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# French Yearbook *of* Public Law

Issue 1, 2023

# Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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# Spain

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Spanish administrative law, Suspension and restriction of fundamental rights, Public contracts, Autonomous communities, Patrimonial liability

This chronicle aims to provide an overview of the main judicial developments in the areas of public procurement, procedure and administrative acts, fundamental rights, patrimonial liability, and judicial control. The present analysis displays the most relevant rulings from the Spanish Supreme Court and the Spanish Constitutional Court during the year 2021.

## I. Public contracts

### A. Case law of the spanish supreme court

#### *1. Sts 1483/2021, appeal 1675/2020, of july 14, 2021*

The purpose of this decision is to identify the concept of *reliable notification* in cases when the person who contracted with the Public Administration transfers his collection rights from the public contract so that a third person may receive the payment. Specifically, it answers whether the provision of the private assignment contract is a requirement for the effectiveness of the *reliable notification* to the contracting Administration or if, on the contrary, the mere communication by the assignor of the credit is sufficient. Secondly, the ruling explores the legal consequences derived from previous interpretations.

The Supreme Court has examined the Judgment of the National High Court that dismissed the administrative appeal filed against the denial of a payment request for the assigned work contract. The assignment was notified to the Administration before the payment was made, although it was done incompletely by not providing the contract or qualifying the assignor. The Administration paid the final certification to the contractor-assignor.

While resolving the appeal issue, the Supreme Court has recalled that a reliable notification is one that has documentary probative value and that allows the certification of an agreement. Furthermore, a reliable notification must record that the recipient has received the notification (a); its content (b); and the date of receipt (c). The Court has decided that it is not necessary to deliver the assignment contract because the Administration does not have control over the assignment contract. It is sufficient that the communication contains the correct identification of the assignor, the assignee and the assigned credit.

The Judgment includes the dissenting opinions of Judge Hon. Mr. D. José Manuel Bandrés Sánchez-Cruzat, joined by Judge Hon. Mr. José María del Riego Valledor, who claimed that the appeal should be dismissed on the grounds that the contract does not allow to check the content of the clauses. The aforementioned precept includes the transfer of collection rights, while excluding the assignment of future credits. In the case under review, the assignment was made before the Administration verified the correct execution of the work contract, highlighting the existence of a specific administrative procedure for the assignment of credits which differs from the civil one.

## 2. Sts 1419/2021, of december 1, appeal 7659/2020

In this judgment, the Supreme Court answered the question whether the ban on contracting in a resolution issued by the Council of the National Markets and Competition Commission must be immediately enforceable for the purposes of its possible precautionary suspension or, on the contrary, its enforceability occurs at a later moment, depending on the outcome of the corresponding procedure at the State Public Procurement Consultative Board.

The judgment appealed to the Supreme Court was a decision by the National High Court, which ordered the suspension of the execution of the Council, sanctioning the constitution of a cartel in the sector of assembly services and industrial maintenance.

This issue has been raised in almost identical terms in a previous appeal (No 3672/2020, Judgment 1115/2021, of September 14), with the Court reiterating its position, given the similarities in approach and allegations. In particular, the Supreme Court claims that the prohibition ban on contracting under article 71.1. b) of the LCSP is tied to a final sanction for a serious infraction in certain matters.

The effects of the ban on contracting only occur from the moment in which the scope and duration of the prohibition is specified, either in the decision itself or through the corresponding procedure. This does not prevent the courts, through precautionary measures, from suspending the referral to the State Public Procurement Consultative Board whenever it is deemed necessary to provisionally suspend the sanction.

## 3. Sts 1392/2021, of november 29, 2021, appeal 8291/2019

In this case, the judges clarified whether the exclusion of a bid from a procedure can be decided if it does not meet the requirements in the Technical Specifications Document.

With regards to the procedure, the appeal was filed against the judgment of the Superior Court of Justice of Madrid. In turn, the latter discussed an appeal against the decision of the Administrative Court of Public Procurement of the Community of Madrid over the agreement of the Local Government Board of the City Council. This agreement awarded a contract for cleaning services, based on the exclusion from competition for non-compliance with the provisions of the Technical Specifications Document.

The Supreme Court declared the admissibility of tenders, even when the bidder does not refer to the contents of the Technical Specifications Document, since there is a legal presumption that the bidder has unconditionally accepted its requirements by submitting the offer (art. 145.1. LCSP 2011, today 139.1 LCSP 2017).

Therefore, it will be necessary to decide on a case-by-case basis, since the apparent lack of references to the Technical Document does not imply its ignorance or a failure to comply with its requirements.

In this way, a restrictive interpretation of the assumptions upon which the contracting authority can exclude a proposal has been imposed.

Therefore, it reiterates the position already established in Appeal 5570/2019, which referred to the examination of the bidding proposal in its objective aspect, while complementing a different body of case law (Appeal 7906 /2018) on the subjective aspect of the competition. This trend follows the decisions of the Court of Justice of the European Union and favors the access to bidding while affirming the principle of proportionality in the interpretation of the requirements set up by the contracting authority.

### *4. Sts 1346/2021, of november 17, 2021, appeal 3772/2020*

In this decision, the Supreme Court decided that a clause of submission to private law arbitration in a work contract does not by itself prevent the exercise of administrative power to review the adjudication acts *ex officio*. The effects on the Administration (not being the one who originally awarded the contract, but having subsequently occupied the legal position of a non-Public Administration contracting authority) will depend on the circumstances of the specific case.

Likewise, the Supreme Court explains that the preference for *ex officio* review or arbitration, as well as the relevance of the temporal criterion between these procedures, will depend on the circumstances of each specific case, such as the content of the arbitration clause or the nature of the discussed act.

### *5. Sts 1254/2021, of october 22, 2021, appeal 2130/2020*

Supreme Court Judgment 1254/2021 addresses the question of whether the act of receiving works, in which the contracting authority shows its agreement with the result of the contract, is liable to be declared null and void (applying the review procedure of article 102 of the LRJPAC), or if it can only be reviewed *ex officio*, in the public procurement file, the preparatory acts and the award acts (according to articles 34 and 35 of the LCSP 2007).

