



HERBERT
SMITH
FREEHILLS

SPAIN

VICTIMS OF CORRUPTION: DAMAGE REPARATION AND LEGAL STANDING

INTERNATIONAL DATABASE 2022

SOURCE: HERBERT SMITH FREEHILLS

VICTIMS OF CORRUPTION WORKING GROUP



Disclaimer

The UNCAC Coalition accepts no liability for the correctness, completeness, or reliability of the information shared in the International Database on Corruption Damage Reparation and Legal Standing for Victims of Corruption.

The UNCAC Coalition assumes no responsibility for any direct or indirect loss suffered by users or third parties in connection with the use of the database. Any reliance you place on such information is, therefore, strictly at your own risk.

The information contained in the database is crowdsourced through an open-call questionnaire from experts, organisations, and the general public. We make no representations or warranties of any kind, express or implied, about the completeness, accuracy, or reliability of the database or the information or related graphics contained on the International Database on Corruption Damage Reparation and Legal Standing for Victims of Corruption website page and related documents for any purpose.

The International Database on Corruption Damage Reparation and Legal Standing for Victims of Corruption is an initiative of the UNCAC Coalition Working Group on Victims of Corruption.

<https://uncaccoalition.org/victims-of-corruption-working-group/>

SPAIN

SOURCE: Herbert Smith Freehills

| | |
|---|-----------|
| Background | 1 |
| 1. Legal Standing | 5 |
| 1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases | 5 |
| 1.2 Type of Cases | 5 |
| 1.3 Legal basis under which citizens have legal standing | 5 |
| 1.4 Citizens and/or civil society's intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc) | 6 |
| 1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens. | 6 |
| 1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens | 7 |
| 2. Cases | 7 |
| 2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens. | 7 |
| 3. Collective Damage | 9 |
| 3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field (environmental damages, human rights, corruption, among others) | 9 |
| 3.2 Procedures for advancing class-actions. | 10 |
| 4. The Role of the victims of corruption | 11 |
| 4.1 Definition of victims of corruption or common definition used by the courts in this country | 11 |
| 4.2 Cases that recognize the role of victims | 12 |

| | |
|--|-----------|
| 4.3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or non-identifiable groups of victims to repair the damage caused by the corruption offense | 12 |
| 4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases | 12 |
| 5. Available Information | 12 |
| 5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions | 12 |
| 5.2 Feasible access to information on ongoing or concluded cases | 13 |
| 5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed. | 13 |
| 6. Supplementary information | 13 |
| 6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases. | 13 |
| 6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption. | 13 |

Background

Types of corruption in Spain

Firstly, it is important to note that, in Spain, corruption cases are classified as crimes and are therefore dealt with through criminal proceedings. In addition, corruption can be divided into three (3) main groups namely: (i) corruption in the public sphere; (ii) political corruption; and (iii) corruption in the private sphere.

Corruption in the public sphere

The main types of corruption within this group are the following, all of which may only be committed by public servants:

- Prevarication and other illegalities (art. 404 of the Spanish Criminal Code (*Código Penal*) ("**CP**").
- Bribery (arts. 419 and following CP).
- Traffic of influence (arts. 428 and following CP).
- Embezzlement (arts. 432 and following CP).
- Fraud and illegal levies (art. 436 and following CP).
- Negotiations and actions prohibited to civil servants and abuses in the exercise of their functions. (arts. 439 and following CP).

Political corruption

- Offences of illegal financing of political parties (arts. 304 bis and 304 ter CP).

Corruption in the Private Sphere

The main types of corruption within this group are the following all of which can be committed by any individual:

- Extortion (art. 243 CP).
- Fraud (arts. 248 and following CP); Disloyal administration (art. 252 CP); Misappropriation (art. 253 CP); Fraud of electricity supply (and similar) (art. 255 and 256 CP).
- Price-fixing in public tenders and auctions (art. 262 CP).

- Offences related to the market and consumers (arts. 278 and following CP): Offences of unfair competition, offences against consumers and offences against the free market or free competition.
- Corruption offences in business (art. 286 bis and following CP).

Legal standing in individual actions

Within the different types of corruption listed above, in general, victims have the following possibilities available in order to intervene in criminal proceedings:

Criminal Actions

Complaint (*Denuncia*): by bringing a criminal offence to the attention of an authority. The person simply informs an authority of facts that appear to be a criminal offence. This can be done in writing, but also verbally and anonymously. Here, the victim brings the complainant as a witness to the offence and will not be a party to the proceedings.

Particular accusation (*Acusación particular*): the legal standing is that of the offended or injured party to the offence (article 270 of the Spanish Criminal Procedure Code (*Ley de Enjuiciamiento Criminal* (the "**LECRIM**"). The status of particular accusation is achieved through the presentation and admission of a criminal lawsuit.

