the object of the penalty procedure.

48 A role that would, in and of itself, be positively viewed from an anti-corruption standpoint, as we have noted above with regard to ceasing criminal activities (Paternoster, 2010).

- Lastly, possibly the greatest value of the investigative function is that its activities can give rise to recommendations and preventative or corrective measures for irregular situations. This makes the OAC a true guarantor of good administration and integrity in the public sector.[49]

To sum up, in my view, the OAC's function here is neither unnecessary nor does it entail uncalled-for duplication. It is not unnecessary because we have seen that one of its main roles is that of proposing corrective measures, rather than securing any potential sanction, and it does not entail duplication because, as we have seen, it has its own sphere, a field in which the conducts investigated will not be punished by any other body, but those nevertheless are bad practices, an example of poor administration that needs to be corrected and prevented in the future (a bad practice with regard to which the OAC *will* offer guidance for its correction). In this regard, perhaps the OAC should not be seen so much as an anti-corruption organisation that pursues and punishes corruption (something that it actually cannot do), but rather as a body that guarantees good administration, that detects shortcomings and proposes remedies for the better working of Catalonia's public sector.

3 The OAC's preventative functions

In this section, I shall be examining all of the OAC's non-investigative duties, which are organisationally assigned to the Prevention Directorate, embracing under this aegis prevention functions, including prevention advice (Art. 4.1, 6.*a* and 6.*b* LOAC) and the functions that the Office's international operating regulations (the *Normes d'actuació i règim interior de l'Oficina Antifrau de Catalunya*, "NARI") classify under the category of "advisory powers", such as the formulation of recommendations, the drawing up of proposals and responses to non-binding consultations.

3.1 Submissions on rules and regulations

Amongst the duties assigned to the OAC and fitting within this preventative scope is firstly, the ability to make representations with regard to legislation at the preparatory stage, during the hearing and public consultation stages, always with regard to the fields in which the OAC has competence. In practice, this has meant that the OAC submits representation with regard to legislation dealing with areas particularly subject to the risks of corruption, such as public procurement, grants and public sector organisation and the civil service (and probably town planning) and those dealing with areas of importance in the fight against corruption, such as transparency, the adoption of codes of ethics and conduct or the protection of reporting persons.[50]

So, it can be said that, thanks to this function, the OAC, may have an impact upon regulators to ensure that legal provisions take into account its effect upon public integrity and minimise the risks of corruption and/or do not foster misconduct. This function may be carried own either at the request of the body promoting the draft regulations or at the OAC's own initiative.[51]

At the time of finishing this article, 2020 had seen the submission of two representations on regulations, specifically with regard to municipal byelaws on grants (of the municipal councils of Vilobí d'Onyar and Premià de Mar). Clearly, to keep it down to a reasonably length, I cannot provide a detailed commentary on these representations, but it is worth noting some specific information that can help illustrate the OAC's involvement in this area. According to the wording of the representation addressed to Vilobí d'Onyar Municipal Council, made on an ex-officio basis, they are "brief observations of a technical nature and considerations on some provisions of the planned byelaws that, in our opinion, are crucial in strengthening the prevention of possible fraudulent or improper conduct in the field of grants", in reference to, amongst others, the recommendation to set up collegiate bodies of a technical nature (requesting "a rethink of the participation of elected officials"), indications on the need to clearly limit and specify those situations permitting the

49 A role that, it should be remembered, it shares with other bodies such as the Catalan Ombudsman (*Síndic de Greuges*).

50 If, for example, we examine the figures on representations contained in the most recent annual report (that for 2018), we can see that the majority were made in respect of municipal council codes of ethics and conduct (6 out of a total of 15), followed by regulations on transparency and e-government. With regard to codes, the report tells us that, amongst other issues, the OAC has repeatedly recommended the inclusion of channels for reporting breaches of said codes, with protection for reporting persons (OAC, 2019: 13).

51 This does not employ the technique known as "corruption impact assessment" (Chvalkovska et al., 2012).

modification of a concession resolution and recommendations on how to regulate the possibility of directly awarding grants (without a competitive procedure) as well as a reduction in the use of undefined or vague legal terms and incorporating, as a good practice, "the obligation to incorporate in the case file a reasoned report on the existence of proper cause for the impossibility of or difficulty in making a public call for applications".[52]

The total number of representations submitted each year varies considerably, but, in any case, I believe that it is sufficient for it to be said that this activity is very significant. Taking into account only the most recent years, in 2019, 29 representations were made, in 2018, 15, in 2017, 40 and, in 2016, 15.

If, for example, we look at 2019, we can see that the great majority are addressed to municipal councils, although, to a lesser degree, there are also some addressed to Ministries of the Catalan Government and even to Spain's Ministry of Territorial Policy and the Civil Service, something that provides an indication of how significant the scope of this power is. Representations have even been made on an international level, such as that submitted in July 2017 to the European Commission with regard to the Directive of the European Parliament and of the Council on the protection of persons who report breaches of Union law.

So, it must be pointed out that this power is highly important in the fight against corruption, as its mission is to introduce anti-corruption criteria into legal provisions, in other words, into stable normative regulations and criteria, with the goal that they remain in legislation over the course of time, with the ability to be applied in a large variety of situations. Some of the representations have the potential for great impact, due to the large number (or importance) of the situations in which the law with regard to which the representations are made is applicable, such as those made in December 2019 with regard to the draft of the Catalan law on the procedure for drawing up regulations,[53] as it governs which criteria and parameters should be applied in the drawing up of other regulations, and those formulated in regulations applicable to municipal councils,[54] that govern the day-today operations of the public administrations.