The Supreme Court has determined that article 34 of the LCSP 2007, in relation to the provisions of article 102 of the LRJPAC, does not preclude the acts of receiving public works from being declared null and void through the procedure of *ex officio* review in the cases of nullity provided for in article 62.1 of the LRJPAC.

### *6. Sts 952/2021, of july 1, 2021, appeal 337/2020*

This decision clarified whether an administrative act, according to which a contract is not extended further and the Administration assumes direct control, can be assessed for its economic repercussions by virtue of article 7.3 of the Organic Law 2/2012, of April 27, on Budgetary Stability.

The Supreme Court declared that when the Administration assumes direct management, the administrative act must be accompanied by an assessment of its economic effects in accordance with article 7.3 of Organic Law 2/2012, of April 27 on Budgetary Stability and Financial Sustainability, taking into account the nature and scope of the act and the circumstances.

### *7. Sts 398/2021, of march 22, 2021, appeal 4883/2019*

The Supreme Court addressed the issue of discerning if specific administrative clauses of an administrative contract can be challenged: more specifically, if these clauses can be challenged indirectly by contesting the adjudication act; or if they can only be challenged for the violation of the principles of equality, publicity and transparency.

According to the Supreme Court, it is possible (in exceptional cases) to indirectly challenge the specific administrative clauses, even when they have not been directly contested. The Court argued that the indirect challenge is possible whenever a "reasonably informed and diligent bidder could not understand the auction conditions until the mo-

ment in which the contracting authority reports the reasons for its decision, after evaluating the offers", or in case of nullity.

### *8. Sts 154/2021, of february 8, 2021, appeal 1889/2019*

This decision has determined the parameters of legality of mixed contracts, which provide services of a different nature.

The appeal was filed against the decision of the Superior Court of Justice concerning a contract for the supply of materials for hemodialysis services provided by the municipal company and the completion for a new nephrology care unit.

The Supreme Court held that, pursuant to the combined previsions of articles 12 and 25.2 of the Public Sector Contracts Law and Directive 201/24/EU: 1) mixed contracts require «that the benefits are rational, "directly linked to each other" and complementary, as a functional unit aimed at contractual fulfillment, coherent with the institutional purpose of the contracting Administration»; 2) must justify the use of a single contract and clarify the priority interest; 3) the requisite of relevance must be indicated with rationality as per article 25.2 of the Public Sector Contracts Law, pursuing both technical and economic objectives; 4) the use of a mixed contract must "be consistent with the public interest pursued by the contract, depending on the suitability of the contractor to provide services of a different nature", and 5) it will be necessary to weigh its impact on the basic principles of public contracting: freedom of access to tenders, transparency of the procedure and non-discrimination and equal treatment between of candidates.

## B. Constitutional decisions on public contracts

### *1. Stc 68/2021, of march 18*

The Constitutional Court discussed the exclusive state competence over the bases of the legal system of Public Administration, including administrative contracts, as per article 149.1.18 of the Spanish Constitution (hereinafter, CE), and whether its exercise has been detrimental to the competences of Autonomous Communities.

The claim raised the following issues: the violation of the principle of neutrality in the transposition of European Law (a); the non-recognition of the foral character of the Autonomous Community of Aragón (b); the breach of the exclusive state competence over matters of public contracting (c); the constitutionality of articles 75.11 and 12 of the Statute of Autonomy of Aragón, which grant the autonomous community legislative competence, and (d) the constitutionality of articles 41.3, 44.6 and 128 of Public Sector Contracts Law.

The Constitutional Court has declared the unconstitutionality of the articles of Public Sector Contracts Law that exclude any extraterritorial effect of the decisions adopted by the competent bodies of the Autonomous Communities, and that introduce the obligation for local entities to publish their profiles in a specific contracting platform. This decision has also declared the unconstitutionality of: the specifications of particular administrative clauses; the definition of prescription or technical specification; the decision not to publish certain data on the conclusion of the contract; the subphases in the project contest; regulatory authorization regarding the use of electronic, computerized or telematic means. Likewise, the specific procedural time limits are deemed contrary to the constitutional order of competences. And, finally, it also declared it unconstitutional

to determine the competent body to resolve the special appeal in matters of contracting in the field of local entities.

## C. Legislative developments in public contracts

### *1. Royal Decree-Law 24/2021, of November 2*

This Royal Decree-Law modified articles 328.4 and 331.a) of the Public Sectors Contract Law. Article 328.4 has seen the introduction of the obligation of the State Public Procurement Consultative Board to send a report to the European Commission every three years, regarding all the state, regional and local contracting authorities with respect to public bidding and work contracts subject to harmonized regulation. Article 331.a) requires the inclusion of the information prescribed under Article 328.4.f) in the triennial report that the Autonomous Communities must send to the Cooperation Committee on public procurement.

### *2. Law 22/2021, of December 28, on General State Budgets for the year 2022*

The General Budget Law of the Spanish State for 2022 modified articles 159.4, 226.1, 324.1 and 332.3 of the Public Sectors Contract Law.

Article 159 (simplified open procedure) is modified to allow bidders to participate in the contracting process before being registered in the Official Register, provided that they have submitted the registration application with its requirements, and that the application is prior to the final date for the submission of offers.

On the other hand, new wording is given to section 1 of article 226 (awarding of specific contracts within the framework of a dynamic procurement system), to add that in these cases the award will be based on the terms that have been provided in the specifications of particular administrative clauses and technical requirements of the dynamic acquisition system.

Likewise, article 324.1 letter c) is modified, to include dynamic acquisition systems, which require authorization from the Council of Ministers so that the contracting authorities of state public sector can enter into contracts worth more than twelve million euros.

