

## SPANISH CONSTITUTIONAL COURT

Cabinet of the President  
Press Office

### INFORMATION NOTE No. 16/2014

#### THE SPANISH CONSTITUTIONAL COURT (TC) MODIFIES ITS CASE-LAW TO EXCLUDE THE REVIEW OF JUDGMENTS DELIVERED *IN ABSENTIA* AS A PRIOR CONDITION TO EXTRADITION

The Plenary Meeting of the Spanish Constitutional Court (TC) has endorsed the “*unconditional*” surrender of an Italian citizen to the national authorities in order to complete the conviction delivered *in absentia*, i.e. without being present during the trial. With this judgment, after raising for the first time ever a preliminary ruling before the European Court of Justice (ECJ), the TC has modified its case-law: until now, the extradition of convicted parties *in absentia* had to be subject to the possibility of appealing the conviction before the national judicial authorities in order to uphold the convicted party’s rights to defence and to a due process. Hereinafter, this prior condition shall not be necessary. This resolution includes the particular coinciding votes of its Vice-President, Adela Asua, and Judges Andrés Ollero and Encarnación Roca, the latter acting as reporting judge.

On 21 June 2000, S.M. was convicted *in absentia* by the Court of Ferrara to ten years’ imprisonment for an offence of fraudulent bankruptcy. The judgment was upheld on 14 March 2003 by the Appellate Court of Bologna. The State Prosecutor of the Republic decided to issue a European Arrest Warrant against the appellant on 8 June 2004. On 1 August 2004 the appellant was arrested in Spain and one month later, following the decision of 12 September, the Spanish National Court agreed to surrender S.M. to Italy in order to complete his conviction. S.M. bases his relief appeal [“*recurso de amparo*”] against said decision from the Spanish National Court on the fact that, as a prior condition to surrender, Italy had not been required to guarantee a review of the judgment.

The Plenary Meeting of the TC applies to this judgment the interpretation delivered both by the European Court of Human Rights (ECHR) and the ECJ on the international agreements and treaties which legally bind Spain in relation to the protection of fundamental rights and public freedoms.

The judgment states that, according to the Strasbourg Court, Article 6 of the Convention (which grants the right to a due process) “*is not breached*” “*when the accused, duly summoned, decides of his own free will to waive his presence at the trial, and is assisted during the trial by a lawyer in order to defend his interests*”.

In the judgment which resolves the preliminary ruling raised by the TC, the ECJ states, in turn, that “*there is no breach of the right to a due process, even in absence of the defendant, whenever he has been informed of the date and place of the trial or has been defended by a duly empowered lawyer*”.

The core of the matter refers to the interrelationship of European Union laws and constitutional domestic laws, regarding fundamental rights and their interpretation by the TC.

The Court has reviewed the case-law established in judgment 9/200 and declares that *“the absolute content of the right to a due process (Article 24.2 of the Spanish Constitution (CE)) is not breached when a conviction is delivered in absentia and without it being subsequently possible to remedy his absence during the criminal proceedings underway, if there is evidence that this failure to appear at the trial was voluntarily and unequivocally decided by the accused, duly summoned and effectively assisted by a lawyer of his choice”*.

According to the documentation provided by the Italian authorities, it is not ascertained that the lawyers named by the appellant *“no longer represented him after 2001”*. Furthermore, *“there was no lack of defence, given that the requested party was well aware of the future date of the trial, voluntarily entered contempt of court, and had appointed two lawyers of his choice to represent and defend him, who acted as such, at first instance, on appeal and in cassation, thus exhausting all appeal channels”*.

The TC concludes that *“the decision of the Spanish National Court to surrender the appellant to the Italian authorities unconditionally does not entail an indirect breach of the right to a due process, since it has been proven that the accused had been technically assisted and had voluntarily waived his right to appear in the trial”*.

The three judges who issued particular votes disagree with the legal reasoning of the judgment, but share the ruling.

Judge Asua declares that the grounds to overrule the appeal should have been based on applying the level of protection arising from fundamental rights recognised by the Union, as interpreted in this case by the Court of Justice, i.e. not by reference to the content of fundamental rights conferred by the Spanish Constitution, as upheld by the majority. Moreover, she considers that the judgment *“does not take advantage of the chance to consider and reflect on the important transformations undergone in the TC’s jurisdictional task further to membership of the European Union”*.

Judge Roca, who acted as reporting judge, does not accept that *“a change in TC case-law” “is not a result”* of the ECJ’s decision in the preliminary ruling *“but because the TC has legitimately reconsidered its prior case-law”*. The legal reasons for the judgment, she adds, ignore the principles of *“primacy, unity and effectiveness of European law”*, do not support the so-called *“dialogue between Courts”*, and, in practice, constitute a *“clear lack of recognition of the ECJ’s competence”*.

Judge Ollero declares his disagreement with the general applicability, according to European Court of Justice case-law, of a *“necessary exclusion”*, as applied in the judgment, which lessens the special protection established by the Constitutional Court regarding certain fundamental rights.

Madrid, 20 February 2014.