For less recent examples (from 2019 or earlier), there is also a follow-up report, assessing the quality and degree of acceptance of the representations made.[55] Although the OAC has not presented standardised data, and so we cannot provide an overall evaluation, one can see that the degree to which the recommendations submitted by the Office via its representations has been followed varies greatly: some are rejected almost in their entirety,[56] others, as in the above case of Piera Municipal Council, have an even spread (with similar figures for recommendations adopted, rejected and only partially accepted), whilst others indicated that some administrations show a high degree of acceptance of the OAC's opinion and regard it as a key actor in guaranteeing the proper provision of public services, as we sometimes encounter regulations incorporating most of its recommendations.[57] It would therefore appear that the degree of acceptance mainly depends on the attitude of the body producing the regulation, although in some cases I did detect that their complete unawareness of the recommendations was due to the fact that, at the time the representations were received, the plenary council meeting for approving the regulations had already been called, or they had even already been approved, as would appear to have occurred in the odd case.[58]

52 With regard to the criteria generally employed by the OAC in this role, the 2018 report states the following: "By formulating recommendations and proposals, we seek to help ensure that the regulations the object of the representations is in line with current anti-corruption standards, taking care to avoid, for example, excesses of discretionality, the accumulation of powers, the preference for collegiate instead of single-person bodies in decision-making in certain fields, any lack of transparency and, in short, for the purposes of promoting all those aspects that may contribute to improving the regulation from the standpoints of integrity, ethics in public action and transparency" (OAC, 2019: 10).

53 Viewable on the OAC website.

54 For example, the representations made in October 2019 to Piera Municipal Council, viewable on the OAC website. Generally speaking, at a local authority level, there is a fairly standardised selection of regulations subject to representations, most commonly governing regulations, byelaws on participation, transparency, grants or regarding codes of ethics and good government.

55 For example, in the case of the regulation in respect of which the representations mentioned in the previous footnote were made, the follow-up report, noting that 38% of recommendations made were fully implemented and 23% partially, is viewable on the OAC website.

56 Viewable on the OAC website.

57 Viewable on the OAC website (follow-up reports 8/2019 and 4/2019).

58 For example, the aforementioned follow-up report on the Regulations for Morell Municipal Council contains the notification from said Council to the OAC: "we hereby notify you that we shall take into account the recommendations for compliance purposes,

So, although this tool has a great capacity for impacting improvements in the prevention of corruption in the Catalan public sector, it should be noted that, to be effective, it must be used as quickly as possible, and in all cases within the timeframe for the submission of representations. There is therefore a need for promptness to increase the likelihood of having an impact upon any regulations finally approved and, also, a need for administrations to respect the timeframes for public consultation, to analyse in detail all the representations received (from both the OAC and any other body) and to provide a reasoned response with regard to their acceptance or rejection to those submitting them. In this regard, it is surprising to see how few responses to representations are to be found on the OAC website.[59]

3.2 Non-binding query: an inexplicably-forgotten anti-corruption tool

Pursuant to Article 33 NARI, those public sector bodies in Catalonia and those individuals and private undertakings and companies that are public service concessionaires or recipients of public funds may, via their bodies with relations with the OAC (cf. Arts. 12 and 13 LOAC) or via their highest representative body, formulate consultations for the OAC associated with the matters with regard to which the latter carries on its functions (Art. 3 *et seq*. LOAC). These consultations, which are addressed to the director in writing, seeking his or her opinion, must receive a response within one month.

There is no doubt that this tool could have a great ability to prevent cases of corruption and other improper conduct, since regulations are occasionally unclear and, for proper compliance, there is a need for mechanisms for consulting with expert bodies.

Despite its anti-corruption potential, particularly with regard to those cases where the goals is avoiding bad practices, we can observe that this is an underused tool. The total number of non-binding consultations made to the OAC have been as follows: 1 in 2013, 1 in 2015, 2 in 2017, 1 in 2018 and 2 in 2019.

To assess this activity, we shall analyse the latter three consultations, which took place in the last two years. In the 2018 consultation, a municipal secretary enquired about the possibility that he himself participate as a bidder in a public auction that the council at which he worked would soon be holding, with regard to some property he wished to acquire. In the OAC's opinion, the civil servant had a conflict of interest, and therefore advised the secretary that, if he intended to participate in the auction as person interested in the asset, he should refrain from taking part in the administrative procedure regarding its disposal. It also recommended increasing the appearance of impartiality by, amongst other options, publicising the agreement on the municipal secretary's recusal.

In another case, the subject of a 2019 consultation, a council's secretary/comptroller requested the OAC's opinion on the compatibility between the duties of an elected councillor and the main job of one particular councillor, who worked as a member of a university's clerical staff, carrying out support coordination duties, as well as working as an associate professor. In this case, the OAC did not see any conflict of interest and indicated that his job was compatible his position as a public servant, provided that he carried on his duties as an elected official outside of his working hours and without exceeding any salary limitations.

The other 2019 consultation was with regard to the possibility of an elected municipal official working on a 90% part-time basis. Quite correctly, the OAC responded that, given the lack of specific jurisprudence or legislative provisions, it had to restrict itself to providing recommendations on integrity, exemplariness and transparency in the performance of public duties, and could not, therefore, provide an interpretation as to what the maximum amount of part-time work could be. Accordingly, it recommended using as a benchmark the criteria of 75% employed by some municipalities, not approving anything above this figure, and the making of proper use of the discretional organisational power by means of which any applicable part-time work should be approved, in respect of which it also provided criteria and guidance.

So, we can see how the OAC uses this tool to help internal control functions (secretaries and comptrollers) or the public office holders and servants themselves to properly apply and comply with the legal provisions

although the Regulation's text shall remain as approved", which would lead one to assume that the representations were received after the regulations had already been approved.

59 Viewable on the OAC website.

on public integrity-related matters, so as to prevent possible cases of corruption and misconduct in the future. Furthermore, in addition to purely legal requirements, it recommends actions that are, in its view, exemplary and constitute good practices in the fields of integrity and transparency. This function, so necessary and positive in the fight against corruption, has one great limitation: the total number of consultations made is tiny. There are years in which none at all are made and, in those when they are, they are obviously specific queries that, although they may be applicable to other cases, are essentially tailored to that particular one and, in principle at least, are only effective with regard to one possible case of potential breach of public sector integrity. So, despite its positive nature, we cannot ignore the fact that impact of the OAC's use of this tool is minimal.