Finally, article 332.3 is modified, eliminating the rules on the first renewal of the Independent Office for the Regulation and Supervision of Procurement. It is specified that the members of this Office will continue in their functions until their successor takes office.

# II. Procedure and administrative acts

## A. Case law of the supreme court

### *1. Sts 243/2021, appeal 2854/2019, of february 22, 2021*

The appeal was filed in order to determine the maximum term to resolve disciplinary procedures over the exercise of regional and local public functions, in the absence of an explicit legal basis.

According to the Court, in the absence of a specific provision, a legal basis could be traced back to Royal Decree 33/1986, of January 10, containing the Disciplinary Regime

Regulations for State Administration Officials; under the terms of its article 3, the aforementioned Decree could also be applied to "*other officials at the service of the State and Public Administrations not included in its scope of application*".

## *2. Sts 234/2021, of february 19, 2021, appeal 3929/2020*

The question resolved by the Supreme Court consists in determining whether the Administration is obliged to issue an express resolution declaring the termination of an administrative procedure for reimbursement of subsidies as a condition of validity of the initiation of a new refund procedure or if, on the contrary, such an omission should be considered an irregularity.

The appealed decision of the National High Court targeted the resolution of the Secretary of State for the Information Society which required the total reimbursement of the subsidy on the basis of article 37.1 sections a), f) and g) of Law 38/2003, of November 17, General Subsidies, and as a result of a new presentation.

The Supreme Court establishes the possibility of re-initiating a subsidy reimbursement procedure provided that the limitation period of the Administration's right to demand reimbursement has not elapsed.

## *3. Sts 197/2021, of february 15, 2021, appeal 7363/2019*

The issues subject to the appeal are: to determine whether the suspension of the term provided for in article 37.1.a) LDC is reserved for the claim of necessary documents of the specific case, which could not be obtained in the ordinary term, or also mandatory actions (a); and to specify the calculation of the term of the suspension agreed in single procedures with multiple interested parties, for the purposes of its expiration (b).

The appeal was filed against the ruling of the National High Court in a proceeding challenging a resolution of the Competition Chamber of the National Markets and Competition Commission for which a fine was imposed.

The Supreme Court concludes, referring to its judgment 929/2020, of July 6 (Appeal n.372/2019), that the possibility of suspending the term to resolve the administrative procedure, provided for in art. 37.1.a) of the Competence Defense Law ("*When any interested party must be requested to rectify deficiencies, the provision of documents and other necessary evidence [...]*"), is applicable when the documents and other elements are needed in order to issue the resolution. What is decisive is not the possibility that the evidence could have been collected before, but that the requested information is necessary to issue the substantive resolution, and that the Administration has not caused this situation artificially in pursuit of a fraudulent purpose, an issue that must be referred to concurrent circumstances in any case.

Regarding the second question, it concludes that when a single procedure is processed with a plurality of parties involved, and a suspension is decided, both the start of the suspension period, its extension and the end of it operate for everyone equally, regardless of individual issues regarding compliance with the agreed requirement.

## *4. Sts 552/2021, of april 23, 2021, appeal 5177/2020*

The Supreme Court has responded in this appeal to whether the rebuttable presumption of veracity of the administrative reports issued in the exercise of technical discretion, is applicable to the reasoned reports issued by the Ministry of Science and Technol-

ogy, the technical reports issued by an entity duly accredited by National Accreditation Entity, or none of the above.

The Supreme Court establishes that the technical report issued by an entity accredited by the National Accreditation Entity, which the party provides to obtain the qualification of the project for the purpose of tax deductions, does not enjoy a presumption of veracity.

The report is not imposed on the decision-making body, which may or may not follow its conclusions, while assessing the technical qualification of the experts who issue the report and the reasoning on which it is based.

### *5. Sts 114/2021, of february 1, 2021, appeal 3290/2019*

This judgment analyzes whether or not it is necessary to follow the procedures for *ex officio* review in the event that there is the declaration of nullity of an act (a); and if the recognition of the aforementioned legal infringement has to produce future effects or retroactive effects (b).

The Supreme Court's response to the first question is that administrative acts, not subject to appeal within the established period and declared void, may only be repealed through the *ex officio* review procedure provided for in article 106 of Law 39/2015, of October 1, of the Common Administrative Procedure.

The answer to the second question is that the effects of the declaration of nullity will take place from the moment the resolution was issued, that is, with retroactive effects.

### *6. Sts 84/2021 of january 27, 2021, appeal 8313/2019*

The question raised in this appeal presents an objective interest for clarifying, specifying or revising the existing jurisprudence on delegation of powers and substitution. The question was filed in order to determine if the same body that issued the contested resolution can decide over its appeal.

The Supreme Court has concluded that the appeal must be resolved by a different body than the one that issued the original resolution. When, by delegation, the appeal is resolved by the same official who issued the original resolution (by substitution), he must notify the delegating body that the appeal is entrusted to a different subject than the one that issued the appealed resolution.

### *7. Sts 680/2021, of may 13, 2021, appeal 5011/2019*

The issues raised in this case were: if the principles and guarantees of the sanctioning administrative procedure are applicable to the revocation of a taxi car license (a); and, if it is possible to obtain as proof of charge the data of the taxpayers assigned by the Tax Administration for the processing of a sanctioning procedure (b).

The Supreme Court reiterates the doctrine established in Judgments 8040/2019 and 8288/2019, concluding that if an Administration, for the exercise of its own functions, requests the transfer of tax data from the Tax Agency, such transfer will be for tax purposes. However, if it is for the exercise of other powers and there is no legal provision that provides for it, it must obtain the prior authorization of the interested party. Therefore, the act will be in accordance with the Law if the assignment respects the rules of article 95.1 of the General Taxation Law. However, the first question is not answered, as it is considered unnecessary in this case since what is involved is not a sanction.

