SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATIVE NOTE No. 34/2016

THE TC DECLARES THE UNCONSTITUTIONALITY OF THE ACT FORBIDDING "FRACKING" IN CATALONIA

The Plenary Meeting of the Constitutional Court (TC) has partly upheld an unconstitutionality appeal lodged by the Government against Act 2/2014, of 27 January, on tax, administrative and financial measures and the public sector in Catalonia. The judgment, where Andrés Ollero acted as the Reporting Judge, has declared null and void Art. 167.1 and the 8th transitional provision, on the grounds that they invade State competences: the first forbids the use of "fracking" in the drilling and exploitation of hydrocarbon fields, as the Court has declared in previous judgments (Constitutional Court Judgments (STC) 106/2014, 134/2014 and 208/2014); the second forbids the implantation of shopping centres measuring at least 800 m2 outside "*consolidated urban sections*", a measure that is not based on "*imperious general interest needs*", as required by basic state legislation. The Vice President, Adela Asua, issued a particular vote, adhered to by the Judge Fernando Valdés Dal-Ré; the Judge Juan Antonio Xiol also issued a vote.

The judgment has declared the unconstitutionality and nullity of Art. 167.1 of the challenged law. Said provision forbids the use of "fracking" as a technique for drilling, prospecting and exploitation of hydrocarbon fields.

As affirmed by the Court in its judgments settling appeals against laws that prohibited "fracking" in Cantabria, La Rioja and Navarra, any fracking authorisation subject to technical requirements and a prior declaration of its environmental impact must all be established by the State by virtue of its competences, both in economic planning (Art. 149.1.13 Spanish Constitution (CE)) and in mining and energy matters (Art. 149.1.25 CE) and protection of the environment (Art. 149.1.23 CE). Consequently, an "*absolute and unconditional prohibition of fracking throughout the territory*" of said Autonomous Community was declared as "*radically and inescapably*" contrary to the provisions of state laws.

Furthermore, the Plenary Meeting pointed out that autonomous competences on territorial and environmental arrangements do not justify a "fracking" prohibition, as these cannot prevail over the State's exclusive competence in mining and energy matters and general arrangements of the economy.

In the case of the challenged Catalonian rule, the judgment points out that it neither implements nor complements state laws, but "*reformulates this law under a radically different perspective*". In fact, according to state bases, "*fracking technology should always be used, as long as the project meets certain technical and environmental requirements*"; whereas the autonomous law "*contemplates fracking in the opposite sense, as technology that should be forbidden due to its potential detrimental effects in any of the multiple circumstances foreseen*".

In other words, the challenged rule "*allows an interpretation that is manifestly contrary to basic state legislation*", given that "fracking" is "*absolutely forbidden in the territory of Catalonia if its use affects any "competence" of the Generalitat*".

The Court has also decided to declare the unconstitutionality and nullity of the 8th transitional provision of said Catalonian Act 2/2014. This provision suspends the effects foreseen in Catalonian Decree Law 1/2009, which in exceptional circumstances allowed the implantation of medium and large-size shopping facilities (based on surface area) outside consolidated urban sections.

This resulting suspension "*is equivalent to forbidding the implantation outside consolidated urban sections of shopping centres measuring at least 800 m2"*, this prohibition, explains the judgment, "*should be based on imperious general interest reasons*", as foreseen in state laws. However, "*the disputed act does not express any reason for this huge limitation on the implantation of shopping centres measuring more than 800 m2. The preamble and 8th transitional provision are silent on the matter*". This is why, despite the provisional nature of the suspension, it collides "*headlong*" with the provisions of Act 17/2009, on free access and performance of service activities, and Act 7/1996, on arrangements for retail trade.

The unconstitutionality appeal was also brought against the 5th additional provision of Catalonian Act 2/2014. A subsequent amendment of this provision, as regards the Catalonian Institute for Assistance and Social Services, has cancelled the challenge due to a subsequent non-existing object.

The Vice President and Judge Valdés both refer to the particular vote they issued in relation to judgment 106/2014, of 24 June. Furthermore, they insist on the fact that the judgment should have weighted "*the interests eventually affected by co-existing competence over the same physical space, without making one subordinated to the other*".

Judge Xiol, who issued a concurring vote (i.e. agreeing with the ruling but disagreeing with the legal grounds) with respect to judgment 106/2014, claims in this case that the appeal should have been dismissed and the constitutionality upheld of the challenged rule, based on the following reasons (amongst others): the autonomous rule was aimed at protecting constitutional interests entrusted to the autonomous community, and did not devoid basic state competence on "fracking" techniques. The Judge also affirms that the judgment "*is interpreting relations between the State and Autonomous Communities in such a way as to lean in favour of the principle of hierarchy, reformulating the criteria until now strictly based on the principle of competence*".

Madrid, 25 April 2016.