



## INFORMATIVE NOTE No. 60/2016

### THE TC UPHOLDS THE CONSTITUTIONALITY OF THE MEASURES APPROVED BY THE GOVERNMENT TO CONTROL THE ADMINISTRATION'S COMMERCIAL DEBT

The Plenary Meeting of the Constitutional Court (TC) has dismissed the appeal brought by the Autonomous Community of Andalusia against various articles of Public General Act 9/2013, of 20 December, on control of commercial debt in the public sector. The Court has endorsed the use of this public general act, questioned by the plaintiff, as the matter regulated in this case is constitutionally reserved to rules enjoying this rank; on the other hand, the Plenary Meeting considers that the State's withholding of funds, a device used to directly pay the debt undertaken by Autonomous Communities with their suppliers, does not breach the constitutional principles of political and financial autonomy. The Reporting Judge was Juan José González Rivas; a particular vote was delivered by the Court's Vice-President, Adela Asúa, and the Judges Fernando Valdés Dal-Ré and Juan Antonio Xiol.

With respect to the first issue (reservation in favour of public general acts), the judgment indicates that according to reiterated constitutional case-law "*the challenged rules, insofar as directly connected to financial relations between Autonomous Communities and the State, are naturally covered by said reservation in favour of public general acts*", by virtue of Art. 157.3 of the Spanish Constitution (CE). Said doctrine is applicable to this specific case because, it adds, the device challenged (the State's withholding of amounts owed by Autonomous Communities to their suppliers, in order to effect direct payment) meets the necessary requirements to confirm that the rule "*directly affects financial relations between the State and Autonomous Communities*". In effect, the challenged act authorises the State to unilaterally ascertain that an Autonomous Community holds a payment obligation; it may also unilaterally declare that said payment obligation has not been fulfilled; and it may exercise, on a substitution basis, a competence enjoyed by an Autonomous Community by withholding the amounts due against the autonomous financing system, in order to directly pay its suppliers.

The plaintiffs also questioned the constitutionality of this system (i.e. the possibility of the Government blocking certain amounts against the autonomous financing regime in order to directly pay supplier debt). Specifically, the Regional Government of Andalusia considers that this infringes the financial autonomy of Autonomous Communities.

The judgment explains that the financial autonomy entrusted by the Constitution to Autonomous Communities means that they should be able to decide on their economic policies, in order to achieve stability and financial sustainability objectives. "*Only when the measures seeking to fulfil this mandate are non-existing or insufficient, and only then, may the State*" adopt the necessary measures.

In this case, the withholding of the amounts due *“would not prevent the Autonomous Community in breach from identifying its policies, or determining and starting up measures to reduce costs, to increase income or to manage receivables and payments, as it deems appropriate”*. What the challenged rule foresees is that, upon expiry of the legal time limit for payment of the debt, the State, in order to settle the debt, may use part of the resources assigned to finance an Autonomous Community. The aim is no other than to *“guarantee that the average deadline for payment is met and, consequently, the system’s financial sustainability”*.

The Court considers that, although the financial independence of Autonomous Communities is limited, this is not unconstitutional *“as they are not deprived of the right to adopt any treasury measures deemed appropriate (...)”*. Consequently, *“this would be a legitimate limitation of financial autonomy”* because it is *“adequate”* (its purpose being budgetary stability, constitutionally enshrined), *“necessary”* (it guarantees supplier payment and limits the indebtedness of autonomous bodies); and *“proportionate”* (the device is only put into practice if the Autonomous Community does not adopt the necessary decisions to effect payment within the legal timeframe).

The Court also disagrees that the challenged act, as alleged by the appellants, infringes financial sufficiency, by placing Autonomous Communities in the quandary of having to pay their suppliers or cover fundamental public services. This is because, on the one hand, the amount withheld only affects part of the resources held by Autonomous Communities and, on the other, because *“healthcare, education and social services are also covered through various contracts that the Administration signs with its suppliers to purchase goods and services (...)”*, which is why payment of this debt, *“in addition to meeting a contractual obligation of the Administration, is an essential part of the provision of said public services”*.

The plaintiffs also claimed that the withholding device challenged intensifies, in a disproportionate and unjustified manner, the State’s powers of supervision and control; this is because a fund already exists for the financing of supplier payments. The judgment clarifies that the fund withholding system created by the challenged act replaces the former supplier payment fund. There is a difference between the two: with the fund, *“the law guaranteed that suppliers were paid”* but did not reduce the indebtedness of autonomous public bodies. In other words, the debt still existed and only the creditor changed (which became the State). With the challenged regulations, suppliers are paid whilst also reducing the debt, as it *“disappears from the liabilities of the autonomous body, thereby preventing its indebtedness becoming excessive and dragging down the budgetary stability objectives that are binding on all public Administrations”*.

In her particular vote, the Court’s Vice-President, Adela Asúa, considers that the appeal should have been upheld because, in her opinion, the fund withholding device foreseen in the challenged act infringes the financial independence of Autonomous Communities. Financial independence not only entails the capacity to define expense policies but also *“the full availability of financial means which, in accordance with the Constitution, are entrusted to Autonomous Communities”*; in other words, the *“direct and full receipt”* by Autonomous Communities of these financial means. Consequently, she concludes, the withholding device challenged should be declared unconstitutional because it replaces Autonomous Communities when exercising a competence inherent thereto, thereby exceeding the limits of State control over Autonomous Community activity.

The Judge Fernando Valdés Dal-Ré considers that the judgment upholds “*an expansive interpretation*” of the reservation in favour of public general acts foreseen in Art. 157.3 CE, exceeding the scope clearly defined in Constitutional Court Judgment (STC) 13/2007, of 18 January (Point of Law 7). He considers, therefore, that the Court should have upheld the challenge based on the *ultra vires* application of this reservation in favour of public general acts “*in order to preserve the essential rule of unqualified parliamentary majorities*”. The Judge adheres to the vote of the Court’s Vice-President as regards the device used by the State to withhold resources arising from financing regimes to directly pay suppliers (Arts. 1.6, 1.16 and 2 of Public General Act 9/2013).

In his particular vote, the Judge Juan Antonio Xiol believes that the reservation in favour of public general acts is not backed up by Art. 157.3 CE but by Art. 135.5 CE. This is because the aim of the challenged rule is to regulate default in the public sector when paying commercial debt; if this situation is not remedied, it could eventually hinder achievement of the principle of budgetary stability foreseen in Art. 135 CE. In turn, he disagrees that proportionality be used as a principle to examine the constitutionality of the withholding device challenged. In his opinion, a decision should have been reached on “*who is competent, and with what competences, in the Administration*” in order to fulfil its deficit objectives “*and any future coordination and control for their achievement*”.

Madrid, 15 June 2016.