

LUX BARCELONA

METROPOLITAN TRANSPARENCY REVIEW

01

| *English edition* |



Who we are

The Transparency Agency is in charge of implementing transparency and fostering good governance in the metropolitan administration, its related bodies and in public service providers of the Barcelona Metropolitan Area (AMB).

In order to move towards an open and innovative government that promotes integrity and avoids corruption, the Transparency Agency draws up protocols and recommendations, ensures the disclosure and access to public information, promotes staff training and awareness, fosters a code of ethics and conduct, manages possible conflicts of interest, monitors the relationship with interest groups, supports transparency in local governments and encourages best practices in the management of public services.

The main principles and values in which the Transparency Agency is based on are: legality, responsibility, objectivity, integrity, public ethics, accountability, right to information and gender equity.

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A NEW OPEN WINDOW ON TRANSPARENCY

Recent years have seen the uncovering of numerous cases of political corruption, administrative irregularities and malpractice by some government leaders and public managers that have made fraud and corruption one of the problems that worry citizens most, after unemployment. Citizens have shown zero tolerance with fraudulent practices and private interests overriding the general interest. As a consequence, the various administrations have promoted regulations and policies aimed at reinforcing public integrity and prosecuting fraud and corruption, in compliance with legislation on transparency.

The metropolitan government that arose from the municipal elections of May 2015 set transparency as one of its priorities, and committed itself to fostering a new way of governing based on information, participation and accountability to citizens. In this mandate, we have proposed that transparency should permeate the whole range of initiatives and activities of the metropolitan government. The aim is to encourage critical reflection on govern action and so incorporate a variety of contributions reflecting the plurality of visions and serving as a driving force for a change in the way metropolitan public policies are planned, managed and implemented.

In order to give concrete shape to this commitment, in July 2015 Barcelona Metropolitan Area approved the creation of the Transparency Agency, the main purpose of which is to consolidate the model of open government and reach the standards set by the law as regards transparency, publicity of information, quality of management, integrity and public ethics. To achieve this mission, the Agency promotes, coordinates and evaluates the implementation of legislation concerning transparency, access to public information and good governance throughout the metropolitan public sector, which includes the metropolitan administration, associated bodies, public companies and consortiums, and enterprises providing public services or organisations receiving public funds. In short, the Transparency Agency constitutes a key instrument to advance towards an innovative, democratic, open and inclusive model of metropolitan governance that can generate synergies between the public and private stakeholders involved, with the vocation to integrate a global vision.

The governance model of Barcelona Metropolitan Area is characterised by a relatively lean second-level administration that implements a large part of its policies through local administrations, metropolitan public-sector bodies or private companies that provide public services. This management model poses some specific challenges for transparency and good governance. Since its creation, the Transparency Agency has deployed a series of innovative initiatives in order to adapt open government policies to this metropolitan reality.

Transparency and open government are a global trend that is transforming the functioning of public administrations worldwide. To improve the effectiveness and the results of public integrity policies, we need to learn mutually from the experiences and good practices being developed by the most innovative of the world's governments in this sphere. Barcelona Metropolitan Area cannot stand on the sidelines of this global dialogue. We want to participate in it with a voice of our own. The magazine *Lux Barcelona* aspires to be the medium through which AMB conveys metropolitan contributions to this dialogue, taking advantage of the great legacy of the humanities, with the challenge of advancing in good governance and public policies for future generations.

Ada Colau Ballano

Mayor of Barcelona and President of AMB





El Prat de Llobregat. Benches' lookout
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“Each and every person possesses an inalienable human dignity that ought to be respected by laws and institutions.” **Martha Nussbaum**

“All politics is the art of the possible.” **Tony Judt**

“It is not possible to live pleasantly unless one also lives prudently, and honourably, and justly; and that one cannot live prudently, and honestly, and justly, without living pleasantly.” **Epicurus**

“Ethics is effective; it must therefore triumph.” **Hegel**

“We understand that power is a matter of national and international interests, the play of classes and ethnic groups, the conflict of regions or religions. But we do not act upon that understanding.” **Richard Sennett**

“But the big question is: How can we make this joint responsibility compatible with a society in which machines work tirelessly to produce exchange values from which their owners then gain benefit when those owners are, moreover, no more than a minority of the population?”

Yanis Varoufakis

IN THE LIGHT OF NEW TIMES

At the beginning of the 21st century, economic globalisation and the crisis of democratic legitimacy in the face of growing inequality arising out of the economic crisis bring us to believe more than ever that the light shed by shared thought, open reflection, belief in the legacy of the humanities, must continue to offer us the indispensable tools to advance towards the progress of our society.

Those responsible for the world's public policymaking, in different cultural or geographical locations and contexts, are facing a phenomenon that undermines the pillars of collective belief in good governance and democracy: corruption. This phenomenon is nothing new in itself, but in the information society it has become visible, and this has gradually led to the creation of transparency regulations, registers of interest representatives and efforts in new guarantee bodies that seek to fight crime committed at the heart of the *res publica*. The aim is to build a constructive culture that strives to convert public ethics into an ethics applied to changing the notion of democratic power. In Catalonia, Law 19/2014 has required us to react with shared efforts of democratic regeneration.

The starting point of the new paradigm is called *transparency*. Some of us prefer the term *good governance*, that is, the sort of sort of governance that, from the times of Confucius and Taoism in the East and Western classical philosophers of ethics such as Aristotle and Epicurus through to Hannah Arendt and Martha Nussbaum, has sought to reorient the practices through which political and administrative power is wielded.

There has also been criticism of the new focus of transparency, for example by the Korean Byung-Chul Han, who warns of the risk of uniformity—'the society of transparency is an inferno of the same'—, inefficiency—'more information does not necessarily lead to better decisions'—, and the need for discretion—'beauty needs a veil; nakedness runs the risk of annulling the mystery').

Clearly, these critical reflections must be integrated into a model of transparency and good governance policies that offer us credibility, certainty and flexibility. Only with a desire for *substantive transparency* as opposed to a *formal transparency* can we go forward. And it is more necessary than ever, at this embryonic moment, to weave together knowledge and applied science of transparency and good governance, and at the same time share efforts in order to avoid falling into the risks identified above.

The value of transparency should not be to the detriment of the internal value of each institution or body required to observe the regulations. On the contrary, it is an opportunity for a deeper examination of its own identity, of the capacity to create good governance.

By nature, transparency has no absolute or finalistic value. Therefore, rankings carry risks of artificial disguise, as we have seen in the economic system. Applied transparency is essentially a path, an ongoing, dynamic, consensus-generating process. It is the *overlapping consensus* propounded by Rawls, in this case between regulation and initiative in public management, or between the public and the private sectors, between citizens and administrations. And also, let it be said, between private interests and the general interest. Recognising the existence of interests is the first step to be able to advance and identify the weak points of good governance. This *consensus for transparency* also poses a brand new challenge: the need to build alliances from the bottom up and from the top down. The hierarchical conception of the administration involves the challenge of a change in the managerial mission and a high level of commitment in the management of public workers. We could say that transparency and good governance represent the great opportunity that Weber postulates when he recognises and develops the huge potential for change in the word *charisma* of the civil servant.

The management of transparency and good governance should recognise the complexity we are up against, and should also be able to work towards a *democracy of authenticity*.

In today's globalised society, the coexistence of the public and private spheres has become an everyday reality, especially in the public procurement of services of general interest such as energy supplies, water, mobility, social housing and waste management, among others. The coexistence of transparency regulations, public procurement and fairness European directives and the

growing penal dimension of the crimes liable to be committed in this sphere by both public and private stakeholders have brought us to see the need to share thought and action.

As director of the Transparency Agency of the Barcelona Metropolitan Area, which comprises 36 municipalities of various sizes and is presided over by the Mayor of Barcelona, I believe that it is necessary to offer a magazine like this, in which the word *lux* serves as a starting point to open windows that, with the force of the word, entwine legal debate and humanist thought, and in which the force of images, with silence, enables readers to understand that the scope of today's challenge of good governance is as huge as the sea, but where a commitment to individual creation is as indispensable as the construction of new public and immaterial cathedrals.

Creation and commitment in the age of transparency. Construction of a new dimension of metropolitan collectiveness that puts people, citizens and fairness—the essential cores of the notion of social justice and good governance—at the centre of things.

Gemma Calvet Barot

Director of the Transparency Agency
of the Barcelona Metropolitan Area

TRANSPARENCY



CAN IT BE DONE?

Human beings are doomed to pitfalls. Whether individually or collectively, there is a special interest in setting traps. Even if they are obvious, we fall into them. Seeing them doesn't make them avoidable. We are human, for good and for evil, and good and evil are not to be sorted out with just a few rules. Morals are subject to too many values to be universally consumable. We have built our organisation on a pillar of restrictive freedom that becomes stronger or weaker depending on the social and economic times (I don't know if there's much sense in separating those two terms). The link with possession forms part of culture. All our representations are based on the fact of having or not having, whether they are people or golden calves. Some find a balance quickly and others are in a hurry to find a balance. The starting line is shifting and the finishing line is always ambitious. Talking about it is both beneficial and frustrating. We get the feeling that we have gone part of the way, but we never quite get to where all is justice, peace and the passing of the seasons. This finishing line doesn't exist in the world of the liv-

ing, but the possibility of imagining a much more correct functioning of the institutions is the same as the possibility of making it happen. There are instruments and hands that are capable of playing without cheating. The rights of everyone must prevail in an unfair society.

A government is a body made up of people who work under a set of inherited rules that can, like any inheritance, be forgone. In order to advance as a society we have had to break many of these rules that our male ancestors wrote or proclaimed. Disobeying what is morally unacceptable for a global improvement of the whole of humanity should be almost an obligation. But as individuals, the global concerns us to a relative degree. If the problem doesn't affect me it doesn't exist. We live in a dark bubble. A transparent one would never do. Transparency forces us to see what we don't want to see, even if it's for our own good. Our own good is our own evil. The commitment to take responsibility for what we do, the way we live, what we decide and how we read our own mistakes.

Transparency is not only a way of having accountability between government and us; it is also a way of being accountable to ourselves. The standards we demand must be related to the standards we impose on ourselves. It makes no sense if there is a gulf between those who represent us and ourselves. This is often the case. But even if it is impossible to belong to all tribes, it is necessary to have a common aim between tribes: a relentless, firm struggle against the abuse of power.

The level of corruption today has given us a lot of information. It has talked to us of greed and the complete disaffection felt by certain individuals towards the society around them. It has introduced us, more intimately or less so, to people we see every day in the street and whose gym we don't share. It has explained the importance of control over governments, the independence of the judiciary and ethics, regardless of so many badly made laws. It has shown us what we already knew, although perhaps we are overwhelmed by the size of the network. But

size doesn't matter. With the right tools the network should be unviable. Fragility of convictions forms part of the construction of a person. The fact of one's only conviction being to take advantage of the common good exclusively for one's individual good is reprehensible by any standard of advanced society. The fight against corruption doesn't consist of an indecent wage for a huge responsibility. It requires a general change of mentality, laws and actions that uphold values that are not predominant in society so that what they represent can set a good example. A tough job, I know. But if those at the top do it right...

Citizens have a right to be informed. That means we have to be able to know if a party sticks to its programme for government (even if nobody reads it) and what budget allocations are made to each government action. For example. But for this information to be transparent, the channels have to be transparent too. And the words. Political language is undergoing increasingly ridiculous—and increasingly crude—malfor-

mations. Politics should be expressed correctly, without the express intention to be “the coolest sound bite of the day”. *Likes* shouldn’t be on social networks. Failing to recognise one’s mistakes and always blaming others is an insult to citizens’ intelligence. Likewise when all the stereotypes are perpetuated and the capacity of half the population is belittled. Greece. January 2015. The party Syriza, with Alexis Tsipras at the head, formed a government of 12 ministers with no women. Was it a good government? Was it ethical? Is it important for any government to take into account the representation of half its population? It is fundamental. The situation of inequality between men and women has to do with the social representation of women, historically mistresses of their homes. The street belonged to men. Neither is it good government nor is it ethical for any party to discriminate against women. This is a major goal to achieve any generous change in the formation of a good government. A balanced representation represents a new way of working and understanding each other. Any practice that turns its back on a feminist

– and therefore political – vision will not enable any of us in general to advance. The street belongs to women too. Rights belong to women too. Bravery to make profound changes is not bravery; it is a necessity. For the good of humanity.

Is it possible to govern today without falling into any of the traps laid by the system to evade annoying obligations? What happens when the whistle is blown on a dishonest, corrupt, perverse practice? Do citizens really want an ethical government or a good government? A good government can meet ideological and economic needs that are not ethical. Or can it? Can it be done? Questions are always a good way forward.

Natza Farré



Sant Climent de Llobregat. Church tower
© KIM MANRESA

A LOCALIZED EVIL

I remember a small traffic accident I had in Bolivia, almost forty years ago. It was in a quiet residential area of La Paz. I was driving across a street and a car crashed into mine at high speed. The driver was a young boy, fifteen or sixteen years old. He had no driving licence. Neither he nor I was hurt, but his car was badly damaged. Mine, a jeep, came out of it quite well.

We called the police, who took note of everything, and we went to the court, where there was a short trial in which the boy was inadvertently replaced by his father, a wealthy businessman. Everything went very quickly. One expert said that, after measuring the braking traces, the boy's car speed was seventy kilometres per hour, just over the limit of sixty. Surprised, I said that would perhaps have been the speed if the car had stopped on its own, but that it had hit me, so the speed at the moment of the impact had to be added. The judge said it was not necessary, that was irrelevant. He also said that I shared part of the responsibility for what had happen-

ed because, although I had looked before crossing the street, I had not looked well enough, because I had not seen the other car coming.

The result was that, since the damage to the other car was four times greater than the damage to mine, my insurance company had to pay part of the damages. I was outraged, but the company's representative told me that the judge had been bribed by the other party and I should let it go because there was no alternative. There was no mention of whether the boy had a driving licence or not.

I still wonder how much money the father of the boy paid to that venal judge, but it probably wasn't very much. In Bolivia at that time, corruption was a livelihood for many people, and the decisions of civil servants, judges and policemen could be bought for a few banknotes. This happened decades ago, and it's probably not that way today.