## III. Fundamental rights

### A. First judgment on the state of alarm: stc 148/2021, of july 14, 2021

This judgment has a crucial significance in the Spanish doctrine of fundamental rights. In the context of an epidemiological crisis, it deals with an issue that had previously sparked a prolific academic debate.[2] We are referring to the interpretation of the concepts of *suspension* and *restriction* of fundamental rights. The discussion stems from the fact that a state of alarm only allows *restricting* measures of fundamental rights. On the contrary, *suspension* of fundamental rights requires the declaration of a state of exception, or a state of siege.

In the process of clarifying these notions, the Constitutional Court gives an interpretation of constitutional provisions of little practical application until the pandemic crisis, such as article 116 of the Spanish Constitution, which reads as follows:

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1. *An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations.*
2. *A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation, the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply.*
3. *A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements.*
4. *A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration, and terms.*
5. *Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee.*
6. *Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law.*

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2 On the difficulties of defining and elucidating between these two notions, see: Domenéch, G., "Dogmatism against pragmatism. Two ways of seeing the restrictions on fundamental rights imposed on the occasion of COVID-19", InDret, 29 Sept. 2021. Available at: https://indret.com/dogmatismo-contra-pragmatismo/.

The purpose of the ruling is to resolve an appeal of unconstitutionality filed against several articles contained in Royal Decree 463/2020, of March 14, according to which the state of alarm was declared; the different Royal Decrees modifying and extending the duration of the state of alarm; and Order from the Ministry of Health n. 298/2020, of March 29, which established exceptional measures in relation to funeral ceremonies to limit the spread of Covid-19.[3]

The judgement declares the unconstitutionality of two groups of rules: the first refers to the government measures adopted in the state of alarm. The second, to the attribution to the Ministry of Health of powers of 'modification, extension and restriction of certain measures limiting the freedom of enterprise.[4]

The first group requires special attention. It assesses the constitutionality of the containment measures adopted during the state of alarm. The Constitutional Court notes the existence of three limits applicable to this state of crisis; the state of alarm cannot encompass the *suspension* of fundamental rights; it is subject to the principle of legality and to the principle of proportionality.[5] The core argument of the decision lies in the first of the three limits.

According to the Constitutional Court, the generalized confinement measure did not *restrict*, but rather *suspend* the freedom of movement of citizens. This would have breached the first of the limits of the state of alarm. The s*uspension* of fundamental rights can occur in the framework of a state of emergency or siege, but not in a state of alarm. The state of alarm only allows for its *restriction*. In the words of the Court: «the declaration of a state of alarm does not admit the suspension of any of the fundamental rights».[6]

There is a straightforward reason behind the prohibition of the *suspension* of fundamental rights in the state of alarm. The Government declares this state of crisis independently from the Parliament.[7] In the other states of emergency, the previous intervention of the Parliament is required.

In other words, the constitutional framework allows the Government to *restrict* fundamental rights by its own will. However, it denies the Government the possibility to *suspend* them by itself. Accordingly, *suspending* rights by means of a state of alarm implies removing the matter from the parliamentary control contemplated by the Constitution as well as by Organic Law 4/1981, of June 1, on the states of alarm, exception and siege (hereinafter LOAES).

In order to discern between the terms of *suspension* and *restriction* of fundamental rights, the judgment delimits the specific scope of each of them. The Constitutional Court declares that: 'the concept of "limitation" (or "restriction") is broader than that of "suspension": every suspension is a limitation, but not every limitation implies a suspension. The suspension is, therefore, a specially qualified limitation (or restriction)'.[8]

In particular, suspension is defined as a cessation, albeit temporary, of the exercise of the rights constitutionally or conventionally recognized; this cessation can only be considered admissible in certain cases, and with respect to certain rights, under article 55.1 of

3 STC 148/2021 A1.
4 Ibid, judgement.
5 Ibid, FJ 3.
6 Ibid, FJ 3.
7 Article .116.2 CE and article 4 LOAES.
8 STC 148/2021, FJ 3.

the Constitution. Conversely, limitation of rights admits many more forms, apart from the *suspension*.[9] *Suspension* is, thus, a (particularly intense) form of *limitation.*

The decision then proceeds to the specific examination of the contested provisions.[10] In this regard, the judgment declares that article 7 of Royal Decree 463/2020 is in breach of the freedom of movement (article 19 CE), since it *alters the essential content* of the right.[11] Such a measure could only have been adopted under the figure of the *suspension* of rights. As already stated, *suspension* could only have been adopted under a declaration of a state of emergency or siege.[12]

Additionally, the resolution declares that the depletion of the freedom of movement entails the violation of the right of assembly, even in the domestic sphere (articles 21.1 and 18 CE),[13] and the right to freely choose one's residence (article 19.1 CE). The reason is that the limitation of the freedom of movement involves considering the place where the subject has been residing as an 'immovable residence'.[14]

Based on the above analysis, it becomes clear that the judgement does not declare the unconstitutionality of the provisions due to substantive reasons. Irrespective of these substantive considerations, the declaration of unconstitutionality is based on the non-compliance with the constitutional state of alarm framework.

The second block of provisions examined interprets the constitutionality of the attribution to the Ministry of Health of competences to 'modify, extend or restrict' measures limiting the freedom of enterprise during the state of alarm. The Constitutional Court declares that the possibility of limiting measures during the state of alarm is an exclusive competence of the Government. Therefore, these measures could only be modified by the Council of Ministers itself (and not by a ministerial department, such as the Ministry of Health).[15] As a result, the attribution to the Ministry of Health of competences to alter these limiting measures had gone beyond the constitutional limits, and thus, was unconstitutional.

## B. Second judgment on the state of alarm: stc 183/2021, of october 27, 2021

In the formerly examined resolution, the Constitutional Court ruled on the scope of the *restriction* and *suspension* of fundamental rights. In this decision, the Court examines the constitutionality of the provisions designating *delegated competent authorities* and attributing them powers to *limit rights* and *modify the measures* adopted during the state of alarm. It also brings into question the constitutionality of the duration of the extension of the state of alarm and the possible breach by the Government of its duty to be accountable to Parliament for all of its actions.