The main difference between the complaint and the particular accusation is that, with the presentation of a complaint, the complainant does not become a party to the proceedings, but instead, simply complies with its civic duty to bring to the attention of the authorities facts that appear to be criminal. On the other hand, through the particular accusation, the offended party reports facts that appear to be criminal and also expresses the desire to be part of the proceedings as an offended party.

In this sense, the victim can choose whether or not to appear in the proceedings as a claimant (Particular accusation) or simply as a witness (Complaint). The decision between the two options is

purely personal and subject to the circumstances of the case. The victim can decide between simply informing the authorities of the criminal acts so that they can be prosecuted and punished, through the complaint, or informing and also express his desire to be taken into account in the process, by filing a criminal lawsuit that will grant the status of particular accusation (the victim would then have a lawyer who will file briefs against the accused on his behalf, he will have knowledge of the final judicial resolution, etc.).

Civil Actions

Civil action in criminal proceedings is the tool through which the victim or injured party by the commission of a criminal offense can assert the claims of a civil or patrimonial nature in which they were affected by said illegal act. It can be exercised together with the Particular Accusation, or it can be executed separately by different procedures, or it can even be waived. The usual practice is that both actions are processed jointly. It is important to note that unaffected third parties cannot bring civil actions, but rather it is reserved for victims or economically affected parties.

The issue that arises in corruption cases is that the victim is not an identifiable person *per se*, and, thus, the legal interest safeguarded is not an individually owned interest, but rather, it refers to the Administration of Justice, the Public Treasury, the free market and similar interests. It is precisely this impossibility of specifying the owner of the protected legal interest, which makes it difficult to identify the victim in these types of offences.

Considering that, in these cases we are dealing with collectively owned legal interests, there are collective interests at stake whose ownership lies in the hands of citizens.

However, legal standing in private actions is only designed for individual victims or complainants. As such, in practice it is difficult in Spain to enforce the collective interests of citizens impacted by corruption through such routes.

Legal standing in collective actions and the important role of the Public Prosecutor's Office in Spanish Corruption-related cases

In light of the above, the following possibilities are at hand:

Popular action (art. 125 of the Spanish Constitution): the standing to bring a popular action is recognised for Spanish citizens, not requiring them to be the owners of the legal interest protected by the offence, thus defending the public or general interest, affirming the right to punish (*ius puniendi*) of the State.

The reform of the Spanish Criminal Procedure Code by Law 4/2015, of 27 April, on the Statute of the victim of the crime: specifically, art. 109 bis foresees the exercise of the criminal action for the associations of victims and legal persons to which the law recognises legitimisation to defend the rights of the victims, if such persons are authorised by the victim of the crime.

In Spain, the Public Prosecutor's Office has a vital role, as it is a fundamental instrument for the prosecution of these types of offences. The Public Prosecutor's Office carries out the public criminal action and ensures the protection of citizens in these types of crimes. Nonetheless, in case the Public Prosecutor's Office is inactive regarding a certain offence, citizens can still look after their own interests. This means that public prosecution can occur independent of the Public Prosecutor's Office.

Considering all the above, we will now proceed to answer the relevant questions posed in the Questionnaire regarding legal standing:

1. Legal Standing

1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases

Civil society organisations and individual citizens have legal standing in corruption-related cases in Spain.

1.2 Type of Cases

Corruption cases in Spain are classified as crimes and are therefore dealt with through criminal proceedings. It is within the framework of these criminal

procedures that Spanish citizens have an added constitutional protection offered by article 125 of the Spanish Constitution: the popular action, a channel through which any citizen or organization can appear in the proceedings.

1.3 Legal basis under which citizens have legal standing

Citizens in Spain have standing under the following legal basis:

- A. Spanish Constitution
- B. Royal Decree of 14 September 1882 approving the Criminal Procedure Act (*Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*).
- C. Organic Law 10/1995 of 23 November 1995 on the Criminal Code (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*).
- D. Law 4/2015, of 27 April, on the Statute of the Victims of Crime (*Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito*).

1.4 Citizens and/or civil society's intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc)

Citizens and/or civil society can intervene as witnesses and giving expert input in corruption cases.

1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens.

As mentioned above, in Spain we have the Public Prosecutor's Office (*Ministerio Fiscal*), which acts as a completely independent body of the Ministry of Justice and the Government and is in charge of coordinating actions throughout the national territory. Thus, it could be said that it is a State Entity. Moreover, the Public Prosecutor's Office exists precisely to defend public interests and the rights of citizens collectively. Its intervention does not exclude the direct participation of citizens. In fact, citizens can commence private proceedings whether or not the Public Prosecutor's Office files charges (but subject to the difficulties individual citizens will have in this regard as set out above).