We are now convinced that we live in a corrupt country. According to the May Barometer of the Socio-

logical Research Centre, corruption is the second problem that most concerns us, behind unemployment and far ahead of immigration, drugs, health, justice administration and public security.

But the corruption in Spain bears no relation to that of truly corrupt countries. Justice is slow and can be unpredictable, but judges can't be bribed. Tax inspectors don't turn a blind eye. Policemen don't sell themselves to the highest bidder. Civil servants don't demand 'incentives' to deal with our needs.

And yet, there is no doubt that corruption exists. According to the International Transparency Index, which evaluates the levels of corruption of 176 countries with a score ranging from 0 (highly corrupt) to 100 (very clean), Spain stands in 41st place with 58 points. It has more corruption than Uruguay, France, Poland and Portugal, and less than Latvia, the Czech Republic, South Korea and Italy. In other words, we are somewhere in the middle, among the most corrupt countries in the European Union and the least corrupt in the world.

There is, however, a lack of proportion between the actual level of corruption, which is not as high as we think, and our perception that it is a problem of exceptional gravity. There have been times in recent years when newspapers barely talked about anything else. I wonder whether this lack of proportion is due to the high concentration of corruption that we suffer. If judges, civil servants and police are generally not corrupt, who is? Well, the answer is many politicians, especially at the regional and local level.

If we think about it carefully, we see that a considerable proportion of the scandals are linked to the illegal financing of political parties through the awarding of public contracts and reclassification of land for construction. Among the parties that have had government responsibilities, there is not one that is not being prosecuted, although some are involved in more cases than others. There are autonomous regions where it is hard to find anything clean. Some municipalities have had to be taken over. Some politicians—the whose names are well

known— have used their positions to get rich.

Given the highly concentrated source of corruption (a very localized tumour, which has not metastasized), it is difficult to avoid the impression that we could reduce it immediately if the rules on public procurement, reclassification of land and financing of political parties were applied strictly. The criminal code, for example, states that companies guilty of corruption may not participate in public tenders for a specified period of time. If this rule were applied seriously, large companies would think twice before bribing anyone, because a sentence would lower the value of their shares and could force executives to resign.

Why is this not being done? Why are the existing rules not being applied? Sometimes it is difficult to avoid the impression that it is because those in positions of responsibility, the political parties, would suffer the worst consequences. But the level of social tolerance has fallen sharply, and justice is acting slowly but inexorably. The procedures used by corrupt politicians

and their accomplices have been seen by everyone. The parties are subject to very strict vigilance. There may still be more cases from recent years, but the tumour has been controlled.

There are many degrees of corruption and here we have not reached the worst, by a long way. Fortunately, we are very unlikely to reach it. A farce like the La Paz trial would be unthinkable here.

Carles Casajuana



Badalona. L'edifi underground station
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The transparency obligations of private entities that receive public funds or provide public services or services of general or universal interest

Isabel Baixeras Delclòs

I. Introduction

1. Object of the study

This article makes a legal analysis of the subjective scope of Law 19/2014, of 29 December, on Transparency, Access to Public Information and Good Governance (hereinafter the Catalan Transparency Law) and, specifically, in relation to the legal interpretation of Article 3.1d and e of said law.

We analyse the determinations that the Law provides for entities associated with the Metropolitan Area of Barcelona (AMB) that exercise public functions or administrative powers, that provide public services, or that receive public funds for their functioning or to carry out their activities under any legal principle, and for those that carry out activities that are legally qualified as services of general or universal interest.

In particular, we aim to clarify the scope of responsibility assigned to the AMB regarding the effectiveness of the duty of transparency of these entities.

2. The principles underlying the legislation on transparency

The principles of transparency, access to public information and good governance are cited in the Preamble to the Catalan Transparency Law as the basic principles for assessing the quality of the democratic functioning of public administrations.

The purpose of the law is to establish a system of relations of people with the public administration and with other legally bound entities, with the following objectives:

- To help citizens to gain knowledge of public activities
- To encourage citizen participation
- To improve the quality of public information and administrative management
- To ensure accountability and responsibility in public management

Paragraph 9 of the Preamble of the Law refers to citizens as recipients of tools that will provide them with knowledge of the internal organisation of the administration, of the facts on which their decisions are based, and of the reasons for their actions, including the financial commitments that they involve.

The invocation of the democratic principle and the mention of citizens as recipients of the tools of transparency are also present in the Preamble to Spanish Law 19/2013, of December 9, on Transparency, Access to Public Information and Good Governance (hereinafter the Spanish Transparency Law). The Preamble states that public authorities should be accountable to society and warns that this is only achieved when citizens can know how decisions that affect them are made, how public funds are managed, and under what criteria the institutions operate.

We found some of the constitutional foundations of these two laws in Article 1.1 of the Constitution, according to which Spain is a social and democratic state of law which advocates as the highest values freedom, justice, equality and political pluralism, and Article 9 of the Constitution, which states that the public authorities are subject to the Constitution and to the body of laws, and charges the public authorities to promote the conditions for real and effective freedom and equality of individuals and social groups, to remove the obstacles that prevent or hinder their full effect, and to facilitate the participation of all citizens in political, economic, cultural and social life. The prohibition of arbitrariness of public authorities, guaranteed in Article 9.3, is also a clear link between the Spanish and Catalan laws and the Constitution. Article 105b, which provides for public access to administrative files and records, unless it affects the security and defence of the State, the investigation of crimes and the privacy of individuals, also provides constitutional protection to the legislation on the right to transparency.

Both the Spanish and the Catalan laws on transparency offer citizens the tools for controlling public management, and aim to achieve the traceability of public funds to their destination in order to empower citizens and satisfy the principle of democracy.

In European law, the Charter of Fundamental Rights of the European Union guarantees “the right of every person to have access to his or her file” (Art. 41) and the “right of access to European Parliament, Council and Commission documents” (Art. 42). The latter was already stated in Article 255 of the Founding Treaty of the European Economic Community, and is included in

Article 15.3 of the consolidated version of the Treaty on the Functioning of the European Union, which was implemented by Regulation 1049/2001, of 30 May, of the European Parliament and of the Council. Although these rules are only directly applicable to the institutions of the European Union, the Spanish courts often invoke them in the interpretation of domestic law.

This European regulation links the right of access to the principles of transparency, democratic control of public authorities, and participation. The interpretation that the Court of Justice of the European Union makes is restrictive regarding the exceptions to access: the purpose of the regulation is to promote good administrative practices and ensure transparency as an element of democratic control.

The principle of transparency is present in many provisions of the Statute of Autonomy of Catalonia. It is mentioned in Article 71, which refers to the principles of organisation and functioning of the Administration of the Generalitat, which include the following:

- It serves the general interest with objectivity.
- It is fully subject to the law.
- It acts in accordance with the principles of coordination and has a cross-cutting approach, in order to guarantee the integration of public policies.
- It must make public the necessary information to enable citizens to evaluate its management, in accordance with the principle of transparency.

The Catalan Transparency Law is also founded on this statutory provision.

The values to be taken into account in the interpretation of each provision of the Law that we are analysing are the consideration of citizens as recipients of the instruments that the law offers, which must allow them to evaluate the management of public management, and the democratic principle as the ultimate inspiration of the principles of transparency and good governance.

3. Transparency, traceability and free competition

Article 1 of the current text of the Law on Public Sector Procurement, approved by Royal Legislative Decree 3/2011, of 14 November, refers to the principle of transparency of procedures. The Law links this principle to the need to ensure the efficient use of funds for carrying out public works, acquiring goods and contracting services, and relates this principle to the requirement of prior establishment of needs, safeguarding of free competition and selection of the most economically advantageous offer.

The relationship between the principle of transparency and that of preservation of free competition is also laid down in Directive 2014/24/EU of the

European Parliament and of the Council, of 26 February 2014, on public procurement. Although the deadline for transposing the Directive into the national law of the Member States has not yet expired (the two years provided end on 18 April 2016), both the imminent expiry and the need to interpret national law in order to preserve the useful effect of the new regulation—characterised by the principle of primacy of European Union Law—make it advisable to interpret Spanish law on contracts in light of the principles that underpin the European regulation. Because the principle of transparency governs the selection of contractors and the awarding of contracts, the Spanish government must bear in mind that tender procedures must be accompanied by appropriate safeguards to guarantee its observance.

The Directive relates transparency to the traceability of the procurement process. Consideration 126 states that the traceability and transparency of decision making in procurement procedures are essential for ensuring sound procedures, including efficiently fighting corruption and fraud.

Contracting authorities should therefore be prepared to provide the public with access to the key decisions and elements of each procurement procedure and to all contracts of high value that have been awarded.

4. Subjective scope of the Spanish Transparency Law

The Spanish Transparency Law includes in its scope entities comprising the local administration (Art. 2.1a); public entities with legal personality related to or depending on any of the public administrations (Art. 2.1d); corporations in which the above entities have a shareholding of more than 50% (Art. 2.1g); public sector foundations (Art. 2.1h) and associations formed by these administrations, bodies and entities (Art. 2.1i).

According to Article 3, the provisions on transparency of public activities are also applicable to political parties, trade unions and business organisations, and to private entities that receive during the period of one year public aid or subsidies to an amount exceeding €100,000 or receive 40% of their total annual income from public grants or subsidies, if their income is at least €5,000.

Article 4 of the Spanish Transparency Law refers to persons other than those mentioned in the above articles that provide public services or exercise administrative powers. It states that not all the provisions of Chapter II are enforceable, but only the obligation to provide the administration, organisation or entity to which they are associated with any information that the administration, organisation or entity in question needs for compliance with its own transparency obligations. This obligation, which extends to public sector contractors in the terms laid down in the respective contracts, is only required on demand.

Therefore, the transparency regulations to which the Spanish Transparency Law submits private juridical persons providing public services or exercising administrative powers involves the obligation of meeting the requirements that the administration communicates to them.

The transparency obligations required of public sector contractors are limited to those provided for in the contract.

5. Special features of the subjective scope of the Catalan Transparency Law

The Preamble of the Catalan Transparency Law refers to the need for all public authorities to notify the public of their activities and of the management of public funds that have been put at their disposal in accordance with the principle of responsibility and in the context of a democratic state of law. It also expresses the desire to meet society's demand for transparency by extending its scope to cover all public bodies in Catalonia, whether or not administrative.

It also states that the main subjective scope of the Law is the public administrations of Catalonia, and that this notion includes the Administration of the Generalitat, local authorities and all the bodies and entities of an administrative nature that are dependent on or associated with these administrations.

In the next paragraph, after referring to the public administrations of Catalonia and the bodies and entities that depend on or are associated with them (which it qualifies as the main subjective scope of the regulations on transparency and good governance), the Preamble states that private persons exercising these activities are included within the scope, having transparency obligations despite being governed by private law. The meaning of the adverbative “however” emphasises that, in these cases, compliance with the transparency obligations and provision of information does not become effective directly, but through the public administrations responsible for the service or for overseeing it.

The Preamble provides two justifications for extending the subjective scope: administrative organisations are characterised by their diversity; and some public activities or activities of public interest are increasingly carried out by private agents.

The scope of the Law also extends to another type of juridical persons governed by private law: organisations, associations and foundations whose income is significantly obtained from public subsidies or grants.

The inclusion of private law entities within the scope of the rules on transparency in the Catalan Transparency Law goes one step further than the Spanish Transparency Law.

The legitimacy of this step is discussed below.

A. Citizens as a reference

We have already mentioned that the Catalan Transparency Law aims to establish a system of relations between people and public service providers based on knowledge of public activities, encouraging citizen participation, improving the quality of public information and administrative management, and ensuring accountability and responsibility in public management. We also noted that citizens are the recipients of the tools of transparency.

The Statute of Autonomy of Catalonia states that public authorities are at the service of the general interest and the rights of citizens. The service relationship of public authorities regarding citizens legitimises the subjection of private persons who exercise public activities to any function of control that citizens wish to apply to them.

B. The particular system in which public services are provided should not alter the right of citizens to access them in conditions of quality

Article 30.1 of the Statute of Autonomy of Catalonia proclaims the universality of people's right to access public services and to a good administration. This right corresponds to a duty of public authorities to establish the conditions of access and quality standards of these services. The last paragraph of this provision makes an important statement: the public administrations shall set the conditions of access and quality standards of public services "regardless of the system under which they are provided".

The right of citizens to access public services and to good administration regardless of the system through which they are provided is thus enshrined in the Statute. To the extent that the citizen's right to access services in conditions of quality includes the right to control the proper management of these services using the tools of transparency, it is fully reasonable for the Catalan legislation on transparency and good governance to include in its scope private persons who exercise public activities.

C. The progressive increase in the participation of the private sector in carrying out public policies and providing public services

I stated above that the Preamble of the Catalan Transparency Law warns that some public activities or activities of public interest are carried out by private agents, and that this phenomenon is becoming increasingly widespread.

The Statute of Autonomy is fully aware of the progressive increase in private sector participation in the provision of public services and provides tools to subject it to the inspiring principles of public management. For example, Article 71.6 states that, when regulating the organisation of the Administration of the Generalitat, laws should not only regulate its purely administrative structures but also do the following:

- Provide types of functional decentralisation.
- Provide various forms of public and private personality that the Administration of the Generalitat can adopt.
- Deal with the forms of organisation and management of public services.
- Regulate the action of the Administration of the Generalitat under private law.
- Regulate the progressive increase in the participation of the private sector in carrying out public policies and providing public services.

It therefore appears that the increase in private sector participation in the provision of public services is, in Catalonia, a welcome phenomenon, but the Catalan laws have the statutory mandate to regulate the participation of this sector not only in the provision of public services, but also in the execution of public policies.

The fact that this statutory mandate is related to the constitutional right as a person and as a member of a social group to participate in political, economic, cultural and social life in conditions of freedom and real and effective equality confirms the suitability of subjecting private agents providing public services to the regulations on transparency and good governance arising from the Catalan Transparency Law.

6. Basic lines of the Catalan Transparency Law

The basic lines of the Catalan Transparency Law are the following:

- The regulation and guarantee of transparency in public activity.
- The regulation and guarantee of people's right of access to public information and documents.
- The establishment of the principles and obligations of good governance that must be observed in the actions of senior management, staff in the administration and other persons to whom this law applies.