The Court resolves an appeal of unconstitutionality filed against various provisions of Royal Decree 926/2020, of October 25, by which the second state of alarm was declared; and against the Resolution of the Congress of Deputies and the Royal Decree that con-

9 Ibid, FJ 3.
10 Ibid, FJ 4.
11 Ibid, FJ 4.
12 Ibid, FJ 4.
13 Ibid, FJ 4.
14 Ibid, FJ 4.
15 STC 148/2021, FJ 9.

templated its extension.[16]

The structure of the ruling goes as follows. The Constitutional Court first analyzes the allegations of breach of fundamental rights; it then examines the extension in duration of the state of alarm and the accountability of the Government to the Parliament; finally, it reviews the provisions that affect the designation of *delegated competent authorities* and their functions.

In relation to allegations of breach of fundamental rights by the Government measures,[17] the Court considers three aspects. Firstly, the existence of sufficient legal basis; secondly, whether the measures contained a *restriction* or *suspension* of rights (given that the *suspension* is prohibited in the state of alarm); lastly, compliance with the principle of proportionality according to its three elements (adequacy, necessity, and proportionality in the strict sense).

The adequacy test checks whether the measure is suitable to achieve its aim. The necessity test analyzes whether there are any other less restrictive measures that can achieve the same aim. For a measure to be necessary, it should be the least restrictive. Proportionality in the strict sense refers to the burden on the individual. If a measure is adequate and necessary, but it imposes an excessive burden to its addressee, it will not be proportionate.[18]

The first measure analyzed is the general ban on circulation at night.[19] According to the Court, the measure has sufficient legal basis, in the text of the LOAES.[20] It is a *restriction* and not a *suspension* of the right to freedom of movement.[21] In addition, the measure was adequate to deal with the pandemic situation and prevent its evolution,[22] deemed to be necessary to control the development of the pandemic crisis,[23] and proportionate to the constitutionally legitimate purpose of preserving life (article 15 CE) and public health (article 43.2 CE).[24] With all the above in mind, the Court argues that the measure is in accordance with the Constitution.

The second measure is the limitation of entry and exit of people from the territory of Autonomous Communities, autonomous cities or lower territorial areas.[25] The Court states that the content of this measure is typical of a *limitation* of the right to freedom of movement.[26] The measure is also adequate to reduce the incidence of the pandemic,[27] necessary,[28] and proportionate in relation to the right to life, and to public health.[29]

The third measure considered by the Court is the limitation of the permanence of groups

16 Specifically, we refer to the Resolution of October 29, 2020, of the Congress of Deputies, which orders the publication of the authorization agreement for the extension of the state of alarm declared by Royal Decree 926/2020; and Royal Decree 956/2020, of November 3, which extended the state of alarm declared by Royal Decree 926/2020.

17 STC 183/2021, FJ 3.

18 Ibid, FJ 3.e.ii. On the three elements of the 'proportionality test', see. Alexy, R., "Los derechos fundamentales y el principio de proporcionalidad", Revista española de derecho constitucional, Jan. - April 2011. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=3621584.

19 Ibid, FJ 4.

20 Ibid, FJ 4.

21 Ibid, FJ 4.

22 Ibid, FJ 4.

23 Ibid, FJ 4.

24 Ibid, FJ 4.

25 Ibid, FJ 5.

26 Ibid, FJ 5.

27 Ibid, FJ 5.

28 Ibid, FJ 5.

29 Ibid, FJ 5.

of people in public and private spaces.[30] The Court considers that such a measure is within the framework of the LOAES,[31] is both adequate and necessary,[32] and proportionate in the strict sense to the exceptional state of crisis it was facing.[33]

Lastly, the decision deals with the measure limiting the permanence of people in places of worship.[34] This measure is also declared constitutional.[35] Besides, the specific analysis on the compliance with the proportionality principle should not be made with respect to this measure, but with respect to the specific regional regulations that established the precise maximum capacity in religious acts.[36]

The second issue examined is the constitutionality of the extension in duration of the state of alarm,[37] and the possible breach of the Government's duty to be accountable to the Parliament.[38]

Some doubts arise with regard to the extension of the duration of the state of alarm authorized by Royal Decree 926/2020 (from 00:00 on November 9 2020, until 00:00 on May 9 2021).[39] In this context, the Court points out that there is no *concrete temporary constitutional limit* to the duration of a state of alarm. Neither the Constitution[40] nor the LOAES[41] refer to it. From this perspective, the duration of the state of alarm will vary depending on the type of *serious alteration of normality* taking place.[42] In short, there is no specific limit to the duration of the state of alarm, but rather a broader duty to define it in accordance with the circumstances. Hence, the constitutionality must be analyzed in accordance with the *reasonable adaptation to the circumstances*.[43]

Given that, the Court strives to clarify the notion of *suitability of the duration to the particular circumstances of the specific case*.[44]

Different criteria are followed.[45] Firstly, the *need* for the extension of the duration initially conceived, based on the concurrent circumstances and the arguments provided by the Government (a). Secondly, the establishment of an *indispensable minimum period of time* before the return to normality from the state of alarm (b). Then, the *nature of the measures* applicable during the extension period (c). Lastly, the *periodic control of the review of the Government's performance* (d).