Additionally, the widespread problems in Spain with many cases of corruption, especially political corruption, led to the creation in 1995 of the Special Prosecutor's Office against Corruption and Organised Crime (commonly known as the "Anti-Corruption Prosecutor's Office"). It is a Special Prosecutor's Office which is part of the Public Prosecutor's Office and dependent of the General State Prosecutor's Office (*Fiscalía General del Estado*), with jurisdiction throughout the national territory, which investigates and hears cases of special importance relating to economic crimes or other corruption-related crimes committed by public officials in the exercise of their positions.

Such cases will have been previously assessed by the Attorney General of the State, and will include, among others: a) crimes against the Public Treasury, against social security and smuggling; b) crimes of prevarication; c) embezzlement of public funds; d) fraud and illegal exactions; e) crimes related to intellectual and industrial property, the market and consumers; f) corporate crimes; g) money laundering, or h) corruption crimes in the private sector.

By way of example, the Public Prosecutor's Office initiated well-known corruption cases such as the Malaya case (Marbella), the Palma Arena case and the Noos case (Mallorca), the Palau case and the Pretoria case (Barcelona), the Ballena Blanca case (Málaga), the Gürtel case (Madrid and Valencia), the Mercasevilla and ERES cases in Andalusia, the Brugal case (Alicante) and the Punica operation, among others. In section 4 below, we have summarized some key elements of these cases.

1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens

As mentioned, in these types of cases, the main tool for Spanish citizens is the Popular action.

However, this is reserved for Spanish citizens only. Foreign citizens may only exercise their rights through the particular accusation as a directly affected party or victim (see paragraph 2.2.2 above).

No foreign State or non-state institution of a foreign country is invested with legal standing to intervene on behalf of its citizens.

2. Cases

2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens.

As previously mentioned, in Spain, the Anti-Corruption Prosecutor's Office is principally responsible for initiating the types of proceedings mentioned above, rather than individuals or third parties such as civil society organisations or journalists. The major corruption cases in Spain have been initiated by this office.

Whilst they are not as high profile as cases initiated by the Anti-Corruption Prosecutor's Office, there are some major cases in which citizens have been and continue to be a key element for their continuation through the Popular action. Typically, political parties appear in these types of cases in defence of citizens' interests, but the first three listed below were brought by civil society organisations¹:

- **Palau case:** In one of the pieces of the case for the alleged irregular financing of a political party, the popular action² was the Federation of Neighbourhood Associations of Barcelona (*Federación de Asociaciones de Vecinos de Barcelona*).
- **Púnica case:** The popular action came from the Association of Democratic Lawyers for Europe (Spanish NGO).
- **Caja España case:** one of the members of the board of directors of Caja España (who was also a leading member of a Spanish political party) was accused of committing a crime of unloyal administration and was charged thanks to the popular action constituted in this case by "Ecologistas en Acción" and political party "Izquierda Unida (IU)".

¹ Press report: <https://www.publico.es/politica/corrupcion-10-casos-corrupcion-no.html>

²Palau_Judgment:

<https://www.poderjudicial.es/cgpi/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-ratifica-las-condenas-a-la-cupula-del--caso-Palau->

- **Gürtel case:** case concerning the alleged illegal financing of a Spanish political party. The participation of another political party as a public prosecutor was accepted³.
- **Bankia case:** One of the most active political parties in the tribunals was the almost extinct political party "Unión, Progreso y Democracia (UPyD)", which did not withdraw from numerous cases until their ran out of funds to continue when the party collapsed

However, the lawyer and former leader of the political party, Andrés Herzog, continued to exercise the popular action in the Bankia case. They had been the first to file a lawsuit against the bank and managed to have up to 33 of the bank's board members indicted.

- **Tarjetas Black case⁴:** in this case, it was also Andrés Herzog with UPyD who appeared in the case of the black cards, one of the separate parts of Bankia that has ended with the conviction of 65 former directors. When his party collapsed, Andrés Herzog brought the popular action on behalf of the "Confederación Intersindical de Crédito".
- **Filesa case⁵:** this is also a corruption case about the illegal financing of one of Spain's major parties for inflating public contracts in exchange for commissions for their election campaigns in 1989. This case was initiated by the lawyer of a political party.
- **Case 9-N and the independence of Catalonia:** to date, there are convictions of members of political parties who, in the exercise of their public office, embezzled public funds (among other crimes) to finance an illegal independence referendum. The prosecution has been brought by political parties, as well as by the Professional Police Union and the Federal Police Union.