It is true that a great deal of this failure is due to the fact that the subjects involved do not make use of it, be this because they are unaware of the possibility of addressing consultations to the OAC or because they have chosen not to do so. However, neither can we ignore the fact that, in part, this tool has not been truly operational because it is designed as a residual mechanism: in practice, the restrictions on who may address consultations to the OAC director, by virtue of Articles 12 and 13 LOAC, prevents more from reaching the Office. In fact, strictly applying the OAC's regulatory provisions, none of the three consultations noted above should have been accepted, as they were made by a secretary, a secretary/comptroller and a councillor of the councils in question, none of whom are actually entitled to do so.[60] In all these cases, the body empowered to make the consultation is the municipalities mayor or mayoress.

3.3 On the importance of training

The OAC offers training through both its own in-house training courses and participation in external ones (such as university master's programmes) or professional workshops. The overall numbers are high, to the point that it can be said that, of all the Office's duties, it is this one that probably boasts the greatest impact, spread and reach. More especially, the OAC notes[61] that its training has entailed 7,759 participants in more than 380 actions, with an overall participant satisfaction level of 8.6 out of 10.

If take a look at some more specific aspects, such as its recipients, this training would appear a little unbalanced. Training aimed at 26 councils with more than 40,000 inhabitants has been provided (with 2,210 people attending the different courses), but to only 6 towns or villages of less than 40,000 inhabitants (with a total of 97 attendees). It can therefore be said that, with regard to local authorities at least, training has been provided on an unequal basis to public servants, concentrating on larger towns and cities.

The different training actions include courses on conflicts of interest ("Managing conflicts of interest in public organisations"), the risks of corruption ("Managing the risks of corruption: a senior management responsibility" and "The risks of corruption and to integrity in public procurement") and more general themes aimed at elected officials and work teams ("Fostering integrity in work teams").

Training is undoubtedly an important factor in the fight against corruption (Hauser, 2019). Firstly, it helps prevent cases of unconscious corruption, when—for example—someone does something they have always seen being done and does not perceive of as improper. Secondly, because training ensures raised awareness of corruption, making it easier to identify and know how to report it, in addition to hindering its normalisation in the organisation. Indeed, one important element in the practice of misconduct is that known as "neutralisation", a series of techniques by means of which people justify wrongful conduct, such as denying it causes any harm (Sykes & Matza, 1957; Kaptein &Van Helvoort, 2018). Proper training can stop these techniques and have a positive impact upon corruption prevention (Huisman & Vande Walle, 2010; Gorta, 1998).

So, the impact of this kind of action is highly beneficial and, furthermore, in light of attendees' satisfaction levels, it appears such training is useful, clearing up doubts regarding different aspects of integrity and

60 The three were accepted by virtue of a provision of the OAC's working guidelines issued by its director on 14 December 2016, and forwarded to the Parliament of Catalonia, which indicates that its goal is to "make more flexible the admission of non-binding consultations, with a *pro actione* approach that makes them accessible to significant functions, such as municipal secretaries and comptrollers".

61 Information viewable on the OAC website.

corruption, and is well suited to the profile of those receiving it. Nevertheless, it appears that these benefits are not reaching all administrations, particularly at a local level, which significantly limits their impact upon the Catalan public sector.

3.4 The risks of corruption in public procurement

One of the most ambitious and interesting projects to date of the OAC, "The risks to integrity in public procurement"[62] deserves its own section.

This project, started in 2016 on the basis of working guidelines submitted to the Parliament of Catalonia by the OAC's director, seeks to provide an in-depth diagnosis of the risks to integrity in procurement to then, in a second phase, formulate properly directed and defined suggestions for the public administrations and recommendations for contracting authorities, as well as to offer a series of risk prevention support tools.

Over the course of 2017 and 2018, there were "17 analysis workshops (15 with public sector management and 2 with politicians)" with the participation of "517 public servants (467 managers and 50 politicians)" (OAC, 2019: 33).

Then, after the relevant study and analysis of leading publications, reports and investigations on the matter and consultation with experts, beginning in 2018, the OAC has been publishing the results of the project's diagnosis phase, in the form of "working papers" that are open to participation by way of the submission of comments.[63] Of the planned total of 8, 7 have already been published, meaning that the conclusion of this important task is at hand.

Some tools have also begun to be published, such as tables helping to identify risks.[64]

I would like to stress how this project is a perfect fit with chief recommendation as to the best way to fight against corruption, which has been consolidating its position over the course of the 21st century: first, you need to analyse cases of corruption and carry out a risk analysis, to then suggest solutions for mitigating them, with measures for preventing and quickly detecting any possible misconduct.

Beginning with the United Nations, Article 10 of the United Nations Convention against Corruption, of 31 October 2003, contains the following provision: "Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: […] c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.". This Article is analysed in the Convention's technical guide, which states that, "[t]he information and data should form the basis of a risk or vulnerability assessment that identifies the trends, causes, types, pervasiveness and seriousness or impact of corruption. This will help develop a better knowledge of the activities and sectors exposed to corruption, and the basis for the development of a preventive strategy, buttressed with relevant policies and practices for better prevention and detection of corruption" (UNODC, 2010: 4).

Again on an international level, the OECD has repeatedly highlighted the key importance of risk analysis as the cornerstone of and foundation for a solid public integrity system, stating that, "the Integrity Framework proposes a pro-active approach to address emerging concerns and grey areas. It considers the analysis of integrity risks and integrity dilemmas as a cornerstone and starting point of an Integrity Framework" (Maesschalck & Bertok, 2009: 21). More recently, in 2017, the OECD Council Recommendation on Public Integrity established a series of points necessary for a good public integrity system, recommending that administrations "[a]pply an internal control and risk management framework to safeguard integrity in public sector organisations, in particular through: […] b) ensuring a strategic approach to risk management that includes assessing risks to public integrity, addressing control weaknesses (including building warning

62 Some of the projects results are summarised in the interesting work by Baena (2019).

63 Viewable on the OAC website.

64 Viewable on the OAC website.

signals into critical processes) as well as building an efficient monitoring and quality assurance mechanism for the risk management system" (OECD, 2017b: 12).