The Court considers that what is relevant is not the duration *per se* of the extension, but rather the decision by which that period is set, and the grounds that support it.[46] To carry

30 Ibid, FJ 6.
31 Ibid, FJ 6.
32 Ibid, FJ 6.
33 Ibid, FJ 6.
34 Ibid, FJ 7.
35 Ibid, FJ 7.
36 Ibid, FJ 7.
37 Ibid, FJ 8.
38 Ibid, FJ 9.
39 Ibid, FJ 8.
40 Ibid, FJ 8.
41 Ibid, FJ 8.
42 Ibid, FJ 8.
43 Ibid, FJ 8.
44 Ibid, FJ 8.
45 Ibid, FJ 8.
46 Ibid, FJ 8.

out this legal-constitutional assessment, the decision addresses the aforementioned four elements. The conclusion is that the extension of the state of alarm failed to comply with the last three. From this perspective: The extension of the duration was *needed* in the context of a serious global pandemic crisis (a).[47] However, the extension period is considered excessive, rather than *indispensable* (b).[48] Besides, the requirement regarding the *nature of the measures adopted* is not met, since the extension period was set without prior certainty of the nature of the measures that were going to be applied and their temporal and territorial application (c).[49] Last, but not least, the requirement of periodic control over the Government's action is not satisfactorily fulfilled (d). Especially because the Congress, while authorizing the extension, did not examine the effectiveness of the measures to be put into practice. Furthermore, the delegated authorities were given the competence to freely modify the application of those measures. This competence could only have been carried out by the Congress.[50]

Correspondingly, the Court declares the nullity of the extension of the state of alarm.[51]

In connection to this matter, the Court also analyzes the possible breach of the Government's duty to report to the Congress of Deputies.[52]

The duty of accountability is a link between the Legislative Chamber and the Government, which translates into a right of the Parliament to be informed and a correlative duty of the Government to provide information.[53] The Government's duty of accountability to the Congress of Deputies is also applicable during a state of alarm and its extension (article 8 LOAES).[54]

During the extension of the state of alarm, the following monitoring mechanisms were foreseen:

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*-The President of the Government shall appear every two months before Congress, to account for the data and arrangements taken in relation to the management of the state of alarm.*

*-The Minister of Health shall appear monthly before Congress, to account for the data and arrangements taken in relation to the management of the state of alarm, and in the extent of its ministerial competences.*[55]

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47 Ibid, FJ 8.
48 Ibid, FJ 9.
49 Ibid, FJ 9.
50 Ibid, FJ 9.
51 Ibid, FJ 9.
52 Ibid, FJ 9.
53 Ibid, FJ 9.
54 Ibid, FJ 9.
55 Ibid, FJ 9.

The Court states that the monitoring mechanisms meet the demands stemming from the rule of an effective control of the Government by the Congress. The reason is that the ambiguity and generality of the expressions of *data and arrangements* allow for a broad control, not limited to specific subjects.[56]

The third issue examined refers to the provisions that affect the designation of delegated authorities and their functions.[57] During the extension of the state of alarm, two types of authorities were envisaged: on the one hand, the Government of the Nation, the *competent authority*; and on the other, the presidents of the Autonomous Communities and autonomous cities, the *delegated competent authorities*.

The core of the Court's argument is the following: the state of alarm regime is essentially entrusted to the Government and the Congress of Deputies. The first is the *competent authority* for the declaration and management of the state of alarm. The second is in charge of the political control of the first.[58]

This system is outlined in article 7 LOAES, which refers to the following: 'the *competent authority* will be the Government or, by *delegation* of the latter, the president of the Autonomous Community when the declaration exclusively affects to all or part of the territory of a Community'. Meanwhile, article 6.2 LOAES attributes to the Congress the power to authorize the extension of the state of alarm, as well as the establishment of *the scope and conditions in force during the extension*.[59]

There are three reasons provided by the Court to point out the unconstitutionality of the delegation of powers to the presidents of the Autonomous Communities and autonomous cities.

In the first place, such a delegation is not foreseen by the LOAES.[60] The LOAES only allows the delegation to the Presidents of the Autonomous Communities of powers to manage the state of alarm when it *exclusively affects all or part of the territory of an Autonomous Community* (article 7.1 LOAES). This was not the case during the second state of alarm declared in Spain.

Secondly, the delegation was made without providing criteria or general instructions for the delegated authorities.[61] Lastly, the only means of control was entrusted to the Interterritorial Council of the National Health System (a multilateral coordination body made up of representatives of the Government and the Autonomous Communities) and not by the Government itself.[62]

In summary, the unconstitutionality of the delegation derives from three circumstances. First, it had no legal basis in the text of the LOAES. Then, the scope of the delegation was not well delimited, since the *delegated competent authorities* had no instructions or criteria to exercise the delegated powers. The final reason explaining the unconstitutionality of the delegation is that the Government (that is, the *competent authority*) was not in charge of the control over the *delegated authorities*. That control was entrusted to a different body, the Interterritorial Council of the National Health System.

56 Ibid, FJ 9.
57 Ibid, FJ 10.
58 Ibid, FJ 10.
59 Ibid, FJ 10.
60 Ibid, FJ 10.
61 Ibid, FJ 10.
62 Ibid, FJ 10.

## C. Judgment on the expulsion of foreigners in irregular status, sts 1181/2021, of march 17, 2021

This judgment's importance is twofold. It establishes a precedent on the expulsion of foreigners in an irregular situation in Spain. It also reasserts the applicability of the right to a fair and transparent procedure, and the correlative duty of legal reasoning in the context of an order of expulsion.

The case law regarding the expulsion of foreigners in an irregular situation has undergone an important evolution:

At first, the Supreme Court interpreted that the main sanction for the irregular stay of third-country nationals was a fine. Only *additional aggravating circumstances* could justify the expulsion from national territory.[63]

Later on, the Court of Justice of the EU declared that the main sanction should be expulsion. This statement appears in the case *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*.[64] In this ruling, the Court of Justice points out two obligations for the Member States: to issue return decisions against third-country nationals in an irregular situation;[65] and to adopt all the necessary measures for their expulsion.[66] Both obligations were based on Directive 2008/115.[67] According to the Court, national legislation setting out the sanctions of a fine and expulsion in alternative terms would frustrate the objectives of the Directive. Since Member States cannot apply regulations that jeopardize the achievement of the objectives pursued by a directive or deprive it of its useful effect,[68] the main sanction would have to be the expulsion from national territory.