³Gürtel_Judgment:

<https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-confirma-penas-de-hasta-51-anos-de-prision-para-los-procesados-en-el-caso-Gurtel->

⁴ Tarjetas Black case:

https://www.eldiario.es/politica/tarjetas-consejeros-caja-madrid-bankia_1_1909519.html

⁵ Filesa Judgment: <https://www.elmundo.es/espana/2022/02/01/61f93714fc6c83821d8b457d.html>

3. Collective Damage

3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field (environmental damages, human rights, corruption, among others)

In Spain, there are several precedents regarding the reparation and compensation of collective damages. One of the most famous precedents is the Prestige case, named after the oil tanker, that sank off the coast of Galicia in 2003. After the last final judgement by the Supreme Court⁶, the total compensation was set at approximately 2.5 billion euros, with up to 265 individual victims identified during the course of the proceedings.

This is a development compared to previous cases in Spain. For example, a few years ago, the mining company responsible for the pollution of Portman Bay was acquitted. In the same framework of environmental crimes, there is still an attempt to force the Swedish company Boliden to pay for the damages and expenses caused by the toxic leaks in the municipality of Aznalcóllar that affected the natural park of Doñana.

Legal standing in these types of cases is the same general legal standing explained in section 1 above.

3.2 Procedures for advancing class-actions.

In Spain, there are no class-actions in criminal proceedings, such as those involving corruption offences. This type of actions exists only in civil proceedings.

In any case, along the lines of what we have been explaining, the fact that in Spanish corruption cases we cannot generally find an individual victim does not prevent Spanish citizens, as members of society, from demanding the protection

⁶Prestige_Judgment:
<https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-fija-las-indemnizaciones-definitivas-por-la-catastrofe-del--Prestige--en-mas-de-1-500-millones-de-euros-con-IVA-e-intereses>

of interests that affect us all, such as the defence of legal interests protected by the Criminal Code in the context of corruption offences.

Thus, although there are no class-actions as such in the Criminal Procedure Act, the possibility of exercising the popular action by any Spanish citizen who feels offended by the crime, results in a possibility of action very similar to a class-action.

4. The Role of the victims of corruption

4.1 Definition of victims of corruption or common definition used by the courts in this country

To date, there is no specific definition in Spain for victims of corruption as opposed to any other victim under Spanish criminal law. In cases of economic crime, beyond the public or private nature of the perpetrators, we find in most cases that the protected legal interest is related to the general interest and collective rights: free competition, market access, or those related to the corruption of public servants (politicians or civil servants).

Thus, the protection of the victims of these crimes usually falls upon the Public Prosecutor's Office and the existence of the popular action as a form of recognition of those who are ultimately the victims of this attack on collective legal interests, i.e., the citizens.

Therefore, the financial sanctions imposed are generally returned to the public administration, both in the case of court rulings and in the case of fines imposed by the regulator (e.g., *the Spanish National Commission for Markets and Competition*) or other supervisory authorities. In most cases, the State is the entity that receives the compensation, understood as the personification of the interests affected by the offence. There have been numerous cases in Spain with heavy financial penalties paid by the defendants. Among others, it is worth mentioning:

- Almost €20 million recovered from the various corruption schemes that took place in the Marbella Town Hall, the best known being the Malaya Case⁷.
- Similarly, the Partido Popular has been sentenced as a legal entity to pay €255,492 as a profit-making participant in the Gürtel plot, where there have been many such sentences to other convicted individuals, most notably those of Luis Bárcenas (former treasurer of the Partido Popular and one of the ideologues of the plot), who was finally sentenced to €35,000,000 in compensation for crimes of money laundering and fraud against the public treasury, among others.

4. 2 Cases that recognize the role of victims

Please refer to the section above.

4. 3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or non-identifiable groups of victims to repair the damage caused by the corruption offense

Please refer to the section above.

4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases

N/A

⁷Malaya_Judgment:

<https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-TS-confirma-la-mayoria-de-las-penas-del-caso-Malaya-y-eleva-de-11-a-17-anos-la-conde-na-a-Juan-Antonio-Roca>

5. Available Information

5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions

In Spain, there is a relatively constant flow of information from the authorities on corruption-related cases. This information is most clearly distributed by the different existing control agencies, whether related to regulated sectors or to the defense of free competition, although it also exists on the part of the courts insofar as the rulings are of a public nature.

The information provided by the authorities may vary depending on its source. Thus, in the case of certain supervisory agencies, they will always publish their conclusions concerning cases in which there has been a violation of the legislation in force in the area under their supervision, stating the reasons for the verdict. In certain cases, it is possible to learn about the proceedings at the beginning of the sanctioning process, or the pre-trial investigation proceedings.

5.2 Feasible access to information on ongoing or concluded cases

Access to information on completed cases is relatively simple, even for a general public that might be interested, through the websites of each supervisory authority, or otherwise through the judiciary's free database. As for active cases, it is generally more complicated to obtain the information during the course of the case, either due to express declarations of secrecy or due to the non-obligation to publish this type of information.

5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed.

See the response above.

6. Supplementary information

6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases.

N/A

6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption.

N/A