The European Union also upholds the same criteria in its only report on the fight against corruption, published in 2014 and whose annex on Spain notes the following: "The following points require further attention: […] Developing tailor-made strategies for regional and local administrations, preceded by corruption risk assessments" (European Commission, 2014: 16).

Lastly, and again in recent years, the Group of States against Corruption (GRECO), the Council of Europe's specialist anti-corruption body, has begun to demand a focus based on risk analysis and management in its different evaluation rounds. Taking as an example the most recent Spanish round, we could mention that, in its report on the fifth evaluation round, on promoting integrity in central Governments (top executive functions) and law enforcement agencies, published in June 2019, GRECO noted: "The GET (evaluation team) regrets that a more holistic anticorruption policy has not yet sprouted at central level. The initiatives taken up to the present, although noteworthy, are more of a piecemeal approach hastened by public outcry; they were not based on any prior risk assessment and they do not form part of a targeted strategy. […] GRECO recommends (i) devising an integrity strategy for analysing and mitigating risk areas of conflicting interests and corruption in respect of persons with top executive functions and (ii) connecting the results of such a strategy to a plan of action for implementation." (GRECO, 2019: 15-16).

4 Conclusions: overall assessment and suggestions for reform

When it comes to assessing the actions of an anti-corruption agency, it is easy for any conclusions to be slanted as the result of expectations that are either unrealistic or ill-fitted to the agency's nature, resources (human and material) and actual functions. As Roca (2019) notes, some think that the OAC can do more than it can actually accomplish, and this makes it difficult to objectively assess whether the Office is, in fact, useful and effective in the fight against corruption. In my opinion, one thing that makes a huge contribution to this distorted view of the OAC is the fact that it is often chiefly viewed as something that it is not, or that it should not be: a sort of Catalan anti-corruption prosecutor, a job that, as we have seen, and as I have noted in this and other articles, (Capdeferro, 2016), it does not and indeed cannot carry out within the current legislative framework. This view is even obvious in the actions of the Parliament of Catalonia, whose Motion 43/XI, on a zero-corruption republic, urges the OAC to "focus all its human and material resources on investigating corruption and fraud and *becoming a truly useful tool* in the fight against impunity in these areas". This view, centred on the investigation and suppression of corruption, also extends to the appointment of OAC directors (to date, only men), who have always been professionals from the judiciary, and indeed two of the three have been specialists in criminal law (the third and current OAC director is the exception). The nature, specialism and background of the OAC director is clearly a key factor in establishing the Office's work programme and character.

Probably, ceasing to regard the OAC as a body that prosecutes corruption and accepting that we are instead dealing with a body promoting good government, integrity and proper administration would be of help in providing a more reasonable assessment of its actions, adjusting expectations to fit the roles it actually carries out and, perhaps, those that it could one day perform. Viewed from this standpoint, the OAC's function is by no means unimportant. Quite the opposite: it is highly necessary to tackle one of the chief concerns of the Catalan public, the majority of whom regard corruption as a serious problem that is too widespread (OAC, 2018).

It would also be important to promote this more accurate image of the OAC amongst public sector bodies, as well as how it can be of use to them in promoting integrity and good government, as it is surprising to note that whilst, on the one hand, there is great collaboration with and respect for the OAC with regard to its investigative functions, on the other hand, it is not taken much into account as a specialised body providing guidance on compliance with specific integrity and transparency obligations, as shown by the almost zero use that administrations have made of non-binding consultations, the limited uptake of the recommendations it has made in its representations on legislation and the demonstrable fact that its training function, particularly with regard to local authorities, has reached few administrations.[65]

Aside from these general comments for the overall assessment, I think that there are a number of areas in which it is possible to improve the Office, and that these need to be analysed separately in some detail, also considering any potential need to amend the OAC's regulatory framework to ensure the full implementation of the recommendations on suggested areas for improvement.

4.1 On reporting misconduct to the OAC

As previously noted, one of the great problems associated with corruption in our country is that the reporting of cases is discouraged, amongst other reasons, due to the frequent and repeated forms of harassment suffered by reporting persons (Parramon, 2019). To tackle the curse of punishing whistleblowers and thus incentivise the reporting of misconduct, I propose a reform that would have a double impact: the possibility of making anonymous reports and the broadening of the OAC's material and functional scope of action to make the protection of reporting persons against possible retaliatory action one of its responsibilities.

If it is impossible to identify the reporting person, said person can obviously not be subject to any form of reprisal. Clearly, this is not an ideal solution, as it should—in a perfect world—be possible to publicly report

65 We can see that the OAC's awareness-raising training courses specifically for applicant administrations have been given to 26 towns and cities of more than 40,000 inhabitants (with some even taking a number of courses) whilst ony 6 towns and villages of less than 40,000 are listed (viewable on the OAC website). It should be noted here that, probably, if greater staff were allocated to providing training, the number of actions could be increased. Undoubtedly, collaboration between the Office's training function and other organisations providing courses, such as universities, would be a good option in this regard.

misconduct without suffering from any kind of retaliation. However, as Parramon (2019) quite rightly points out, reprisals against reporting persons are, unfortunately, widespread. Given this fact, the LOAC already contemplates some measures designed to ensure the confidentiality of investigations, the duty of secrecy (Art. 18 LOAC) and the keeping confidential of reporting persons' identity, which, pursuant to Article 16.3 LOAC, the latter may request of the OAC. Nevertheless, this protection of their identity is not unlimited due to the requirements of criminal procedural law as, according to the provisions of Article 16 LOAC, this confidentiality with regard to identity cannot be maintained in the case of judicial injunction.