The interpretation of the Court of Justice was altered in the *Mo case and the Government Subdelegation in Toledo*.[69] The Court declares that the authorities of the Member States could not rely exclusively on Directive 2008/115 to adopt a return decision. The authorities also had to comply with national regulations. If domestic regulations provided for both the sanction of a fine and expulsion, and if the sanction of expulsion could only occur when aggravating circumstances concurred, the expulsion would only take place when such circumstances existed.[70] The basis of the judgement is the principle according to which the directives do not create, by themselves, obligations in charge of individuals.[71] Therefore, the directive could be invoked directly by citizens against the State, but not by the State. Even more so if that application would harm the individuals and go beyond the provisions of the national legal system.

The Supreme Court analyzed whether, according to the latest ruling of the Court of Justice of the European Union, the priority sanction should be a fine instead of expulsion. In its judgment, the Supreme Court claims:

63 STS 268/2006, FJ 5.

64 STJUE, C-38/14, 2015, *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*, ECLI:EU:C:2015:260.

65 Ibid, § 41.

66 Ibid, § 39.

67 Dir. nº 2008/115/EC, 16 Dec. 2008, of the European Parliament and of the Council on common rules and procedures in the Member States for the return of third-country nationals in an irregular situation.

68 STJUE, C-38/14, 2015, *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*, op. cit., § 39.

69 STJUE, C-568/19, 2020, *Mo and Government Subdelegation in Toledo*, ECLI:EU:C:2020:807.

70 Ibid, § 71.

71 Ibid, § 35, and cited jurisprudence.

– That the expulsion decision is the priority sanction. The sanction of a fine is not an alternative to the expulsion from the national territory.[72]

– That the expulsion requires, in each case and on an individual basis, the evaluation and appreciation of aggravating circumstances that reveal and justify the proportionality of the measure, after a procedure with full guarantees of the rights of those affected.[73]

– That there is no contradiction between European and internal regulations, since neither of them contemplate the expulsion order as automatic, without considering the circumstances of the specific case.[74]

The argument of the Supreme Court goes as follows:

In the first place, the Court declares that expulsion must be the main sanction, in accordance with case law of the Court of Justice.[75] National courts must respect the obligation to issue a return decision in accordance with Article 6 of Directive 2008/115 and by virtue of the principle of consistent interpretation.[76]

However, return decisions must only take place after a fair and transparent procedure, with full respect of human rights and procedural guarantees. This interpretation allows overcoming the possible incompatibilities between European and national Law: neither the European regulation nor the national one provides for expulsion in each and every case. As confirmed by the European Court 'according to European Law, the mere irregular stay without the concurrence of other factors does not entail the need to adopt a return decision'.[77]

In essence, both the irregular stay in Spanish territory and the processing of a fair and transparent procedure for expulsion are *sine qua non* requirements for an expulsion decision.

Therefore, the main difference between our national regulation and the European Law is that, while illegal stay can be sanctioned according to national provisions (with the sanction of a fine), European Law requires the prior verification of aggravating circumstances and a procedure with all the guarantees.[78] Thus, our domestic law allows sanctioning situations not identified by European law (irregular stay without aggravation). In these cases, our domestic Law provides for a penalty in the form of a fine. However, if there are aggravating circumstances, the sanction will always be expulsion, as set in European Law.

According to the Supreme Court, in cases where the sanction is the expulsion, the proportionality of the penalty will be examined according to the arguments motivating the expulsion order.[79] Ultimately, the proportionality of the expulsion order will be measured through the duty to state sufficient reasons. Among other sufficient reasons, the Supreme Court foresees those indicated in instruction 11/2020, of October 23, 2020, of the Ministry of the Interior.[80]

72 STS 1181/2021, FJ 3.

73 Ibid, FJ 4.

74 Ibid, FJ 3.

75 Ibid, FJ 3.

76 Ibid, FJ 3.

77 Ibid, FJ 3.

78 Ibid, FJ 3.

79 Ibid, FJ 3.

80 Ministry of the Interior, Instruction 11/2020, Effects of the Judgment of the Court of Justice on sanctioning procedures for violation of article 53.1 a) of Organic Law 4/2000, of January 11. Available at: Instruccion-11-2020-CGEF-aplicacion-STJUE-08102020.pdf .

## IV. Patrimonial liability

### A. Patrimonial liability for breaches of urban agreements, sts 161/2021, of february 10, 2021

The value of this decision is twofold: on the one hand, it lays down the requirements for the exercise of a liability action; on the other hand, it discusses the sector of urbanism and urban planning. This field of study has been traditionally shroud by a veil of controversy, mainly because of the shared competences in the matter between the State and the Autonomous Communities.

The appeal had put forward the necessity of clarifying the effects of the coming into force of a new urban planning. In particular, the ruling questions whether the entry into force of a new urban agreement leads to the automatic extinction of the previous individual administrative licenses that were valid under the former urban agreement. The other possibility would be that of considering that the extinction of those licenses can only take place prior to an administrative procedure, regulated at the regional level by Autonomous Communities.[81]

The Court stands against the first interpretation. In that vein, it considers the entry into force of an urban planning as a premise for the damage compensation under article 35.c of Royal Legislative Decree 2/2008, of June 20, regarding the land and urban development regime. Thus, the normative modification in urban matters can generate patrimonial liability, but never an automatic extinction of the administrative licenses already into force.[82] Such modification or extinction of effectiveness requires a prior administrative procedure regulated by each Autonomous Community.[83]

This interpretation is an outcome of the distribution of powers between the State and the Autonomous Communities. While the latter are competent to regulate urban planning *stricto sensu*, the State can interfere with its competence to regulate the basic criteria for the exercise of the right to property. Nevertheless, this State competence could never go as far as to eliminate the procedural guarantees and procedures set up by the Autonomous Communities.

## V. Judicial control

### A. Appeal of unconstitutionality against the decree-law of the government of Catalonia on urgent measures to improve housing access, stc 16/2021, of january 28, 2021

This appeal of unconstitutionality puts emphasis on the legal limitations of the decree-laws, as well as on their judicial review regime. In addition, it examines the scope of property's social function and the distribution of competences in the field of housing.