- The application of open government and the fostering of citizen participation and collaboration.
- The regulation of the system of guarantees and liability in cases of breach of duties and obligations.

The desire to extend the scope of the law to all public bodies of Catalonia, whether or not they are administrative, is reflected in Article 3.1d: the law applies to natural and juridical persons that exercise public functions or administrative powers, that provide public services, or that receive public funds for their functioning or to carry out their activities under any legal principle.

In the course of this report, we will analyse how these providers of public services or recipients of public funds are subjected to the Catalan transparency system.

II. General obligations of the Barcelona Metropolitan Area as the authority responsible for transparency

1. Overall subjection to the rules of transparency

Title II of the Catalan Transparency Law, regarding the entities that make up the local administration, came into force one year after the Law was published in the Official Journal of the Generalitat of Catalonia. Therefore, as of 1st January 2016, the Barcelona Metropolitan Area (AMB), in its capacity as a local authority (see Article 1.2 of Law 31/2010, of 3 August), is subject to the rules on transparency in public activities, active publicity, transparency in administrative management and reuse of public information that are set forth in Articles 5 to 17 of said law.

2. Provisions of the Metropolitan Organic Regulations

Article 73 of Title IV of the Metropolitan Organic Regulations, of 18 December 2012, regulates transparency, and states as follows:

1. The AMB considers broadening and increasing the transparency of its activities as a goal and an obligation, and recognises and guarantees the right of citizens and municipalities to access information on these public activities.

2. The AMB also recognises the fundamental right to participate on equal terms in public affairs, directly or through representatives, and agrees to protect and facilitate this right by promoting participation in the development, provision and evaluation of its public policies with full respect for the principles of pluralism, free enterprise and autonomy.

3. With the aim of increasing the level of participation, the AMB agrees to review and improve the channels and mechanisms that facilitate the participation of citizens and municipalities in the management of their affairs, and to expand them by testing and putting into practice new forms of participation based on new information and knowledge technologies.

4. The AMB will ensure that this culture of transparency and participation is incorporated into the practices and working methods of all its services and departments, who will draft and publish regularly updated information on their activities related to the operation of public services, so as to ensure transparency, monitoring and control.

3. Plans of the Metropolitan Action Plan

The commitment of public resources to administer and manage services with transparency, providing access to information and data channels and participation is, moreover, one of the defining forces of the AMB, expressed in point 04 of the 2011-2015 Metropolitan Action Plan.

4. Obligations of the AMB as a responsible administration

In its capacity as an administration that has links with natural and juridical persons that exercise public functions or administrative powers, that provide public services, or that receive public funds for their functioning or to carry out their activity under any legal principle, the AMB must comply with the obligations established for it by law. Article 3.2 of the Catalan Transparency Law gives it responsibility for complying with the obligation of transparency applicable to such private individuals and entities.

The text of the provision is as follows:

2. In the cases set out in Article 3.1d and e, the obligations under this law must be met by the responsible administration. To this end, private individuals and entities must inform the administration of the activities directly related to the exercise of public functions, management of public services and receipt of public funds, and of any other activities within the supervision and control of the administration in the case of services of general or universal interest. They must also report the remuneration paid to senior management if the turnover of the company linked to activities carried out on behalf of public authorities exceeds twenty-five percent of the company's turnover.

The use of the concept “responsible administration” could create some doubts, because there are two responsibilities:

- The responsibility of the administration responsible for providing the service, which is therefore responsible for an optimal provision to citizens.

- The responsibility of the administration responsible for obtaining the information necessary to ensure transparency from the private individuals and entities that provide the services.

Since the obligations established by the Catalan Transparency Law must be met by the administration responsible for providing the services in question, both responsibilities are held by the same entity.

Therefore, the administration responsible for providing the services must obtain from the private individuals and entities that provide services the information necessary to ensure transparency. It must publish this information permanently and keep it up to date so that it is understandable to people, through media that allow easy and wide access to data and facilitate participation in public affairs. The citizens will thus benefit from both responsibilities.

I base this proposed interpretation on the second paragraph of point 2 of the Preamble:

However, given the diversity of administrative organisations and the fact that more and more public activities and activities of public interest are being carried out by private actors, the Law also extends its scope to private persons who carry out these activities. However, in these cases the obligations of transparency and disclosure may be fulfilled by the public authorities responsible for the service or for overseeing it. From this private perspective, the scope of the Law also extends to organisations, associations and foundations whose income is significantly obtained from public subsidies or grants. It also extends to the regulation of the Register of Stakeholders, so that citizens can identify the people who act as such and know the relations they have with the administration in defence of specific interests, as well as the ethical rules to which they must adhere.

To make the interpretation more precise, let us see the slightly fuller explanation that is given in Article 60.2 on who must establish indicators for drawing up surveys and consultations. This function is entrusted to “the administration responsible for the service”.

The text of Article 60.1 and 60.2 is as follows:

- 1. Users have the right to be consulted periodically and regularly regarding their degree of satisfaction with the public services and activities managed by the public administration.*
- 2. L'Administració responsable del servei objecte de consulta ha d'establir els indicadors d'acord amb els quals s'han d'elaborar les enquestes i la periodicitat de les consultes.*

Thus, the AMB must act as the responsible administration in terms of transparency regarding the services and functions that it is competent to provide and carry out under this law.

III. With regard to natural or juridical persons exercising public functions or administrative powers or providing public services included in Article 3.1d of the Law

Article 3.1d of the Catalan Transparency Law differentiates two categories of persons to whom the Law is applicable:

- *Natural or juridical persons other than those listed in paragraphs a, b and c that exercise public functions or administrative powers, or that provide public services.*
- *Natural or juridical persons who receive public funds for their functioning or to carry out their activities under any legal principle.*

The juridical persons that exercise public functions or administrative powers or provide public services set out in Article 3.1, paragraphs a, b and c, are the following: the Administration of the Generalitat and the entities of the local authorities of Catalonia; public bodies and entities; companies that have a majority public shareholding or that are associated with the administration; foundations of the public sector; public law entities that are dependent on or associated with the aforementioned administrations; public law entities that act independently or with a special autonomy recognised by law that exercise functions of external regulation or supervision over a particular sector or activity; the institutions of the Generalitat referred to in Title II, Chapter V of the Statute of Autonomy; professional colleges and public law corporations with regard to the exercise of their public functions; consortia or other forms of association and their associated entities and companies in which one of these administrations has a majority shareholding; and the public universities of Catalonia and the entities that depend on or are associated with them or in which the universities have a shareholding, including companies, foundations and other instrumental entities.

In coherence, paragraph d must refer to natural or juridical persons other than the aforementioned, which also exercise public functions or administrative powers, or provide public services.

1. Public services that are within the powers of the AMB

In order to determine the specific entities referred to in Article 3.1d that create a responsibility of transparency for the AMB, we must identify the public services that are their responsibility and are provided by indirect management systems.

Article 14 of Law 31/2010, of 3 August, on the Barcelona Metropolitan Area, details the powers and services held by the AMB. Due to the importance of these powers and services for the purpose of the present report, I will break down the functions and services below:

1. Functions related to urban planning
2. Functions and services related to urban transport
 - a. The surface public passenger transit service, excluding the tram service.
 - b. The underground public passenger transit service.
 - c. The public functions in the regulation and administrative control of the taxi service.
 - d. The functions of approval of the Metropolitan Urban Mobility Plan.
 - e. The functions of coordination and management of the complementary mobility services that entail the special or private use of the public thoroughfare and the regulation and management of passenger transport for cultural and tourist purposes, by delegation of town councils.
 - f. The function of promoting sustainable transport.
3. Functions and services related to water
 - a. The home drinking water supply service.
 - b. Direct and indirect management of water.
 - c. The function of regulating water rates prior to authorisation by the Catalan Prices Committee.
 - d. The public system of sanitation, waste water treatment and reclamation.
 - e. The function of coordinating the municipal sanitation systems and, in particular, the planning and integrated management of rainwater and waste water evacuation and the sewer networks.
4. Functions and services related to waste
 - a. The service of treatment, recovery and use of municipal waste and rubble from minor works and home repairs.
 - b. The function of coordinating the municipal waste collection systems.
 - c. The service of selective collection of packaging.
 - d. The household waste and recycling service.
5. Functions and services related to the environment
 - a. The coordination and formulation of a Metropolitan Action Plan for the protection of the environment, health and biodiversity, and measures to combat climate change, as well as the formulation of a metropolitan Agenda 21.
 - b. The function of collaborating in the drafting of acoustic capacity maps and strategic noise maps.
 - c. The function of issuing the environmental reports established by the legislation on intervention of the Environmental Administration in the procedures for granting municipal environmental licences.
 - d. The function of collaborating with the municipalities to programme environmental planning policies.
 - e. The function of promoting the management of public and private renewable energy facilities.

6. Functions and services related to infrastructure of metropolitan interest
7. Functions of spatial structuring necessary for the articulation, connectivity, mobility and functionality of the territory, and actions that refer mainly to infrastructure and management of mobility, parks, beaches, natural spaces, facilities, provisions, and technical, environmental and supply installations and services
8. Functions and services related to economic and social development
 - a. Functions of promotion of economic activity, promotion of employment and creation of companies in the fields of industry, commerce, services and tourist resources.
 - b. Functions of promotion of a metropolitan strategic plan that favours modernisation, research and innovation.
9. Functions and services of social and territorial cohesion
 - a. Functions of promotion of the implementation of common public policies related to municipal services and promotion of social and territorial cohesion.
 - b. Participation in the Security Committee of the territorial area to promote public policies related to public coexistence.

2. Service providers

According to Article 17 of Law 31/2010, of 3 August, on the Barcelona Metropolitan Area, one of the decisions that the Council must take in relation to the provision and establishment of services is the form of management that it will have.

With regard to planning and programming, Article 15 of the aforementioned law refers to the Metropolitan Action Plan, approved by the Metropolitan Council, which establishes the programmes, lines and actions that are suitable for the provision and establishment of metropolitan services. The action programmes implement the Action Plan and regulate the provision and, if appropriate, the establishment of metropolitan services.

In the 2011-2015 Metropolitan Action Plan, approved in July 2011, we see that the Metropolitan Council set out the specific functional objectives and measures applied in the development of the powers granted by law, as well as the broad lines of action and the sectoral objectives. The Plan is structured on the basis of five management areas: Administration and Territory, Transport and Mobility, Environment, Economic Development, and Strategic Planning. The information is presented in two sections for each area: an introduction referring to powers, lines of action, sectoral objectives and the mission; and the functional objectives and measures.

In cases in which the AMB has decided to use indirect management of the service through a public service management contract, the contractors are subject to the provisions of Article 3.1d of the Catalan Transparency Law. As subjects obliged by the legislation on transparency, these contractors must inform the AMB of activities directly related to the exercise of public functions, so that, as a holder of the power and the responsible administration, the AMB can carry out the duties of transparency that are incumbent upon it.

3. Subcontractors

It should be noted that the consolidated text of the Law on Public Sector Procurement, approved by Royal Legislative Decree 3/2011, of 14 November, provides for subcontracting. Article 227 states that the contractor may agree with third parties for the partial provision of the service, unless the contract or specifications state otherwise or, due to its nature and conditions, it is deduced that the service must be carried out directly by the contractor.

It is interesting to determine whether the association that the subcontractor acquires with the administration makes the latter the responsible administration for the purpose of transparency.

With regard to the issue in question, Article 227 of the consolidated text emphasises that the successful bidder is obliged to provide the administration with prior notification in writing of the following:

- The intention to subcontract
- The part of the provision that it intends to subcontract
- The identity of the subcontractor
- Justification of the ability of the subcontractor to provide the service.

If the contractor intends to enter into subcontracts that are not provided for in the tender, they must abstain from subcontracting until they obtain the consent of the administration, or until twenty days have elapsed since their notification of the intention to do so, and they must provide the justifications mentioned above (except in cases of emergency).

The subcontractor is liable only to the main contractor, who will assume before the administration the total responsibility for execution of the contract in accordance with the special conditions for public contracts and the terms of the contract. The knowledge that the administration may have of the subcontracts entered into through any notification or authorisation that it grants does not alter the exclusive responsibility of the main contractor.

The question arises as to whether the “total responsibility” that the contractor assumes before the administration, with the release of the subcontractor from

its obligations, refers solely to the obligations related to the execution of the contract or may extend to the obligations related to transparency.

Regarding the legal system, we have already seen that the competent administration must know the identity of the subcontractor who provides the service and the scope of its provision; in short, it cannot be unaware of it. We must also consult the guiding principles of transparency, which give the criteria for interpretation.

The view of the right to transparency as a citizen's right to receive provisions of public services, regardless of the agent that carries them out, and the interpretation of the law on public service contracts in accordance with the principle of traceability of the process that is deduced from Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement, lead us to conclude that a subcontractor who provides services, whose identity must be known by the administration responsible for the service, is directly linked to the administration responsible for the service for the purpose of the information that must be subject to transparency.

4. Conclusion on the AMB's responsibility regarding the duty of transparency of parties that exercise public functions or administrative powers, or that provide public services

It should be concluded that natural or juridical persons that exercise public functions or administrative powers and that provide the services referred to in Article 3.1d of the Law are natural and juridical persons who are contractors and subcontractors of the management of metropolitan services related to urban planning, urban transport, water, waste, the environment, infrastructure of metropolitan interest, economic and social development, and social and territorial cohesion.

These natural and juridical persons have the status of obligated subjects for the purpose of the Catalan Transparency Law. The AMB, as the administration responsible for the services, is also responsible for enforcing the transparency obligations of these obligated subjects.

IV. Natural or juridical persons who receive public funds for their functioning or to carry out their activities under any legal principle

According to the Preamble of General Law 38/2003, of 17 November, on Subsidies, a large part of the financial activity of the public sector is channelled through subsidies, in order to respond with financial support to social and economic demands of people and public or private entities.

The Preamble also states that subsidies are an important mode of public spending and must therefore conform to the guidelines of budgetary policy.