This is why anonymous reporting is regarded as a good way of providing the OAC with notice of alleged misconduct without fear of any potential subsequent disclosure of the reporting person's identity and possible resulting retaliation.

Furthermore, the possibility of making anonymous reports before anti-corruption bodies is a requirement of Article 13.2 of the United Nations Convention against Corruption of 2003.[66]

Given that interpretations of the law applicable to reporting are by no means unanimous with regard to the identification of the reporting person in Article 62 LPAC, it would appear worthwhile for the LOAC to make it clear that anonymous reporting is possible, to give added legal certainty to the workings of the OAC's tip-off service. In this regard, any reform could focus on amending Article 16.3 LOAC to make it clear that the Office must create and maintain an anonymous channel and that it may accept, as the grounds for the commencement of its duties under Article 16.1 LOAC, an anonymous report or information.[67] Additionally, given the current and likely future potential for conflict inherent in Article 62 LPAC (above all by virtue of the transposition of the European Directive on the protection of persons who report breaches of Union law and the laws on the protection of reporting persons currently before parliament), one could suggest reforming it to dispel any doubts as to how to interpret ex-officio initiations of procedures when there is a report, and the rights and obligations applicable to both administrations and reporting persons.[68]

As I have noted previously, in my opinion, there is a second measure that could be adopted to incentivise their reporting of misconduct. This is the safeguarding or protection of reporting persons against any type of harassment or other form of reprisal arising from their complaint.

I believe that, to this end, it is worth adding the protection of reporting persons to the scope of the OAC's powers. As things currently stand, the OAC's competences in this field are very limited. According to Article 25.2 NARI, which deals with the issue: "[i]f the Anti-Fraud Office becomes aware of a reporting person or informant being subjected, directly or indirectly, to acts of intimidation or reprisals, such as being unjustly or unlawfully subject to dismissal, redundancy or removal, to delays in professional advancement, to transfer, to reassignment or stripping of duties, negative assessments or reports, the loss of any benefits that may be available to them or any other form of punishment, sanction or discrimination by reason of having submitted the report or notification, the Office director must encourage or carry out before the competent authorities the required corrective or restorative actions, and must in all cases place them on record in the annual report".

In short, two shortcomings can be seen in this regulation: the OAC cannot investigate possible reprisals (being restricted to being made aware of them) and, in the face of any actual reprisal, its only response is to

66 This precept, which represents a real obligation for Member States (amongst them Spain), notes that: "Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention".

67 I suggest the following wording for Art. 16.3 LOAC, with my additions in bold type: "Any person may, **even anonymously by means of the channel created to this end,** address the Anti-Fraud Office to notify it of alleged acts of corruption, fraudulent practices or illegal conduct affecting the general interest or the administration of public funds. **If this person identifies him or herself**, receipt of the document or notification received must be confirmed. The reporting person may request that their identity be kept confidential, and the Anti-Fraud Office's staff are obliged to keep it so, except in the case of the receipt of a judicial injunction".

68 As noted in Section 2.2 hereto, I believe that current regulations do not necessarily prevent the anonymous reporting or notification of acts, and that this does not particularly hinder the initiation of ex-officio procedures arising therefrom, but it is undeniable that it presents problems of interpretation and that the consequences of these interpretations could be truly prejudicial to both reporting persons and those they report. Given, then, that the problems stem from a legislative tangle in the regulation of ex-officio initiations and, in particular, of reporting in said Article 62 LPAC, what we need to remedy the situation is a reform of this Article to permit anonymous reporting and reserve the rights provided for in it solely for those reporting persons providing notification of their identity.

place them on record in the annual report (perhaps with a view to subsequent parliamentary control of the harassing or retaliating body) and to bring the case before the competent body for the adoption of corrective or restorative actions.

Since it seems fitting that the OAC should be able to guarantee that people reporting misconduct in its field of action cannot be subject to retaliation, Article 4 LOAC could be reformed to include the investigation of possible reprisals against those reporting fraud or corruption (and not necessarily only those cases reported to the OAC,[69] as this is not the only channel for making such reports, and sometimes it is not even the most suitable recipient, for example in the case of serious cases constituting a criminal offence), so as to be able to establish whether the prejudicial measures adopted against the reporting person are in response simply to the report or to grounds that may justify the adoptions of disciplinary measures or steps unfavourable to the reporting person[70] and, if applicable, to adopt the relevant protection measures.

Additionally, amongst these reactive measures to deal with abusive reprisals against reporting persons, the possibility should be considered of including the exercise of sanctioning powers, giving the OAC the ability to levy penalties in such situations, provided that this does not conflict with other bodies or authorities (with principle regard, here, to any possible criminal law impact of the harassment).[71]

4.2 On penalty powers: the need to include violations associated with the OAC's investigative and preventative activities

I have fully examined the issue of the potential room for any OAC penalty-levying powers, as well as their usefulness in effectively fighting corruption, in a previous article (Capdeferro, 2016). Indeed, many of the proposals made in this regard in that article are still relevant and could be reiterated today.

Nevertheless, throughout this work, we have noted shortcomings in the OAC's operations that could find some remedy through a penalty system and that were not specifically dealt with in the aforementioned article. As I have already noted, it might be fitting for the adoption of reprisals against persons reporting corruption or other improper practices to be classified as a violation of the LOAC.

Aside from this specific area, which would appear to open up room for the establishment of the OAC's own penalty-levying powers, we cannot forget others that, in my opinion, reinforce this need to include a series of sanction-related articles in the LOAC.