There are a number of legal limits regarding the role of decree-laws. Article 86.1 of

81 STS 161/2021, FJ 9.
82 Ibid, FJ 4.
83 Ibid, FJ 1.

the Constitution foresees those limits, and its content is reproduced by article 64.1 of the Statute of Autonomy of Catalonia.

> *In cases of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-law and which may not affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law.*

The Constitutional Court partially accepts the claims. On the one hand, it considers that the enabling fact to dictate decree-laws, which is the one related to the existence of an *extraordinary and urgent need*, concurs. The ruling concludes that the extraordinary and urgent need is justified here by the generic and devastating implications of the 2008 economic crisis and the new social situation that arose from it. These facts made clear the need for a rapid regulatory adaptation to the new circumstances. In this context, the adoption of a decree-law is justified.[84]

On the contrary, the judgment declares the unconstitutionality of the articles that regulate the social function of property and the coercive measures for its fulfillment that were provided for in the Decree-Law of the Government of Catalonia, as well as those that regulated the obligations of homeowners in this regard. These provisions infringed the inherent limits of the decree-laws, by regulating matters beyond its faculties.[85] In this particular case, the provisions regulated the fundamental right to property (article 33 of the Constitution).

Lastly, the claims referring to the benchmark rental price index and the regional reserve of urbanized land for housing are dismissed. The Autonomous Community had not invaded the state powers granted by Article 149 of the Constitution in none of these cases.

In particular, the rental price reference index does not violate state jurisdiction over civil matters (149.1.8), as it is of a public nature and does not affect the lease contracts, nor the rights and obligations of the parts.[86] As for the regional reserve of land for housing, it is constitutional as long as it adjusts to the limits set by the State in exercise of its competences on regulation of the basic conditions of constitutional rights (149.1.1) and on the coordination of economic activity planning (149.1.13).[87] Within this limitation, the regional legislator can set the uses of land and buildings.[88]

## B. Instructions and circulars, sts of 76/2021, of january 26, 2021

This judgment seeks to give some clarity to the effects on citizens of administrative internal regulations. Specifically, the decision tries to determine whether the challenge of a controversial circular requires the existence of a prior singular act of application. That is, if its challenge must be carried out directly, or if an indirect appeal against circulars is possible.

84 Ibid, FJ 3.
85 Ibid, FJ 5.
86 Ibid, FJ 7.
87 Ibid, FJ 8.
88 Ibid, FJ 8.

Circulars have no *external* legal effect. Hence, they neither create, nor modify, nor directly extinguish the rights of citizens. Therefore, generally, they cannot be challenged directly. However, a provision can have a normative nature, despite the fact that its *nomen iuris* is that of a circular. In these cases, the 'circular' may be challenged directly.

According to the Court, knowing the true nature of the circular requires unraveling its content.[89] This is coherent with the non-formalist nature of our legal system, according to which the *nomen iuris* is irrelevant to know the nature of rules and contracts. Therefore, beyond the *nomen iuris*, the content and purpose of the provisions must be considered.

In this decision, the content of Circular 1/2014-ET, of January 15, 2014, is examined. This circular addresses the visa requirement for professional bullfighting contracts in the authorization procedure for bullfighting shows. Its purpose is to put an end to the interpretative divergences of the Bullfighting Regulation. In other words, the objective of this circular is to 'establish the criteria of action to be followed with regard to the visa requirement of the contracts of bullfighting professionals'.[90]

The circular is structured in four sections, of which the first two are of prime interest:

The first of them indicates the scope of application of the circular: administrative authorization procedures for the celebration of bullfighting shows. The scope of application is hence merely administrative; it lacks direct effects for third parties. Therefore, it does not have the status of an administrative act or general provision, which can be challenged directly.

The second of the sections of the circular establishes the obligation to submit all the contracts signed by the professionals with the request for authorization of a bullfighting show. These contracts must be statutory, as requested by the circular. The circular asserts that the referred obligation is based on the content of the Andalusian Bullfighting Regulation. However, the circular seems to add an additional requirement, given that Bullfighting Regulations do not rule on the statutory nature of the contracts. The key point is that the specification of the circular, not expressly indicated in the Bullfighting Regulation, leads to the exclusion of non-statutory agreements.[91]

The Supreme Court's position is conclusive: the circular does not add an additional requirement, but rather interprets one of the already-established requirements. Concisely, the content of a circular only sets interpretive guidelines. There is therefore no excess in terms of its content as a proper circular,[92] and its effectiveness is merely internal. Consequently, it can only be controlled by challenging the specific acts that apply it.[93]

89 STS 76/2021, FJ 5.
90 Ibid, FJ 5.
91 Ibid, FJ 3.
92 Ibid, FJ 5.
93 Ibid, FJ 5.

## List of abreviations

A Antecedente jurídico. Facts of the dispute.

CE Constitución Española de 1978. Spanish Constitution.

FJ Fundamento jurídico. Legal ground.

LCSP Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014. Public Sector Contract Law.

LCSP 2007 Ley 30/2007, de 30 de octubre, de Contratos del Sector Público. Public Sector Contract Law, (today repealed).

LOAES Ley Orgánica 4/1981, de los estados de alarma, excepción y sitio. Organic Law on states of alarm, exception, and siege.

LOEPSF Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera. Organic Law on Budgetary Stability and Financial Sustainability.

LRJPAC Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. Law on the Legal Regime of Public Administrations and Common Administrative Procedure, (today repealed).

STC Sentencia del Tribunal Constitucional. Supreme Constitutional Court Judgement.

STJUE Sentencia del Tribunal de Justicia de la Unión Europea. European Court of Justice Judgement.

STS Sentencia del Tribunal Supremo. Supreme Court Judgement.

TRLCSP Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público. Royal Legislative Decree approving the consolidated text of the Public Sector Contracts Law (today repealed).