The Preamble later states that, thanks to the subsidy policy, the financing needs of the public sector have been progressively reduced, with a dynamic effect on activity, growth, economic development and job creation. The Preamble relates these effects to the austerity of current expenditure and a better selection of public policies based on spending priorities and greater control and evaluation.

Natural or juridical persons that receive public funds for their functioning or to carry out their activities under any legal principle are also considered obligated subjects for the purpose of the Catalan Transparency Law.

1. What subsidised entities does the Catalan Transparency Law refer to?

The first question that arises is whether the subjection to the transparency system of Title II of the Catalan Transparency Law includes persons and entities that receive any subsidy, regardless of the amount, or whether there is any limitation thereon.

The last part of Article 3.1d suggests that the obligation of transparency includes all persons who receive public funds for their functioning or to carry out their activities under any legal principle, regardless of the amount received and the proportion of overall income, but Article 3.4 provides further details:

4. The transparency obligations established by Title II are also applicable to political parties, associated associations and foundations, trade unions, business organisations and private entities in the following cases:

- a) If they receive public subsidies or grants of more than €100,000 per year.*
- b) If at least forty percent of their annual income comes from public subsidies or grants and this amount is more than €5,000.*

2. The obligation of active publicity that is the responsibility of the administration awarding the public subsidy or grant

The duty of active publicity that is the responsibility of the AMB in relation to any subsidies that it has awarded is added to the obligation established in Article 18 of Law 38/2003, of 17 November, on General Subsidies, which is that of publishing them in the corresponding official gazette, stating the call, the programme and the budget item to which they are allocated, the beneficiary, the amount awarded and the purpose or purposes of the subsidy.

Since this is an activity covered by Article 3.1a of the Catalan Transparency Law, which is not the object of this report, I merely state this.

3. Scope of the obligation of transparency for subsidised entities that are obligated subjects

Law 38/2003, of 17 November, considers that the principle of transparency should be taken into account in the management of subsidies. Article 8.3 states as follows:

The subsidies referred to in this law must be managed in accordance with the following principles:

- a) Publicity, transparency, competition, objectivity, equality and non-discrimination.*
- b) Effectiveness in meeting the objectives set by the awarding administration.*
- c) Efficiency in the allocation and utilisation of public funds.*

In addition to the obligations related to financial control and control of the purpose, which are governed by the sectoral legislation and are relevant to the administration that has awarded the subsidy, the subsidy system also includes the obligations arising from the transparency regime, which should allow control by citizens.

Article 15 of the Catalan Transparency Law contains specific obligations for subjects that exercise the subsidised activity. I will not refer to all of them, because they are outside the scope of this report, but I will mention those of point 2, because the description of the obligation of the administration awarding the subsidy involves an obligation for the beneficiary:

The regulatory bases for the awarding of public subsidies and grants amounting to more than €10,000 must include the obligation of the beneficiaries, if they are legal entities, to provide the obligated subjects with information on the remuneration of their management or administration bodies, for the purpose of making them public. In legal cases in which a process of competition is not used for the awarding of subsidies or grants, this obligation must be included in the corresponding administrative act or agreement.

This specific provision includes one of the duties of legal entities that receive a subsidy of more than €10,000: the obligation to communicate to the responsible administration (the subsidising entity), in order to make it public, the information regarding the remuneration of their management or administration bodies.

V. Entities referred to in point 1.e that create responsibility for the AMB with regard to transparency

The increasing provision of public activities or activities of public interest by private agents is mentioned in the Preamble to the Catalan Transparency Law (referred to above) and in Article 71.6 of the Statute of Autonomy of Catalonia, with the invitation to the administration to regulate the participation of the private sector in the execution of public policies and the provision of public services. It is also mentioned in Article 3.1e, which states that natural or juridical persons that carry out activities qualified legally as services of general or universal interest are subject to transparency obligations.

1. What are services of general economic interest?

Services of general economic interest are commercial service activities that fulfil missions of general interest and that are subject to specific public service obligations. These are the transport, energy and communications networks and postal services.

Because of the importance of services of general economic interest in the common values of the European Union and the role they play in promoting social and territorial cohesion, Article 14 of the Treaty on the Functioning of the European Union, consolidated version 2012/C326/01, orders the Union and the Member States, in accordance with their respective powers and in the scope of application of the Treaties, to ensure that these providers act in accordance with the principles and conditions that allow them to fulfil their assignment.

The European Parliament and the Council must establish these principles and conditions by means of regulations, without prejudice to the competence of the Member States, while complying with the Treaties, to provide, order and finance these services.

2. How are the rules of free market and competition applied to them?

The European Union wishes to ensure that competition is not distorted in the single market and that the same rules are applied to all companies operating in the European area. Title VII, Chapter 1 of the Treaty on the Functioning of the European Union lays down the bases of the Community rules on competition. According to Article 106.2, “Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”

Thus, companies that provide services of general economic interest will only be exempted from the regulations on competition when the fulfilment of the specific mission entrusted to them so requires, competition is not distorted, and the public interest is not opposed.

3. Transparency in the context of guaranteeing the rights of consumers and users

The provision of many of these basic or essential services has developed from its initial situation as a public service provided exclusively by the administration to a situation in which it is provided by private companies in the free market system that is now predominant.

The liberalisation of the provision of activities considered essential should not, however, imply the reduction of rights and guarantees for users.

One of the basic rights of consumers and users that is proclaimed in Article 8 of the consolidated text of the General Law for the Defence of Consumers and Users and other complementary laws, approved by Royal Legislative Decree 1/2007, of 16 November, is that of obtaining correct information about the services offered in order to provide knowledge about their proper use, consumption or enjoyment.

The rights related to the provision of services that are considered basic or essential in the everyday life of people are becoming increasingly important. These include the right to obtain correct information about the services that are offered to them.

The main consequence of the liberalisation and privatisation of public activities and services that I have referred to is that the administration is no longer the only subject that has public service obligations. Because of the activity that they carry out, some private economic sectors also have them.

The Catalan Transparency Law echoes this and, in order to favour control by citizens of entities that provide services of general or universal interest, organises the duty of transparency through control by the administration that supervises them.

VI. Scope of the responsibility of the AMB regarding the fulfilment of the legal obligations of associated private individuals and entities

Next, I will refer to the AMB's obligations regarding liability for transparency, that is, to what extent and in what way the AMB must enforce compliance with the legal obligations of private individuals and entities that are associated with it and that exercise public functions, manage public services and receive public funds.

1. Distinction between the obligations of the obligated subject and the obligations of the responsible administration

For the purpose of the Catalan Transparency Law, natural or juridical persons that are contractors and subcontractors of the management of metropolitan services, that exercise public functions or administrative powers or provide public services, and persons who, because they receive public funds for their functioning or to carry out their activities under any legal principle, have the status of obligated subjects. The obligations that the law establishes for them must be fulfilled by the responsible administration. This is set out in Article 3.2 of the Law.

Several areas of obligation according to the obligated subject are thus established by the Catalan Transparency Law:

A. In paragraph 1.d of the Law, the obligation of private individuals and entities to provide the administration with which they are associated with the following information:

- a) The activities directly related to the exercise of public functions, the management of public services and the receipt of public funds.

- b) The remuneration paid to senior management if the turnover of the company linked to activities carried out on behalf of public authorities exceeds twenty-five percent of the company's turnover.
- B.** The obligation of the administration responsible for the public service to carry out active publicity in accordance with the requirements of Title II, Chapter II.
- C.** The obligation of the administration responsible for services of general or universal interest.

In all cases, the information that the responsible administration obtains from the entities associated with it falls within the concept of public information defined by Article 2.b of the Catalan Transparency Law:

c) Public information: the information drawn up by the administration and that which it has as a result of its activity or the exercise of its functions, including that provided by other obligated subjects according to the provisions of this law.

2. Analysis of the specific obligations of active publicity

Since the basic and general instruments for the management of public documents to effectively comply with the transparency obligations are the Transparency Portal and the websites of local administrations and other administrations and entities (Article 5.5 of the Law), the publication of the documents in question is a responsibility of the administration or entity managing each portal or web, with the particularity that a complete system of links must facilitate access to the websites of the corresponding public administrations or entities, until an electronic platform for active publicity on the internet is set up.

We must therefore consider how access to the information from the entities set out in Article 3.1d of the Law will be provided on this platform, which is interconnected but depends ultimately on the Administration of the Generalitat, which organises and manages the Transparency Portal.

Article 5 of the Law gives the answer: the subjects referred to in Article 3.1d and e must comply with their transparency obligations in the terms established in Article 3.2. Let us remember that in the cases of Article 3.1d it is the responsible administration that must comply with the obligations of the law. Therefore, the responsible administration must collect from the private individuals and entities the information of the activities that are subject to transparency.

The obligations of active publication and access to the information established by the Law are not common to all entities included in the subjective scope of the Law, so it will be necessary to determine which ones are applicable to the entities set out in Article 3.1d and e of the Law.

To this end, we will consider what is laid out in the law, and we will offer criteria to determine whether the activities are directly related to the exercise of public functions, the management of public services, and the receipt of public funds. The doubts that arise in each case must be integrated taking into account the purpose of the regulation: to make it possible for citizens to evaluate the management of the system of provision of public services, in accordance with the principle of accountability that is linked to the democratic principle.

VII. Content of the obligation of active publicity regarding the activities of the entities set out in Article 3.1d and e of the Law

In order to establish the content of the obligation of active publicity, we will determine its source, we will see its limits, and then we will analyse the different subjects in relation to which there is a general duty of information, to check whether it includes the activity of the entities set out in Article 3.1d and e of the Law.

1. Source of the transparency obligations

In order to qualify the obligations dealt with here, it must be kept in mind that the duties of transparency in public activity are set out in the law, mainly in the Catalan Transparency Law, but also in other legislative texts.

The Catalan Transparency Law provides that the responsible administration must advise the obligated subjects of the transparency obligations in the specifications and regulations of subsidies and grants. However, the duty to expressly refer to the transparency obligations of the contracting persons or beneficiaries of the subsidy at the initiation or refinement of the contract or subsidy does not make a legal obligation contractual.

Indeed, Article 3.1d and e of the Catalan Transparency Law do not link the obligations of contractors and providers of public services to the conditions of their respective contracts. However, they consider the contractors to be associated, with the status of “obligated subjects”, insofar as they provide public services, receive public funds or carry out activities legally qualified as services of general or universal interest.

This legal system does not coincide with that of the Spanish Transparency Law which, when referring to the obligations of contractors of the public sector to provide information, take into account the terms provided for in the respective contracts.

2. Limits

Article 7.2 of the Catalan Transparency Law provides that the principle of transparency must be interpreted and applied preferentially in all cases. Any limitation on the application of the principle of transparency must be based on a limit or an exception expressly established by a regulation with legal status. However, Article 7.1 discusses the limits applicable to transparency obligations, as follows:

1. The limits applicable to transparency obligations are the same as those established in Title III for the right of access to public information, especially those relating to the protection of personal data.

In Article 21 of the Law, we find the limits referred to in Article 7.1.

1. The right of access to public information may be denied or restricted if knowledge or disclosure of the information is detrimental to:

a) Public security.

b) The investigation or penalisation of criminal, administrative or disciplinary offences.

c) Secrecy or confidentiality in the procedures handled by the public administration, if the secrecy or confidentiality is established by a regulation with legal status.

d) The principle of equality of the parties in judicial processes or effective judicial protection.

e) The rights of minors.

f) Privacy and other legitimate private rights.

g) Professional secrecy and intellectual and industrial property rights.

2. The right of access to public information may also be denied or restricted if the information is protected and this is expressly established by a regulation with legal status.

3. Information regarding minors has protected status if knowledge or disclosure of this information may condition the free development of their personality in the future. Access to the information may be denied in this case, unless anonymity can be guaranteed, and without prejudice to the provisions of the following articles.

Article 22 refers to the principles governing the right of access to public information, which must also be taken into consideration in the interpretation of the obligation of transparency. Article 22.1 mentions the principle of proportionality:

1. The limits applied to the right of access to public information must be proportional to the object and the purpose of protection. The application of these limits must meet the circumstances of each specific case, especially the existence of a greater public or private interest justifying access to the information.

Regarding the personal nature of any of the data subject to active publicity, the analogical application of the regulations of Chapter III must give rise to the following clarifications:

Personal data subject to special protection, such as those related to ideology, trade union membership, religion, beliefs, racial origin, health and sex life are not accessible, and must not be the object of active publicity. The same applies to those related to the commission of

criminal or administrative offences that do not entail a public warning about the offender, unless the party agrees (Article 23).

Although Article 24.1 speaks of the limits to the right of access and, by extension, to the duty of transparency, it gives a very useful indication as regards the scope of the transparency. Indeed, Article 24.1 states that:

1. Access to public information must be given if it is information directly related to the organisation, functioning or public activity of the administration that contains personal data that are merely identifying unless, exceptionally, the protection of personal data or other constitutionally protected rights must prevail in the specific case.

It is interesting to find that the character of the information is decisive in determining its accessibility: it is accessible (and, therefore, there is a duty of transparency) when the information in question is directly related to the organisation, functioning or public activity of the administration.

3. Information subject to transparency

Article 3.2 of the Catalan Transparency Law, after establishing that, in the cases set out in paragraphs 3.1.d and e, compliance with the transparency obligations must be carried out by the responsible administration, refers generically to the data that private individuals and entities must communicate to the administration.

Article 6.2 establishes that the transparency obligations established therein are minimal and general, and are understood without prejudice to any more detailed and specific ones that the laws may establish.

In all cases, the obligated subjects must disseminate the public information of general interest in a truthful and objective manner, constantly and permanently updated, organised in a way that is easily accessible and comprehensible, and ordered thematically and chronologically, and they must use comprehensible interoperable and reusable computer media.

Article 8 of the Law makes an open, non-exhaustive list of the types of information subject to its system, on which the obligated subjects must provide the information that is congruent with the purpose of knowledge provided in each case, as clarified in Article 8.2.

In accordance with Article 8.1, in the list of specific information subject to the transparency system that is listed from paragraphs a to l, we must add two more, those of paragraph m, which make the list essentially open in nature:

- Any matter of public interest
- The information that is requested most frequently through the exercise of the right of access to public information.