Firstly, when analysing the OAC's investigative function, an obvious shortcoming that affects its very effectiveness has been detected: pursuant to Sections 4 and 5 of Article LOAC, there is a duty to collaborate with the OAC, but the only provision in said law covering cases of non-compliance with this duty is the following: "4. Administration staff, senior managers and private individuals who block or hinder the carrying on of the Anti-Fraud Office's functions or who refuse to provide it with the reports, documents or files required of them shall be answerable in the form established by applicable legislation. 5. The fact of making formally clear, before the competent authority, any potential breach of the duty of collaboration established

69 We should not forget that these provisions should take account of the fact that part of these suggestions or ideas could be implemented via other legal provisions that, without governing its operations, could establish some of the OAC's sectoral functions, as the Law on Transparency does, for example (cf. Art. 75 of Catalan Law 19/2014, of 29 December, on Transparency, Access to Public Information and Good Government). With regard to reporting, note should be taken of the future laws on the protection of reporting persons.

70 I propose, with the relevant amendments in bold type, this alternative text for Art. 4.1 LOAC: "The Anti-Fraud Office of Catalonia possess, within the scope of the public sector of the Government of Catalonia, the following specific functions: 1. To investigate or inspect any possible cases of the improper use or allocation of public funds, as well as conduct contrary to probity or the principles of objectivity, effectiveness and full submission to the law and rights**, or any form of reprisal arising from the reporting of such cases**". An equivalent provision for the local authority level, governed in Art. 6 LOAC, could also well be added.

71 In this case, I would recommend the inclusion of articles recognising and implementing this penalty-related power in the LOAC (compulsorily, as penalties are governed by the principle of formal legality *ex* Arts. 25.1 of the Spanish Constitution and 25.1 of Spain's Law 40/2015, of 1 October, on the Legal System for the Public Sector). To adapt the NARI to include the possible new sanctioning powers, there would have to be an amendment of the final part of its Article 25, to refer to the proposed legal provisions on said powers. In accordance with the criteria of minimal amendments to in-force legislation, I would propose an amendment with the following additions (in bold): "the Office Director must encourage or carry out before the competent authorities the required corrective or restorative actions, and must in all cases place them on record in the annual report, **without prejudice to the application of the penalty system contemplated in the Law governing the Anti-Fraud Office of Catalonia and in other legislation**".

in this Article shall not prevent the placing of record of any unjustified breach or dysfunction arising in the Anti-Fraud Office's annual report or in the extraordinary report, as applicable, addressed to the corresponding parliamentary commission. In any case, before placing the breach formally on record, the Anti-Fraud Office must provide notice thereof, with a proposal regarding the annual or extraordinary report associated therewith, to the affected person or body so that they make may any representations they deem fit".

The only sanction that may be imposed by the OAC in the case of failure to collaborate (e.g. hindering an investigation) is to include this refusal to collaborate in the annual report and, if so merited, in an extraordinary one, and, in all cases, encourage enforcement of the law if this attitude may be the object of sanction by a body invested with penalty-levying powers, for example.

We can find some examples of this in the OAC's annual reports. That for 2018 notes that "on 5 February, Corçà Municipal Council was issued with an eighth demand notifying it that, "given that the numerous demands sent to you that remain uncompiled with or without support for the contribution, this repeated omission of the duty of collaboration could entail a contravention of the provisions of Article 14.1 LOAC, such that, pursuant to Article 14.4 LOAC, you may be committing a criminal offence as classified in Chapter III to Title XIX of the Criminal Code, covering the crimes of disobedience and refusal to provide assistance" (OAC, 2019: 64). As can be seen, the lack of any administrative penalty system to deal with these repeated breaches of the duty of collaboration (in this case, involving eight prior demands) means that there is no middle ground between complete impunity and the criminal sanction for disobedience.[72]

It is worth noting that penalties for failure to collaborate with control bodies with powers in the fight against corruption are not unknown, as can be seen, for example, from Article 41 of Valencia's Law 22/2018, of 6 November, of the Government of Valencia, on the Services Inspectorate General and the warning system for the prevention of bad practices in the Administration of the Government of Valencia and its associated public sector,[73] and Article 49 of Regional Law 7/2018, of 17 May, on the Creation of the Good Practices and Anti-Corruption Office of the Autonomous Community of Navarre,[74] and is the preferred option prior to forwarding the matter to the criminal law jurisdiction, which is used the last resort and only when strictly necessary (García, 2019).

To give another example of violations associated with the OAC's powers, it should be noted that the LOAC includes another obligation, one that could be very important in assessing the OAC's anti-corruption impact and that lacks sufficient mechanisms to guarantee compliance. This is the obligation contemplated in Article 21 LOAC, pursuant to which a competent body receiving a reasoned report from the OAC (arising from an investigation procedure) must provide a response within 30 days, indicating the measures adopted or the grounds preventing the following of the recommendations formulated by the Office. However, there appears to be no guarantee of this compliance, aside from the provision that these measures must be included in the OAC annual report (Art. 23 LOAC).

It would be unreasonable to suggest that compliance with these recommendations be obligatory, as these are non-binding in nature, but one certainly could regard the failure to provide notice of the measures adopted (or not) as the result of the reasoned report as a sanctionable breach.

Giving the OAC the power to levy penalties, or at least giving any body the power to punish breach of the duties and obligations associated with the OAC's actions would, as we know, entail a reform of the LOAC by

72 I therefore suggest adding a new article with contraventions and sanctions within the OAC's scope of action, including breach of the duty of collaboration, and a partial amendment to Art. 14.4 LOAC, as follows (additions in bold type): "Administration staff, senior managers and private individuals who block or hinder the carrying on of the Anti-Fraud Office's functions or who refuse to provide it with the reports, documents or files required of them shall be answerable in the form established **in this Law and in remaining applicable legislation**".

73 I would like to highlight two breaches in particular. One minor, entailing "obstructing access to the information required for an investigation, as well as unjustified refusal or delay, provided that the demand is admissible pursuant to the parameters of this law, when this gives rise to harm to a third party, to the administration, or to the investigation", and a serious one consisting in "repeated and unjustified non-compliance with the recommendations of the reports of the Government's internal control bodies proposing the bringing of breaches into line with the law and giving rise to proven harm to the administration or to third parties".