Although these two categories have a certain ambiguity, there do not seem to be many problems in the interpretation of the first, since the concept of public interest has been widely studied and developed by doctrine and jurisprudence. Indeed, serving general interests is the basis and justifying principle of the action of the public administrations, in accordance with Article 103 of the Constitution. It is dealt with in Article 3 of Law 30/92, of 26 November, on the Legal System of the Public Administrations and the Common Administrative Procedure, and more precisely in Law 40/2015, of 1 October, on the Legal System of the Public Sector, which will enter into force on 1 October.

Regarding the application of this concept to the duty of active publicity that corresponds to the entities set out in Article 3.1d and e of the Law, it must be understood that it is specified as the public interest inherent in the matter in relation to which the administration has assigned functions.

It may not be so simple to establish the information that will be subject to transparency because it has generated most requests in the exercise of the right of access.

A first clarification that will help interpret this rule is the public nature of the required information. Indeed, all the information of any type asked for most frequently should not enter the circle of transparency, but only that which has the status of public information, insofar as the requests to which it refers are formulated in the exercise of the right of access to public information. Public information is, according to Article 2b of the Catalan Transparency Law, that which has been drawn up by the administration and that which the latter has in its power as a result of its activity or the exercise of its functions, including that which the other obligated subjects provide to it in accordance with the Law.

A consistent and proportionate interpretation of the Law is to read the two reasons as partially coincident: it should be considered that transparency does not affect information that is not of public interest, even it has been requested very frequently.

A second question that is raised is that not all requests for access will be resolved affirmatively. The administration that receives them must first determine whether they are sufficiently precise (if they are not, it must advise and assist the applicant to specify them); it must submit them to an admission process; it must refer them, if necessary; it must give a hearing to interested third parties, if their rights or interests may be affected; and it must resolve them, in accordance with the law, with an acceptance or refusal, as appropriate.

According to the principles of consistency and proportionality, of the matters that have aroused most interest of people exercising the right of access, it is

advisable to include in the active publicity system only those that have been accepted.

4. Effects and consequences of a possible breach

In order to determine the mechanism for compliance with the transparency obligations within the AMB, we must bear in mind that in Catalonia the source of the transparency obligation of contractors and beneficiaries of subsidies is the Catalan Transparency Law and that the obligation must be made effective through the responsible administration.

In practice, it may happen that some of these entities diligently fulfil their obligation to inform the administration responsible for the activities directly related to the exercise of public functions, the management of public services and the receipt of public funds, and the activities of provision of services of general interest that is under their supervision and control, but that others delay in providing the information.

Entities that delay in performing this task must, of course, be ordered to do so by the responsible administration. On the occasion of the order, the responsible administration must be aware that the duty of transparency in public activity is a legal obligation, even if it is useful and suitable for the contract to recall the obligation.

Therefore, natural and juridical persons who are obligated under Article 3.1d and e and fail to meet the obligations set out in Article 3.2 – that is to say, said entities do not inform the responsible administration in time with the scope established in the Law – may be punished for a breach of transparency in accordance with the classification of Articles 77.1.b, 78.1 and 79 of the Catalan Transparency Law. The penalties are set out in Article 84 and may be not only economic but also entail temporary prohibition to contract with the administration and temporary disqualification as beneficiaries of public aid.

If the legal obligation of transparency has been included in the specifications or in the contract, any breach of duty may also lead to the initiation, processing and resolution of the procedures provided for in the legislation on public sector contracts for cases of non-compliance with contractual obligations.

In cases of a subsidy for which the transparency obligation was indicated in the regulations or in the agreement, any breach of the legal duty of transparency could also lead to the consequences of failure to comply with the conditions of the subsidy.

The AMB is responsible for reminding the associated entities of their duties in the area of active publicity and inviting them to fulfil them, not only to help them avoid the consequences they would suffer if they were ignored, but especially to ensure that citizens can exercise an agile and effective control of public management through the mechanisms of transparency.

VIII. Particulars of the obligation of transparency of different entities and in relation to different matters

Because, as contractors of the administration or beneficiaries of public subsidies for specific purposes, the field of action of private entities set out in Article 3.1d will often go beyond the field of administrative concession or subsidised activity, we must refer to the literal content of the regulation, which is that the business activities that must be reported to the associated administration are only those directly related to the exercise of public functions, the management of public services and the receipt of public funds.

If we consult the principles underlying the legislation on transparency, we will reach the same conclusion, since the information that is needed for citizens to know about public activity and to demand accountability and responsibility in public management is none other than that referring to the service activity that the private companies carry out on behalf of the administration or under subsidy from it.

It must be understood, then, that the “activities” that generate the duty of transparency are only those that are directly related to the exercise of public functions, the management of public services and the receipt of public funds. Articles 9, 10, 11 and 12 of the Catalan Transparency Law refer to the specific matters subject to transparency, and some of them specify the obligated subjects that are involved.

1. Transparency regarding institutional organisation and structure

Article 9, which deals with transparency in institutional organisation and administrative structure, sees it as a duty of the administration. Although this obligation does not appear to be directly applicable to the private entities set out in Article 3.1.d, it does affect them indirectly, since, in order to create the document that will be actively publicised, the administration must

provide information on its own structures and on the associated or dependent public bodies and entities, societies, public foundations and consortia of which it forms part.

This information must include the description of the organisation, the identification of the persons responsible, the attributed functions, the list of posts and the staff, the announcements and results of staff selection processes, the list of senior positions, access to training and promotion, collective agreements of non-statutory and statutory employees, the list of services, the creation, participation and functioning of public entities, public societies and foundations, consortia and other associated entities, any channels of participation and participatory procedures that are underway, resolutions regarding incompatibilities of senior officials, and the number of full-time union representatives. It must also include information directly related to the contracting companies of the administration and the beneficiaries of subsidies.

Indeed, Article 9h imposes on the administration the obligation to give transparency to:

h. The list of places occupied by staff assigned by the contractors with the administration that, under the contract, carry out a permanent activity, service or work in a public establishment or public premises, and also the hours of work and remuneration of this staff and the tasks that they carry out.

This is therefore a matter on which the AMB's contractors must provide sufficient information: the hours of work and remuneration and the tasks carried out by the staff assigned permanently to an activity, service or work in a public establishment or public premises.

2. Transparency in decisions and actions of legal relevance

Of the decisions and actions of legal relevance subject to transparency detailed in Article 10 of the Catalan Transparency Law, at least the following data related to the entities set out in Article 3.1d must be actively publicised:

- The list and evaluation of the documents that the entities set out in Article 3.1d of the Law have contributed to the procedures of public information (Article 10d).
- Any administrative acts, affidavits and previous communications that may have an impact on the public domain and on the management of public services, and any others for which it is advisable on grounds of special public interest (Article 10f), without personal data or references.
- Any final legal rulings that affect the people obliged to comply with the law, due to the exercise of the functions and responsibilities assigned to them in the event that entities set out in Article 3.1d (Article 10h) are involved, without personal data or references.

- The opinions of the Legal Advisory Committee and of any other advisory bodies that in some way affect the entities set out in Article 3.1d or the services they provide (article 10i), without personal data or references.
- The documents related to the entities set out in Article 3.1d that, in accordance with the applicable regulations, must be subject to a period of public information during the processing.

3. Transparency in economic, accounting, budgetary and asset management

The clarification of which transparency obligations of Article 11 are applicable to the entities set out in Article 3.1d and e of the Law requires a careful reading of Article 11 and the last section of Article 3.2.

Article 3.2 makes a general statement of the transparency obligations incumbent on the cases mentioned in Article 3.1d and e, followed by some clarifications, which we set out below.

Private individuals and entities must inform the administration of the following activities:

- a.** Activities directly related to the exercise of public functions, the management of public services and the receipt of public funds, as well as activities that remain within the supervision and control of the administration in the case of services of general or universal interest.
- b.** The remuneration paid to senior management if the turnover of the company linked to activities carried out on behalf of public authorities exceeds twenty-five percent of the company's turnover.

In fact, it cannot be said that the remuneration received for the senior management of companies in cases in which the turnover associated with activities carried out on behalf of public administrations exceeds the twenty-five percent are strictly “activities directly related to the exercise of public functions, the management of public services, the receipt of public funds and the exercise of public functions subject to supervision and control”.

That is why Article 3.2 referred to this obligation specifically before dealing with the obligations regarding economic, accounting, budgetary and asset management.

Indeed, Article 11.1 lists the transparency obligations in economic and budgetary management. One of these, 11.1b, refers to remuneration, compensation and per diems, activities and assets of the members of the Government, senior officials of the public administration and management staff of public entities, companies, foundations and consortia, and the compensation they

must receive when they cease to exercise their position. Article 11.2 mentions the data relating to asset management that must be made public.

Article 3.2 expressly and clearly mentions the obligation of transparency referring to the remuneration received by senior management if the company's turnover associated with activities carried out on behalf of the public administrations exceeds twenty-five percent of the company's general turnover, and makes no mention of the transfer to said companies of the transparency obligations of Article 11.1a, c, d, e and f and Article 11.2a and b of the Law. Therefore, I think that the latter are not, in principle, enforceable.

In short, the obligation to communicate the remuneration, compensation, and per diems gives senior management of contractors the same status as public senior management, when the administration that is their client provides these companies with more than a quarter of their income.

Another implication for private contractors of the obligation to provide information so that the administration can fulfil the obligation of transparency in economic, accounting, budgetary and asset management is the case in which the entities set out in Article 3.1d of the Law are contractors of services that manage or intervene in the assets of the AMB; in this case, said companies must provide the economic data related to their management (Article 11.2).

It is very likely that the AMB will need information from its contractors when carrying out the planning and programming. The annual and multi-annual general or sectoral plans and programmes on strategic guidelines of public policies and internal and external audits of the quality of public services will probably include data from the contractors that can be gathered for this purpose (Article 12).

4. Transparency in administrative management

With regard to transparency in administrative management, Articles 13 and 14 refer to that arising from public procurement and from collaboration agreements. The minimum obligations established therein are attributable to the administration.

Therefore, although many of the obligations arising from it will involve the contractors, the subject obliged to carry out the transparency actions is the administration responsible for the service and the minimum information that it must offer will normally be already in its power, in its capacity as the contracting administration.

5. Transparency in subsidising activity

One of the matters subject to the obligation of transparency is the justification or reporting by the beneficiaries of subsidies or grants. This is provided for in Article 15.1e.

It could happen that the administration does not have all the justifications and reports that have been provided by its beneficiaries. This is therefore information that the beneficiaries of subsidies or grants must supply to the administration that has awarded them.

I have previously referred to the provisions of Article 15.2, to the effect that the regulatory bases for awarding public subsidies and grants for an amount exceeding €10,000 must include the obligation of the beneficiaries, if they are legal entities, to communicate to the obligated subjects the information regarding the remuneration of their management or administration bodies, for the purpose of making it public. In the legal cases in which a process of competition is not used for the awarding of subsidies or grants, this obligation must be included in the corresponding administrative act or agreement. This obligation, attributed in principle to the awarding administration, implies the imposition on the beneficiary, when it is a legal entity, of the obligation to provide information on the remuneration of its management or administration bodies, so that the responsible administration can publish them.

6. Clarification of the obligation of transparency for the providers of services of general or universal interest

According to Article 3.1e of the Catalan Transparency Law, the duties of the obligated subjects are enforceable on natural or juridical persons who carry out activities qualified by law as services of general or universal interest.

The treatment of the duties of transparency of the people who provide services of general interest set out in Article 3.2 is not the same as that provided for the persons set out in Article 3.1d. Indeed, those of Article 3.1e are obliged to transparency in relation to “activities that remain within the supervision and control of the administration”.

The supervision and control of the administration of activities legally qualified as services of general or universal interest will therefore determine which entities are associated with the administration for the purposes of transparency and in what field of action they must comply with the active publicity obligations.

The provisions of Article 3.2 of the Catalan Transparency Law are applicable to persons and private entities that provide services of general or universal interest and have a turnover associated with the activities carried out on behalf of public administrations that amounts to more than twenty-five percent of the company's general turnover. These people must inform the responsible administration—which is responsible for control and supervision—of the remuneration received by senior management.

IX. Conclusions

Citizens are the recipients of the tools of transparency offered by the Catalan Transparency Law. Citizens should have knowledge of public activity and participate in it, in order to preserve their rights as users and to control the management of public resources. The aim is to ensure that the public information that reaches citizens is of high quality, and that accountability and responsibility in public management are guaranteed.

The Catalan Transparency Law describes private juridical persons that provide public services or exercise administrative powers as legally obligated subjects for providing information on certain matters that must be actively publicised through the responsible administration. These transparency obligations are stronger than those provided by the Spanish Transparency Law.

The Barcelona Metropolitan Area has the status of a responsible administration in terms of transparency with respect to the entities that provide services and carry out functions for which it has attributed powers, and with respect to those that receive subsidies and grants from it. It is also the responsible administration of natural or juridical persons who carry out activities qualified as services of general or universal interest under its control and supervision.

Natural and juridical persons who are contractors and subcontractors of the management of metropolitan services related to urban planning, urban transport, water, waste, the environment, infrastructure of metropolitan interest, economic and social development and social and territorial cohesion are obligated subjects for the purpose of the Catalan Transparency Law, and must fulfil their duties of active publicity through it. The obligation to provide information applies to the activities directly related to carrying out public functions, the management of public services and the receipt of public funds, and on the remuneration received by senior management in cases in which the company's turnover associated with activities carried out on behalf of the public administrations amounts to more than twenty-five percent of its general turnover.

The beneficiaries of subsidies and grants from the AMB amounting to more than €100,000 per year and more than €5,000 when this amount exceeds forty-five percent of its funds must inform the administration awarding the activities directly related to the exercise of public functions regarding the management of public services and the receipt of public funds. In any case, when the grants exceed €10,000, beneficiaries who are legal entities must communicate the remuneration of their management or administration bodies, for the purpose of making them public.

Natural and juridical persons that carry out activities legally qualified as services of general or universal interest under the supervision and control of the AMB must also fulfil with the AMB their duties of transparency, which are specified as the part of their activity that falls within the supervision and control of the metropolitan administration. In accordance with Article 3.2 of the Catalan Transparency Law, private individuals and entities providing services of general or universal interest that have a turnover associated with activities carried out on behalf of public administrations amounting to more than 25 % of the company's general turnover must inform the responsible administration of the remuneration received by the senior management.

In the cases studied, the duty of transparency is not satisfied directly, but through the responsible administration. The fields and aspects of the private action that must be the object of the information are those that the Law delimits in its provisions, with the limits suited to the protection of the public security, the investigation of infringements, the confidentiality of certain matters, the equality of the parties in judicial processes, the rights of minors, privacy and other legitimate private rights, professional secrecy and intellectual and industrial property rights. It should be taken into account that the list of matters subject to the duty of transparency is not closed but open, always framed in the public interest and determined in each case according to the information that is suited to and consistent with the intended purpose of the knowledge.

In short, citizenship as a reference and the democratic principle as the inspiration should serve to interpret the provisions of the Catalan legislation regulating the right of transparency.

“Tax havens are heaven. They are also of concern to everyone seeking a greener world, greater social justice and a fairer sharing of the tax burden.” Susan George

“The world, the world as we know it, is in danger of dying. It can perish from social and economic injustice, or from ecological injustice. We cannot allow this. We must break new ground; we need a constructive vision to build a new future.” Stéphane Hessel

“The communication of things that must be communicated is unavoidable. It is not a matter of finding a way.” Nasreddin (Sufi master)

“To move forward it is necessary to become familiar with the dysfunctions of functions.” Simone Weil

“If you want power you have to accept responsibility, and acts have consequences.” Margaret Atwood

“Nothing on earth is so weak and yielding as water, but for breaking down the firm and strong it has no equal.” Laozi



Legal analysis of the possibilities of remunicipalising services of general interest, from a competition perspective

Stefan Rating and Yolanda Martínez Mata

1. Introduction and contextualisation

The purpose of this article is to analyse the compatibility of decisions to remunicipalise local public services with European and national competition rules.

In 2014 the Catalan Parliament passed Law 19/2014, of 29 December, on Transparency, Access to Public Information and Good Governance (Transparency Law). In accordance with its Article 3.1 and relevantly for the purposes of this study, the Transparency Law applies to local government (Section a); natural or legal persons acting in a public capacity or exercising administrative powers, who provide public services or receive public funds to operate or to perform their activities by any legal title (Section d), and natural or legal persons performing activities legally qualified as services of general or universal interest (Section e).

In the latter two cases, compliance with the obligations arising from the Transparency Law must be enforced by the competent administrative body. To this effect, these persons and private entities are required to inform the administration of the activities directly related to their acting in a public capacity, managing public services and receiving public funds, and those activities remaining under the supervision and control of the administration in the case of services of general or universal interest (Article 3.2).

In other words, the intention of the Transparency Law was to make clear that any institution and/or company managing a service of general interest was subject to it, regardless of its budget and/or turnover and regardless of its legal form. The fact of employing one corporate or organisational form or another does not imply exemption from the Transparency Law, and a clear accounting separation is essential in all cases if the management of services of general interest coincides with other activities of a private nature.

Within this regulatory framework, the AMB Transparency Agency was set up in 2015 as a service to enhance transparency and good governance, with the mission of being an instrument at the service of the AMB, associate bodies and service providers fostering transparency and good governance as a process integrated throughout the management cycle of metropolitan public activity.

A decree by the AMB Presidency, dated 14 December 2015,¹ allocated to it the following duties:

1. To promote compliance with regulations concerning transparency, right of access and good governance and to collaborate in a specialised manner to this effect.
2. To coordinate all actions and initiatives aimed at transparency, right of access and good governance, both internally and externally.
3. To promote research and ongoing training in transparency, right of access and good governance as a model for metropolitan governance. To guarantee ongoing specialisation in information processing in the Transparency Portal and to develop materials with criteria of accessible language and ease of understanding, with maximum information under the principle of accountability.
4. To manage the Transparency Portal in coordination with the computer services of the corporate website.
5. To propose the preparation of protocols and reports for the enforcement of the law and especially to guarantee the right of access to information, and to collaborate to this effect.
6. To ensure compliance with the obligations set forth in the Transparency Law with regard to interest groups.
7. To promote the creation of the Metropolitan Transparency Advisory Board.
8. To promote the adoption of the code of conduct for AMB senior management.
9. To promote the establishing of transparency and good governance indicators in evaluation processes.

All these duties refer to both the AMB and its associate bodies.

In performing these duties, the AMB Transparency Agency is aware of the need to build a new culture of transparency to meet the challenges posed by existing legislation. For this reason, the Agency gives priority to a cross-cutting, participative methodology enabling collective empowerment and showcasing the contribution of all public workers to this task.

One of the main instruments whereby the Agency carries out these duties is ongoing training. It is within this training aspect that the Agency seeks to make known the state of affairs as regards the compatibility of local public service remunicipalisation decisions with European and national competition rules.

The aim is to disseminate these conclusions with a view to enabling all the AMB associate bodies, to whom the Agency delivers its services, to assess them and make the relevant decisions.

The remunicipalisation of public services is an issue that is currently the subject of intense debate.² More and more authoritative voices are being raised in defence of recovering the management of public services directly by local bodies as a more efficient, more sustainable alternative, better suited to the objectives of public interest than their indirect management through private operators. Furthermore, the latest reforms of the legislation regulating local public services have been instrumental in stressing the importance of respecting efficiency criteria in the economic activity of local authorities.

Within this debate and with the clear intention of assessing the different alternatives for action in the applicable legal framework, the AMB have expressed their interest in having an in-depth legal analysis of the viability of these remunicipalisation alternatives from the viewpoint of competition law. To this end, the present article is divided into two main sections: (I) the first summarises the applicable legal framework, distinguishing between Community rules on services of general economic interest (SGEI) and internal regulations defining the requirements for providing and managing local public services; and (II) the second is devoted to analysing the competition issues that a local authority should take into consideration when remunicipalising a public service. Following this analysis, we give a brief account of our conclusions.

It must be made clear from the start that the analysis we have been asked to perform focuses on those aspects of competition law that are raised by decisions to remunicipalise local public services. Therefore, as we have already mentioned, this analysis will involve studying the rules regulating local public services, both from a European perspective and from a statewide, national and local perspective. However, other aspects that may be related to a remunicipalisation decision but have no direct link with competition and free market issues (e.g., labour, tax or compensation issues) are beyond the scope of this study.

This analysis was commissioned to us in two stages: we were asked to produce a first executive draft in which we were to summarise the main conclusions of our study, in order to subsequently submit a more extensive version that could include (i) the legislative and jurisprudential details on which our opinion is based, and (ii) the possibility of comments from the AMB regarding the need for a subsequent development of specific aspects of the analysis.

The executive draft was submitted to the AMB Transparency Agency on 20 March 2017. As a result of this first submittal, a meeting was held with the Agency on 7 April 2017. Initial reflections on the conclusions were shared and those aspects of the study that required subsequent development were pinpointed.

The present article includes those reflections and thus constitutes the complete version of the commission.

2. Legal regime applicable to the management of local public services: Brief summary of the main regulatory provisions from the European perspective and the internal perspective

2.1. European perspective: Services of economic interest according to European Union regulations

Article 14 of the Treaty on the Functioning of the European Union (TFEU) places SGEI among the common values of the Union and ascribes them a leading role in promoting social and territorial cohesion. In turn, Article 36 of the Charter of Fundamental Rights of the European Union establishes that:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

However, the definition of SGEI³ and the establishment of the limits of the concept are not without controversy, and indeed have been the subject of abundant Community case law. The basic reason for this is that Article 106.2 TFEU includes SGEI, in principle, within the scope of competition regulation, unless doing so is incompatible with the public interest mission pursued.

Therefore, the definition of the limits of what is and what is not an SGEI and the public interest missions it fulfils is crucial to guarantee that there is not a wide margin of discretion for Member States to exclude certain activities of an economic nature from an essential field of Community integration: competition law.

In view of its relevance, let us see the concrete terms of Article 106.2 TFEU:

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

The provision contains a compromise between the liberalising spirit of the foundational European integration treaties and the desire of the Member Sta-

tes to maintain a certain degree of control over their public services. The concept of “services of general economic interest” has been the subject of an extensive debate and attention has been drawn to its similarity – but not identicalness – with the concept of “public service” internally, while accepting that the TFEU provision also includes private activities that are of essential importance for the community.⁴

As it is not the purpose of this article to provide a detailed analysis of the various concepts included in the provision, it is sufficient to point out the following relevant aspects:

- Article 106.2 TFEU refers to “services of general economic interest”, and therefore excludes any activities that might be managed by the public sector—either on its own account or entrusting them to a third party—that have no economic content (e.g., justice, police, social security, etc.) and/or are not consonant with the general interest (e.g., traditionally, monopolies on the marketing of tobacco or gambling).
- Beyond the limits mentioned above, it is up to each Member State to determine which activities constitute services of general economic interest, and the intervention of Community institutions occurs only in the event of manifest error.⁵
- Therefore, this is not a uniform concept of European Union law; rather, divergences can exist depending on the different interests that the public authorities of one or another Member State consider to be worthy of protection.⁶
- It is the responsibility of the European Commission, in accordance with Article 106.3 TFEU, to verify whether Member States respect the limits set by Article 106.2 TFEU or abuse them in a manner inconsistent with other provisions of the Treaties (particularly, provisions on State aid).

The delimitation of the border between what constitutes and what does not constitute a local public service exempted from competition rules—including regulations on State aid—was subject to the development of important case law as a consequence of the ruling by the Court of Justice of the European Communities (currently and henceforth CJEU) in the *Altmark*⁷ case. This ruling established the following guidelines to guarantee that the company entrusted with the service should not receive overcompensation that might constitute State aid in contravention of the TFEU (Paragraphs 89 to 93 of the *Altmark* ruling):

- 1) The undertaking that receives the economic compensation⁸ must actually have public service obligations, and these obligations must be clearly defined.
- 2) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- 3) The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into

account the relevant receipts and a reasonable profit for discharging those obligations.

- 4) Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation required must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

These four criteria are still today the basic reference parameter to evaluate whether the activity managed—particularly with regard to the economic resources required to do so—by a local authority is actually an SGEI excluded from competition law or whether this concept is being used inappropriately or excessively according to TFEU rules.

For a more detailed view of the regulations applicable to SGEI, we refer the reader to the bibliography incorporated in the **annex** to this article.

However, before going on to analyse the applicable internal regulations, we should turn our attention to one last aspect of Community regulation that may affect the subject matter of this study, namely some of the free trade agreements signed by the European Union with third States. By way of example, the free trade agreement signed recently with Canada (CETA agreement)⁹ includes some provisions on the protection of investments made by nationals of the other party (Articles 8.10 and 8.12) and, more relevantly, the so-called *ratchet* clause establishes that the level of liberalisation attained in a given sector should never be reversed (Article 8.15.3).¹⁰

The scope of the so-called *ratchet* clause has been a matter of controversy, as it is not clear whether or not it would include services of general interest, despite the fact that they are subject to express reservations by the Member States in Annexes I and II of the CETA agreement.¹¹ Although it remains to be seen whether the CETA agreement will actually be ratified and implemented, it is worth noting that if this regulatory provision ever came into force it might have an effect on the possible intention to remunicipalise a public service at the local level and it would be necessary to assess its compatibility in each particular case.

2.2. Internal perspective: Local public services according to applicable Spanish legislation

For the purposes of the present study, three constitutional provisions are particularly relevant: (I) Article 31.2 of the Spanish Constitution (SC), which indi-

cates that public spending should meet criteria of efficiency and economy; (II) Article 103 SC, which indicates that all public administration action should serve a general interest and comply with the principles of efficacy, hierarchy, decentralisation, deconcentration and coordination, and is fully subject to the statutes and the law; and lastly (III), Article 128.2 SC, which literally states the following:

2. Public initiative in economic activity is recognised. Essential resources or services may be restricted by law to the public sector, especially in the case of monopolies. Likewise, intervention in companies may be decided upon when the public interest so demands.

On the basis of these constitutional provisions and with regard to their application to municipal administrations, the basic Spanish legislation regulating these authorities provides the guidelines for managing local public services. In this regard, the following Spanish regulations merit special attention:¹²

- Law 7/1985, of 2 April, regulating the Rules of Local Government (LRLG). Articles 25 and 26 of the LRLG list the services that must be provided¹³ and/or the economic activities that can be performed by municipal authorities. In turn, Articles 85 and 86 of the same law determine the requirements and management methods of these services and/or economic activities. It is important to stress that, in the wake of the latest reforms of this law, the legal reservation of certain activities in favour of local government—and consequently the possibility (not obligation) of providing these activities on a monopoly basis, thus excluding private enterprise—includes the following services: water supply and treatment; collection, treatment and recovery of waste; public passenger transport; and any other services that may be determined by means of Spanish or autonomous community rules with status of law (Article 86.2 of the LRLG).¹⁴
- Royal Legislative Decree 781/1986, of 18 April, approving the Consolidated Text of the existing legal provisions on Local Government (CTLG). Articles 88 and following of the CTLG refer to the rules applicable to local government activities and services. Article 97 of the CTLG is of particular relevance, as it establishes the procedural requirements for local government to pursue economic activities. Section 2 of this provision indicates that in order to operate activities reserved for local government on a monopoly basis, it is necessary to request a mandatory report by the competent antitrust authority, among other requirements.¹⁵
- Decree of 17 June 1955, approving the Regulation on Local Corporation Services (RLCS).

Although this rule is prior to the current Constitution, it has never been expressly repealed, and its Articles 49 and following deal precisely with service municipalisation dossiers, even in cases in which there is a previously existing system of indirect management—we would be talking, then, for the purposes of this study, of remunicipalisation. Specifically, Article 52 of the RLCS establishes the rules applicable to the redemption of a public service concession when this service has been municipalised.

Nevertheless, these articles should clearly be analysed with caution, and they need to be interpreted in accordance with the rest of the rules of our legal system. If this accordance should prove impossible, it would be understood, in application of the principles of normative hierarchy and posteriority, that the specific rule of the RLCs has been tacitly repealed.