74 The following is, amongst others, classified as a serious breach: "breach of the contemplated obligations of active collaboration or the supply of information entailing the disregarding of express notice from the Good Practices and Anti-Corruption Office after an initial delay and with no justification in this regard", as well as "the failure to collaborate in the protection of the reporting person".

application of the principle of legality with regard to sanctions (Articles 25 of the Spanish Constitution and 25 of Spain's Law 40/2015). Obviously, sanctions are not the only answer, but do provide a further guarantee that could be added and that should, therefore, be borne in mind.

4.3 On non-binding queries

The legislation applicable to non-binding queries prevents such tools—*a priori* of great use in the avoidance of corruption and other forms of misconduct—from becoming more commonplace.

As previously noted, pursuant to Article 33 NARI, such consultations may only be formulated by the most senior representatives (Arts. 12 and 13 LOAC) of Catalonia's public sector bodies and of natural persons and private undertakings and companies the concessionaires of services or recipients of public grants. To increase the number of those entitled to do so, in December 2016, the OAC director adopted new Anti-Fraud Office Working Guidelines specifically aimed at "making the admission requirements for non-binding consultations more flexible, with a *pro actione* interpretation making them available to significant groups, such as municipal secretaries and comptrollers", in addition to also raising the possibility of a future reform of regulations.

I am also of the view that there is a need for reforms to broaden the number of parties entitled to make such a consultation. One option could be to empower internal control bodies themselves so that they may make consultations, as noted by the aforementioned Working Guidelines, which specifically mention municipal secretaries and comptrollers. However, if this is restricted to internal control bodies, other control bodies overseeing compliance with codes of ethics and conduct in the public sector should also be included.[75] The second, and probably for now best, option would be to broaden the scope of active legitimacy to encompass all public offices and employees. I say "for now" since, as things currently stand, given the current interpretation, in addition to the most senior representatives, for the purposes of communicating with the OAC, elected officials such as councillors and control bodies such as secretaries and comptrollers are also accepted but, nevertheless, scant use is made of the tool. Therefore, if there are to be reforms to formally and legally regularise what is already *de facto* taking place on the basis of working guidelines, advantage should be taken of the occasion to increase still further the pool of those entitled to do so.

Said reforms could cover only the NARI, or also the aforementioned Articles 12 and 13 LOAC if the general intention is that more bodies and persons may directly and legitimately address the OAC. The reforms' content should aim to increase as much as possible the number of those entitled to submit non-binding consultations, with some counterbalancing measures to ensure that the OAC is not overwhelmed by any massive increase in the number of consultations, such as the possibility of increasing or suspending the deadline for resolving the consultations, that of being able to respond by (reasoned) referral to a previous consultation resolving a similar case and the ability to consolidate and jointly resolve substantially similar consultations.

Clearly, simply increasing the number of legitimated subjects will not by itself lead to a significant rise in the amount of consultations. It should not be forgotten in this regard that the 2016 guidelines have not led to any improvement in the extremely low number made. This reform of the regulatory framework needs to be accompanied by determined efforts on the part of the OAC to incentivise the use of this tool and to promote it amongst those entitled to formulate such consultations, pointing out, in brief informative documents, the importance of consulting the OAC in the case of doubts with regard to its area of competence.

4.4 On the technological modernisation of the fight against corruption in Catalonia

If, today, one had to map out a strategic anti-corruption plan, it would probably be characterised by firm backing for the inclusion of artificial intelligence-based anti-corruption tools. Similarly, if the OAC had been created in 2018 or 2019 rather than in 2008, it would in some way to incorporate the smart technologies that are already demonstrating their usefulness in curbing corruption. Indeed, within the current context

75 For example Arts. 15 *et seq.* of the Code of Ethics of Barcelona City Council, governing the Ethics Committee, and Art. 16 of the Code of Ethics and Conduct of the public offices and temporary staff of the General and Institutional Administration of the Autonomous Community of the Basque Country, governing the "Public Ethics Committee of the Executive Senior Management of the General and Institutional Administration of the Autonomous Community of the Basque Country".

of the development of data and information technology, data analysis' potential for preventing misconduct and improving the fight against corruption has been made clear, particularly by the OECD (OECD, 2017 and 2019), and has been noted in academic articles (Fazekas & Kocsis, 2020; Wachs, Fazekas & Kértesz, 2020) and reports on the subject (Open Data Charter, 2017), including those exclusively dedicated to the impact of smart tools against corruption (Aarvik, 2019). This is no mere theoretic or hypothetic framework: in fact, the public sector itself has already begun to use new and promising smart tools in the fight against corruption, as shown by a number of recent initiatives, including the RAVN and Axcelerate programmes used with great success by the UK's Serious Fraud Office in investigating complex corruption cases such as that involving Rolls-Royce,[76] a range of projects in different countries featuring the participation of Transparency International, such as Hungary's RED FLAGS[77] and the Ukraine's DoZorro,[78] the European Commission's Arachne programme[79] and the SALER rapid alert system developed by the Government of Valencia and approved by Law 22/2018, of 6 November, of the Government of Valencia, on the Services Inspectorate General and the warning system for the prevention of misconduct in the Administration of the Government of Valencia and its associated public sector.[80]

Clearly, there are differences between all these computer tools, but, generally speaking, it can be said that they share some common features. Firstly, they are based—to a greater or lesser degree— on more or less sophisticated artificial intelligence,[81] leading them to be dubbed "smart tools". Secondly, they are systems that identify, from large data sets, warnings (signs of misconduct, or red flags) or that link different data to provide forecasts or estimates based on the probability of occurrence of a case of misconduct or corruption in an open administrative case, as they provide almost real-time analyses. It should also be noted that they are tools that work without human involvement, as it is the program itself that executes the relevant tasks on the data analysed and provides the results (a corruption risk indicator or a list of corruption indicators or warnings detected). Human involvement can be limited to programming, assessing, modifying, administering and updating the software. Formally, the program does not itself initiate penalty procedures or inspections, but is instead limited to providing corruption risk information to administration inspectors for the latter to decide, if applicable, whether to initiate or not any kind of inspection or penalty procedure.