Lastly, in the Catalan context we should highlight the following rules, likewise applicable to the operation of municipal public services:

- Legislative Decree 2/2003, of 28 April, approving the consolidated text of the Law on Municipal and Local Government of Catalonia (LD 2/2003). Article 245 of LD 2/2003 indicates:

245.1 Those essential services that have been reserved by law for local authorities may be provided on a free competition basis or as a monopoly.

245.2 If service provision is to be on a free competition basis, definitive approval rests with the plenary. Provision on a monopoly basis also requires approval by the Government of the Generalitat.

245.3 For the provision of reserved essential services, any of the forms of management established by the law may be used.

245.4 Provision on a monopoly basis requires, if expropriation is necessary, the declaration of public interest and the need to occupy the assets pertaining to the service.

However, no other provision of LD 2/2003 specifies what these essential services are. This list was eventually given concrete expression at regulatory level, reproducing the previous provisions of the basic Spanish regulations, but as we will see presently, insofar as it requires legal reservation— i.e., a rule with status of law—the aforementioned regulatory provisions must be considered superseded by the current Spanish legislation on local government, which is of a basic nature.

- Decree 179/1995, of 13 June, approving the Rules on Works, Activities and Services of local authorities (RWAS).

Articles 181 to 187 of the RWAS deal with the regulation applicable to so-called “reserved essential public services”. As we mentioned above, Article 181.2 of the RWAS continues to equate these services with those stipulated in the previous basic Spanish legislation (e.g., water supply and treatment, collection, treatment and recovery of waste, supply of gas and heating, abattoirs, markets and central exchanges, public passenger transport and mortuary services), but nowadays they should be understood as being limited to those established under Article 86.2 of the LRLG in the version currently in force, after the amendments introduced by Law 27/2013.

With regard to the legal regime of these essential services, the RWAS regulates, first, the procedural requirements for their provision on a monopoly

basis: memorandum justifying its advisability and expediency, approval by the Plenary of the Corporation by absolute majority and approval by the Government of the Generalitat (Articles 183 and 184); and second, the effects of this decision as regards assets subject to the service and possible expropriation needs (Articles 185 and 186). It is important to note that Article 187 of the RWAS expressly indicates that the procedural requirements are also applicable to remunicipalisation decisions; e.g., when the service is provided on a free competition basis.

3. Legal analysis of the possibilities of remunicipalising a local public service in accordance with the legislation in force, from a competition perspective

As we have seen in the section above, the current regulations that affect—directly or indirectly—the possibilities of remunicipalising local public services are fragmentary and dispersed, and have not always been duly updated in recent legislative changes. The aim of this section is, then, to analyse these regulations, in an attempt to systematise them according to the legal analysis goals entrusted to us: the viability of remunicipalising local services from a competition perspective.

To this end, we consider it appropriate to distinguish three different situations in which a local authority may find itself when making a decision that affects the management of a public service and that are relevant from a competition law perspective. First of all we come up against two decisions that are linked directly to the reasons of public interest, efficiency and budgetary sustainability that must underpin the action of the local authority: (I) the decision regarding the system of service provision and (II) the decision regarding the way the service is managed. In addition to these, the analysis would not be complete without reference to (III) factors external to the decisions regarding how the service is provided and managed and are directly related to the previous existence of a private operator providing the service in question and the possibilities of terminating the contract in advance.

3.1. The municipal decision regarding the system of service provision: monopoly or free competition

In the wake of the recent legislative changes, local authorities only enjoy a certain degree of freedom to decide whether a particular public service is operated as a monopoly or on a free competition basis in relation to the following

activities: water supply and treatment; collection, treatment and recovery of waste; and public passenger transport. This list may be extended in the future by means of rules with status of law, but for the time being these are the only activities that are covered by the requirement of legal reservation pursuant to Article 128.2 SC.

In any event, local authorities' discretion regarding the decision to operate these services on a monopoly or free competition basis is not absolute, as the applicable regulations impose various requirements of a procedural and substantial nature. We shall examine both types below.

3.1.1. Procedural requirements for operating a local public service as a monopoly

Systematisation of the procedural requirements set forth in the applicable Spanish and Catalan legislation leads us to conclude that a local authority's decision to operate one of the public services listed in Article 86.2 LRLG as a monopoly requires adherence to the following procedural formalities:¹⁶

- Initial agreement by the Corporation to process the dossier.¹⁷
- Memorandum justifying the advisability and expediency of operating the service as a monopoly, in the general interest.¹⁸ The analysis must include an evaluation of the financial sustainability and profitability of the service, and the effects of the municipal decision on competition, in addition to the corresponding study of the supply and demand existing in the market.
- Consideration of the memorandum by the plenary and public display for a period of at least 30 days, during which claims and allegations may be made.¹⁹
- Request for a mandatory but non-binding opinion from ACCO (Catalan competition authority).²⁰
- Approval of the dossier by the Plenary of the Corporation by an absolute majority of the legal number of members.²¹ The decision may depart from the recommendations made by the competition authority, but the reasons for this departure must be stated.²²
- Issuance of a mandatory but non-binding opinion by the Advisory Legal Committee.²³
- Approval by the Government of the Generalitat within three months.²⁴ On expiry of this period, if no decision has been reached the request shall be deemed to be refused. The Government's decision must address the advisability and expediency of the monopoly in service provision, in relation to the interests of the Generalitat.²⁵

3.1.2. Substantial requirements for operating a local public service as a monopoly

As can be seen from the section immediately above, the decision to operate a service as a monopoly requires a prior analysis of advisability and expediency

evaluating the effects of the decision on the market, the importance of the public interest pursued and the possibilities of achieving it while maintaining a system of competition. This analysis is conducted initially by the local authority itself, which then requests an opinion from ACCO, and finally is also subject to evaluation by the Government of the Generalitat. Thus, all three bodies have to evaluate thoroughly whether a monopoly is really the best and most efficient way of operating the service.

The regulations do not provide guidelines for the analysis, other than requiring that it be done and that it take into account the criteria of financial sustainability, efficiency, expediency and advisability.

For their part, the competition authorities recommend that whenever the service can be provided on a free competition basis, provision on a monopoly basis should be avoided. However, they recognise that the free market is not always the best option, as there are situations in which it fails, being incapable of offering suitably of its own accord goods and services that are necessary for satisfying public interests. The evaluation must therefore be made case by case.²⁶

We find an example of the type of evaluation required by the competition authority in the ACCO report on the drinking water supply service of the municipality of Santa Maria d'Oló.²⁷ In this report, ACCO indicated that insofar as the creation of a monopoly involves a significant restriction of competition, it is important for the municipal authority to properly justify the need for and the proportionality of this shaping of the service, taking into account the sustainability and efficiency criteria referred to at length.

In this particular case, ACCO considered that Santa Maria d'Oló Town Council had not justified its decision sufficiently. However, the competition authority itself mentioned some of the criteria that could have been taken into account to evaluate the expediency of the municipal decision, such as the fact that water resources and the spaces for their provision are in the public domain, or the consideration of the activity of drinking water supply as a natural monopoly.²⁸ In other words, ACCO does not deny the possibility that in some cases it may be appropriate – and even justified and desirable – to operate a public service as a monopoly, but merely indicates that in that particular case the decision had not been properly justified.

Along similar lines but with a different conclusion due to the better justification of the municipal decision, we can also cite the recent ACCO report on the drinking water supply service operated as a monopoly in the municipality of Vidreres.²⁹ In this case, ACCO took into account one by one the arguments set forth by the Town Council in the memorandum establishing the municipal service as a monopoly, which can be summed up in the following points: (I) the infrastructures required to provide the service would be entirely of municipal

ownership; (II) operating the service as a monopoly would be the only economically sustainable and efficient way to do so; and (III) the drinking water supply service constituted a natural monopoly in the municipality of Vidreres.

In the opinion of ACCO, point (I) does not in itself justify the establishment of a monopoly, and point (II) does not refer to the system of provision (monopoly versus free competition), but rather to the form of management of the service (direct management versus indirect management). However, point (III) brings ACCO to the following reflection:

Traditionally several situations have been considered, from a competition perspective, in which it would be justified to establish a particular service on a monopoly basis (and in which the entry of other operators would therefore be vetoed). This happens in, among other scenarios, those sectors in which the market structure constitutes a natural monopoly, as is precisely the case of the management of the water cycle. Such cases are characterised by the existence of high fixed costs, and provision by a single operator (or few operators) is considered more efficient. Infrastructures and networks (such as the water supply) are classic scenarios of natural monopolies. [Footnote 8: “In addition to natural monopoly scenarios, other cases exist in which the free market is not always considered to be the best option; this is so, for example, in those situations that display market failures derived basically from the existence of certain externalities or information asymmetries. Furthermore, it may be indispensable to take into consideration certain efficiency criteria when providing certain services”].

In addition to the fact that the drinking water supply service constitutes a natural monopoly, other reasons exist that can be taken into account when considering the advisability and expediency of establishing the service on a monopoly basis, such as the fact that water resources and the spaces for their provision are in the public domain, or the irreplicability of the drinking water supply network by other operators.

These reflections by ACCO, which in the case in hand brought it to conclude that the option of a monopoly system was indeed justified, enable us to draw some conclusions about the type of analysis conducted by the competition authority in these cases. However, these conclusions should be taken with caution, because to date few cases have been brought before the authority, and therefore each particular case should be carefully evaluated and we should be alert to any possible new reports by the competition authority. Thus, with this due caution, the conclusions that can be drawn from these reflections by ACCO can be summarised, in our opinion, as follows:

- The responsibility for proving that it is justified to operate the service as a monopoly falls on the Council, and this task is not considered to be complete with a mere generic reference to general principles of efficiency and sustainability that are not demonstrated in the case in point.

According to the few existing precedents, ACCO requires a justification that matches the particular case, duly set forth in the memorandum justifying the expediency and advisability of operating the service as a monopoly, in the general interest (see Section 3.1.1 above).

- However, ACCO has provided some pointers for municipalities interested in operating a particular service as a monopoly. Thus, in scenarios concerning the provision of drinking water, ACCO has made repeated reference to the fact that this service is a natural monopoly, but recently also to the fact that water resources and the spaces for their provision are in the public domain, or the irreplicability of the drinking water supply network by other operators.
- Some of the arguments regarding the drinking water supply service may be extendable to other local public services that the legislation allows to operate as a monopoly. However, given the detail with which ACCO analyses municipal justifications, it is advisable to avoid automatism and consider case by case whether the arguments match the service for which remunicipalisation is sought. In any event, ACCO has noted some other arguments that could also be taken into account in the analyses, such as a possible market failure derived basically from the existence of certain externalities or information asymmetries, or the fact that it may be indispensable to take into consideration certain efficiency criteria when providing certain services.

To conclude, it should be noted that neither the applicable regulations nor the competition authorities make any procedural or substantial distinction based on whether the decision to operate the service as a monopoly is made primarily (as of the creation or establishment of the service) or derivatively (after having initially provided the service on a free competition basis).³⁰ In other words, there is no distinction between municipalisation and remunicipalisation of the service as regards the substantial evaluation that the local authority is required to make when deciding to operate the service as a monopoly.

3.2. The municipal decision about how to manage the service: direct or indirect provision

Once it has been decided whether to operate the public services listed in Article 86.2 LRLG as a monopoly or on a free competition basis, the local authority must also decide what form of management it prefers: direct or indirect. This decision is independent of the previous one and is not predetermined by it.³¹ Therefore, neither monopoly precludes the participation of private operators by means of mechanisms of indirect management nor does free competition preclude direct management of the service provided by the municipality in competition with other operators.

Direct forms of management include management by the local authority itself and management through an independent local body, a local public business entity or a local trading company whose share capital is entirely publicly owned. The last two alternatives must be subsidiary to the first, unless they are

more sustainable and efficient, taking into account the criteria of economic profitability and return on investment.³²

In turn, indirect management of public services can be implemented through any of the channels established by the legislation on public sector procurement for the public service management contract (i.e., concession, fee-based management, charter or joint venture).³³

Again, the regulations state no preference here for one public service management mechanism or another, other than establishing the need to manage the service as sustainably and efficiently as possible. It is up to the local authority, then, within its margin of discretion—but not arbitrariness—to opt for the management method that best suits the satisfaction of the general interests it pursues, while respecting the principles of sustainability, efficiency and least market distortion.

Without prejudice to this discretion, doctrinally the following criteria have been identified that should be taken into account when opting for one form of service management or another from a perspective that respects competition law:³⁴

- A sufficient number of suppliers in the market interested in providing the service.
- Possibility of measuring the quality of the service and the viability of the service being mainly user-funded.
- Possibility of allocating the risk to the private operator and controlling it, in the event of opting for an indirect form of management.
- Existence of high entry costs or sunk costs, which may favour the perpetuation of the pre-existing private operator.
- Possibility of granting a private operator autonomy as regards the operating costs of the service.
- Limitations on the possibility of making contract amendments.

Analysis of these variables could afford a better approach to the decision to either outsource or, on the contrary, remunicipalise the public service. The more suppliers there are in the market, the easier it will be to shape a service in which the cost is covered by the user, and the lower the sunk costs, the more recommendable it will be to resort to a mechanism of indirect management enabling the participation of a private operator in the provision of the service.

However, if private participation is likely to entail a high risk of inefficiencies due to the difficulty in controlling the economic variables of provision or the risk of favouring the perpetuation of the same operator with little incentive to improve the service, the best option will be to resort to one of the forms of direct management.

In any event, in our opinion, the decision is clearly in the hands of the local authority, which is granted a wide margin of discretion by the legislation, within

respect for the principles of efficiency, budgetary sustainability and least distortion. On this point there are no rigid principles that apply to all local authorities, because the decision will depend on the municipality's resources, the supply and demand existing in that particular area, and to some extent also reasons of ideology and political expediency – within the bounds of respect for the principles mentioned above. In short, a case-by-case analysis is necessary.³⁵

3.3. The municipal decision about the right moment to remunicipalise: circumstances exogenous to reasons of efficiency or budgetary sustainability of the decision to remunicipalise

Article 246 LD 2/2003 establishes that “local authorities are fully competent to constitute, organise, modify and cancel services under their jurisdiction, in accordance with the legislation on local government and other applicable provisions”. This statement is in line with the wide margin of discretion that, as we have explained above, belongs to local authorities for decisions regarding systems of provision and forms of management of the local public services included in the legal reservation of Article 86.2 LRLG. The statement also seems to be in line with European rules applicable to SGEI, which, as we saw in Section 2.1 above, allows for a wide margin of discretion for their definition by national, regional and local authorities.