The OAC could play a dual role with regard to this type of corruption warning and detection tool. One could obviously be to make use of this kind of program as a support tool in its oversight duties, prioritising administrative cases requiring an OAC investigation, and even including cases monitored by the program that have not been reported to the OAC. A tool of this sort, which could have a great impact on the OAC's investigative duties, and one that is clearly in line with more recent and promising innovations in the fight against corruption, is already being used close to home, as noted, because the of Services Inspectorate General the Government of Valencia is using a computer system of this type (Puncel, 2019; Ponce, 2018; Amoedo, 2018). Possessing a program like this means, as has been the case with Valencia's Services Inspectorate General, that, by virtue of a regulations with the status of law, the information and databases the program accesses are recognised, as is a penalty-levying power sufficient to ensure the program's proper functioning, as deliberate actions designed to force its improper working need to be classified as violations of administrative law.[82]

76 As explained in a fascinating article published by the BBC.

77 Viewable on the RED FLAGS project website.

78 Viewable on the DoZorro project website.

79 Viewable on the European Commission website.

80 I have examined these smart tools in more detail in some previous articles (Capdeferro, 2019a and 2019b), to which I refer for further consideration and information. More recently, also worth consulting are Torres Berru et al. (2020) and Lima & Delen (2020).

81 The very concept has no universally-accepted definition. For the purposes of this study, we can state that one useful working definition is that contained in the *Catalonia Artificial Intelligence Strategy. Background Document* (*Estratègia d'intel·ligència artificial de Catalunya. Document de bases*), published by the Government of Catalonia in 2019: "Artificial intelligence is a computer science discipline dedicated to the development of algorithms that allow a machine make intelligent decisions or, at least, behave as if it had human-like intelligence". A very comprehensive definition is to be found in the document issued by the High-Level Expert Group on Artificial Intelligence appointed by the European Commission and entitled *A definition of AI: Main capabilities and disciplines* (2019), viewable on the European Commission website.

82 Thus, Art. 41.3.*c* of the aforementioned Valencian Law 22/2018 classifies as a serious violation "the non-incorporation or alteration of information destined for the warning system when an intention to obstruct the latter's normal operations is appraised".

Should another official body seek to develop and manage a program of this type (e.g. a local authority for its own administrative procedures), the OAC could offer expert recommendations and guidance, indicating the main areas for the risk of corruption or misconduct in Catalan administrations, and the vulnerabilities and warning signs that the program should take into account.

Additionally, these tools call for accurate, error-free data in electronic form, in order for them to work effectively and efficiently. This means that guidelines on how to record certain key data for detecting patterns of misconduct with the framework of a procedure subject to a risk of corruption and support for e-government are vital for the proper operation of these tools that could be used by the OAC.

Secondly, another highly interesting tool is the chatbot. This is a conversational computer program that employs natural language to interact with users, in one or more languages, orally or in writing.

Interest in the use of chatbots in public services has increased considerably in recent years due to the quick pace of their technological advances. Thanks to current technology, we now have multiple chatbots working in the administrations of a number of different countries and public services, and it is forecast that their use will only increase. To analyse the current status and the present and future potential of chatbots, in September 2019, the European Commission published a comprehensive report entitled *Architecture for public service chatbots*,[83] which also offers interesting recommendations on the design of public service chatbots (e.g. that they operate in English in addition to the local language, that they be easily findable on the relevant administration's website, etc.).

According to said report's analysis of a number of chatbots, it can be said that, to date, they have mostly been developed to provide access to information or services available online. They would thus provide a quick way of browsing through the information available on the 'web by asking simple questions like "how can I make a prior appointment with the Council?", or "am entitled to a property tax rebate?".

The use of chatbots could result in an improvement in the provision of public services, particularly in the field of information and may, in some cases, help ensure the automated performance, when requested by users, of some simple procedures such as the lodging of complaints, which the chatbot itself could then forward to the relevant department or service.[84] It might be possible to imagine a chatbot allowing the reporting of misconduct in the provision of some service, procedure or a specific administrative action that a user may have detected in their dealings with the public administration in question. This potential additional role for the chatbot, as a tool for facilitating the reporting of misconduct, could help increase its impact on improving public services and guaranteeing good government as, aside from its abilities as a public information tool, it would thereby act to ensure the proper functioning of the administration and the early correction of errors, misconduct or inappropriate actions.

It is also worth suggesting the use of chatbots for internal purposes, an admittedly uncommon approach, as the vast majority are made available to the public to help manage online information and quickly guide users to answers to requests. It would nonetheless be perfectly feasible to design an internal chatbot to provide support to public servants in the performance of their duties. In particular, this chatbot would be especially useful if, in addition to providing information to the authority or civil servant using it, it were also able to indicate whether the activity or sector it is dealing with was particularly subject to the risk of corruption or misconduct, so as to include warnings on said risks and provide guidance to public decision-makers in these areas particularly vulnerable to bad practices. Additionally, it could assist with oversight duties (for example, whether a councillor can make certain planning queries should the legality of a particular action be suspect).

The OAC's role in spearheading the technological modernisation of the fight for integrity and against corruption with the use of these chatbots could consist, firstly, in the creation of its own chatbot to, for example, provide users with guidance on finding the tools they need or even reports and consultations in which the Office has issued opinions and/or recommendations regarding a specific situation of interest to that

83 European Commission, Directorate-General for Informatics, *Architecture for public service chatbots*, 2019, available on the Joinup platform website.

84 As is the case with the Murcia City Council chatbot, information on which can be found on the Observatorio de Inteligencia Artificial website.

user, or one that warns of the risks of corruption for public decision-makers in risk areas. It could also assume the function of providing information to other public sector bodies seeking to develop their own chatbots for integrity and against corruption by virtue of their powers of self-organisation and within the framework of their competences, offering information and recommendations or guidance on, for example, how to manage reports of misconduct or breaches of codes of ethics and conduct using chatbots.

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