Nonetheless, a legitimate conceptual doubt arises with respect to the limits of this discretion when a service that is targeted for remunicipalisation was provided on an indirect management basis by a private operator, the contract with whom is still valid.

The possibility of redeeming a public service concession is expressly provided for in the current internal regulations.³⁶ However, some authors³⁷ consider that this redemption could be contrary to Article 44 of Directive 2014/23/EU,³⁸ insofar as this provision does not recognise redemption as a mechanism for the termination of a concession and the consequent reversion of the public service to the local authority. Therefore, they argue, the provision could impede the effective possibility of remunicipalising a local public service included in Article 86.2 LRLG when a pre-existing concession remains in force and no other grounds for termination exist.

The aforementioned Article 44 of Directive 2014/23/EU, on the termination of concessions, reads literally as follows:

Member States shall ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one or more of the following conditions is fulfilled:

a) a modification of the concession has taken place, which would have required a new

concession award procedure pursuant to Article 43;

b) the concessionaire has been, at the time of concession award, in one of the situations referred to in Article 38(4) and should therefore have been excluded from the concession award procedure;

c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or contracting entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.³⁹

Admittedly, the article does not expressly include the possibility of redeeming the concession prior to the expiry of the concession period for reasons of public interest that might justify a decision to remunicipalise the service.

However, in our opinion, the fact that the article does not refer expressly to this possibility should not imply that a national regulation that does expressly allow for it is contrary to the directive and in the ultimate instance incompatible with European Union law. The main legal arguments supporting this stance are as follows:

- 1) Article 44 of Directive 2014/23/EU does not list all the possible causes for terminating a concession contract. It does not include, for example, the scenarios of failure by the concessionaire to comply with the contractual conditions agreed upon, or expiry of the concession due to completion of the contractually defined period. While the second example could be rejected on the grounds that it is a scenario of expiry rather than termination, this cannot be said of the first, and it is quite clear that the contracting party must have the possibility of terminating the contract in advance in the event of breach of contract.
- 2) It is perfectly possible to interpret that Article 44 of Directive 2014/23/EU does not constitute a definitive list of scenarios of the termination of concession contracts, but is merely intended to ensure that Member States legally guarantee that the three scenarios provided for in the article allow the contracting authorities to terminate the concession.
- 3) As we have seen in Section 2.1 of this report, the TFEU itself (Articles 14 and 106) and the CFREU (Article 36) assign to SGEI a leading role in the fostering of the social and territorial cohesion of the Union, and in fact Protocol No. 26 annexed to the TFEU recognises expressly “the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”.

Considering that (I) all these regulations have the force of primary law and as such are hierarchically superior to any directive, and (II) rules of secondary legislation shall be construed as closely as possible in accordance with the provisions of primary law (in fact, if it were not possible, the CJEU would ultimately deem them invalid), we understand that before concluding

that Article 44 of Directive 2014/23/EU invalidates any possibility of remunicipalisation in the event of a current concession, it would be necessary to attempt to construe the provision in accordance with the abovementioned rules of primary law.

- 4) In connection with the previous point, it is perfectly plausible to imagine a scenario in which a decision is made to redeem the public service and at the same time the rights of the outgoing concessionaire are respected, by awarding it the compensation to which it is legally entitled for the period of the early termination of the concession contract.

In our view there is no reason to believe that the concessionaire's rights regarding the concession terms initially agreed upon, based on the principle *pacta sunt servanda*, should prevail over the municipal authority's right to organise its public services in whichever way meets best the general interest of the municipality and the reiterated criteria of sustainability and efficiency. Anything else would be tantamount to condemning the municipal administration – and its citizens – to perpetuating until the completion of the concession period an initial decision in favour of indirect management that subsequently became or proved to be wrong, inefficient, unsustainable or unsuitable for satisfying those general interests.

To sum up, we understand that Article 44 of Directive 2014/23/EU does not preclude a national regulation that allows for the possibility of redeeming a public service concession for reasons of public interest with the aim of managing the service directly. National authorities, including local ones, have a wide margin of discretion when shaping and delivering their public services (SGEI, in European terminology) and therefore the said provision should be construed in accordance with this discretion.

Without prejudice to the compensation to which the concessionaire of the indirect management is legally entitled, we understand, then, that the decision to remunicipalise a local public service in order to deliver it directly when a previous concession is still in force is not contrary to Article 44 of Directive 2014/23/EU, on the assumption that the municipal decision is in fact based on a careful assessment of the general interest and the criteria of sustainability and efficiency imposed by the applicable legislation.

4. Conclusions

First

Article 106.2 TFEU contains a compromise between the liberalising spirit of the foundational European integration treaties and the desire of the Member States to maintain a certain degree of control over their public services.

The concept of “services of general economic interest” has been the subject of an extensive debate and attention has been drawn to its similarity—but not identicalness—with the concept of “public service” internally, while accepting that the TFEU provision also includes private activities that are of essential importance for the community. The provision excludes, however, any activities that might be managed by the public sector – either on its own account or entrusting them to a third party – that have no economic content (e.g., justice, police, social security, etc.) and/or are not consonant with the general interest (e.g., traditionally, monopolies on the marketing of tobacco or gambling).

It is up to each Member State to determine which activities constitute services of general economic interest, and the intervention of Community institutions occurs only in the event of manifest error and/or abuse of the concept in a manner inconsistent with other provisions of the Treaties (particularly, provisions on State aid). This freedom for the Member States to determine what constitutes and what does not constitute a service of general economic interest is expressly recognised in, among others, the Services Directive, which excludes the application of the legal rules on the free provision of services in the internal market to certain activities expressly referred to in its Article 17.

Second

Internally, local authorities only enjoy a certain degree of freedom to decide whether a particular public service is operated as a monopoly or on a free competition basis in relation to the following activities: water supply and treatment; collection, treatment and recovery of waste; and public passenger transport. This list can be extended by means of rules with status of law, but for the time being these are the only activities that are covered by the requirement of legal reservation pursuant to Article 128.2 SC.

In any event, local authorities’ discretion regarding the decision to operate these services on a monopoly or free competition basis is not absolute, as the applicable regulations impose various requirements of a procedural and substantial nature.

Neither the applicable regulations nor the competition authorities make any procedural or substantial distinction based on whether the decision to operate the service as a monopoly is made primarily (as of the creation or establishment of the service) or derivatively (after having initially provided the service on a free competition basis).

In other words, there is no distinction between municipalisation and remunicipalisation of the service as regards the substantial evaluation that the local authority is required to make when deciding to operate the service as a monopoly.

Third

The responsibility for proving that it is justified to operate the service as a monopoly falls on the Council, and this task is not considered to be complete with a mere generic reference to general principles of efficiency and sustainability that are not demonstrated in the case in point.

According to the few existing precedents, ACCO requires a justification that matches the particular case, duly set forth in the memorandum justifying the expediency and advisability of operating the service as a monopoly, in the general interest.

However, ACCO has provided some pointers for municipalities interested in operating a particular service as a monopoly. Thus, in scenarios concerning the provision of drinking water, ACCO has made repeated reference to the fact that this service is a natural monopoly, but recently also to the fact that water resources and the spaces for their provision are in the public domain, or the irreproducibility of the drinking water supply network by other operators. Some of the arguments regarding the drinking water supply service may also be extendable to other local public services that the legislation allows to operate as a monopoly. However, given the detail with which ACCO analyses municipal justifications, it is advisable to avoid automatism and consider case by case whether the arguments match the service for which remunicipalisation is sought.

In any event, ACCO has noted some other arguments that could also be taken into account in the analyses, such as situations of market failures derived basically from the existence of certain externalities or information asymmetries, or the fact that it may be indispensable to take into consideration certain efficiency criteria when providing certain services.

Fourth

Once it has been decided whether to operate the public services listed in Article 86.2 LRLG as a monopoly or on a free competition basis, the local authority must also decide what form of management it prefers: direct or indirect. This decision is independent of the previous one and is not predetermined by it. Therefore, neither monopoly precludes the participation of private operators by means of mechanisms of indirect management nor does free competition preclude direct management of the service provided by the municipality in competition with other operators.

Again, the regulations state no preference here for one public service management mechanism or another, other than requiring that the service be managed as sustainably and efficiently as possible. It is up to the local authority, then, within its margin of discretion—but not arbitrariness—to opt for the management method that best suits the satisfaction of the general interests it pursues, while respecting the principles of sustainability, efficiency and least market distortion.

The decision will depend on the municipality's resources, the supply and demand existing in that particular area, and to some extent also reasons of ideology and political expediency—within the bounds of respect for the principles mentioned above. In short, a case-by-case analysis is necessary.

Fifth

Article 44 of Directive 2014/23/EU does not expressly include the possibility of redeeming the concession prior to the expiry of the concession period for reasons of public interest that might justify a decision to remunicipalise the service.

However, we understand that Article 44 of Directive 2014/23/EU does not preclude national regulation that allows for the possibility of redeeming a public service concession prior to the expiry of the concession period for reasons of public interest with the aim of managing the service directly. National authorities, including local ones, have a wide margin of discretion when shaping and delivering their public services (SGEI, in European terminology) and therefore the said provision should be construed in accordance with this discretion.

Without prejudice to the compensation to which the concessionaire of the indirect management is legally entitled, we understand, then, that the decision to remunicipalise a local public service in order to deliver it directly when a previous concession is still in force is not contrary to Article 44 of Directive 2014/23/EU, on the assumption that the municipal decision is in fact based on a careful assessment of the general interest and the criteria of sustainability and efficiency imposed by the applicable legislation.

Documentary annex

European legislation and other documentation of relevance to the legal status of services of general economic interest

This annex is not intended as a bibliography of all the legislation, case practice and scholarly opinions used to prepare the present study, as these references can be found in the body of the article or at the end. The sole purpose, then, of this annex is to collate and facilitate access to certain documentation that is of relevance to the concept of SGEI and its interaction with the regulations on State aid and competition in the European Union.

- Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318 of 17.11.2006, p. 17-25.
- Communication from the Commission: *A Quality Framework for Services of General Interest in Europe*, 20 December 2011, COM (2011) 900 final.
- Commission Decision 2012/21/EU, of 20 December 2011, on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7 of 11.1.2012, p. 3-10.
- Communication from the Commission 2012/C 8/02, of 11 January 2012, on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.
- Commission Regulation (EU) No. 360/2012, of 25 April 2012, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis aid granted* to undertakings providing services of general economic interest, OJ L 114 of 26.4.2012, p. 8-13.
- Communication from the Commission 2012/C 8/03: *European Union framework for State aid in the form of public service compensation*.
- Commission staff working document SWD/2013/040 final, of 21 February 2013, *3rd Biennial Report on Social Services of General Interest*, accompanying the communication from the Commission *Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020*.
- Commission staff working document SWD(2013) 53 final/2, of 29 April 2013, *Guide to the application of the European Union rules on state aid, public procu-*

rement and the internal market to services of general economic interest, and in particular to social services of general interest.

- Directive 2014/23/EU of the European Parliament and of the Council, of 26 February 2014, on the award of concession contract, OJ L 94 of 28.3.2014, p. 1-64.
- Study on the financing models for public services in the EU and their impact on competition, Ecorys, KD-02-16-641-EN-N of 2016.

Notes

- 1 <http://transparencia.amb.cat/web/l-agencia/coneixer-l-agencia>.
- 2 The matter has been debated recently in the Catalan Parliament: <http://www.parlament.cat/document/bopc/207484.pdf>.
- 3 «SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention.» *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Quality Framework for Services of General Interest in Europe*, Brussels 20.12.2011, COM(2011) 900 final.
- 4 García de Coca, J.A., “Régimen jurídico de las empresas encargadas de la gestión de servicios de interés económico general”, in Velasco San Pedro, L.A. (coord.), *Derecho Europeo de la Competencia: Antitrust e intervenciones públicas*, Lex Nova, 2005, pp. 625 ff.
- 5 This is expressly stated in, for example, Article 1.3, second paragraph, of Directive 2006/123/EC, of the European Parliament and of the Council, of 12 December 2006, on services in the internal market (Services Directive), OJ L 376, of 27/12/2006, p. 36-68:
This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

In fact, according to Articles 16 and 17 of the Services Directive, the freedom to provide services established generally in this rule is not applicable to several services of general economic interest, such as water distribution or treatment of waste, among others.

Similarly, Article 4 of Directive 2014/23/EU of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts (Directive 2014/23/EU), OJEU L 94 of 28/3/2014, p. 1-6, rules as follows:

Freedom to define services of general economic interest

1. *This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the way in which the Member States organise their social security systems.*
2. *Non-economic services of general interest shall fall outside the scope of this Directive.*

In other words, the definition of what is and what is not an SGEI remains in the sphere of competence of the Member States, although this clearly does not preclude either the application of State aid rules when appropriate or the application of the same Directive if the system of shaping that service falls within its scope (with the exception of non-economic services of general interest).

This does not mean that the definition of the concept has been without controversy between the Commission and the Member States. Relatively recently, the Commission published some guidelines in an attempt to indicate what possible abuses of the concept might come within the framework of European rules on State aid. The details of that debate lie beyond the scope of the present study, but the relevant documents are available on the website of the European Commission's Directorate-General for Competition: http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

- 6 This is emphasised by Protocol No. 26 annexed to the TFEU, which interprets Article 106.2 TFEU in the following terms:

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- *the essential role and the **wide discretion of national, regional and local authorities** in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;*
- *the diversity between various services of general economic interest and the **differences in the needs and preferences** of users that may result from different geographical, social or cultural situations;*
- *a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights. [Emphasis added]*

- 7 CJEU ruling of 24 July 2003, case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, ECLI:EU:C:2003:415. This case analysed the limits of the compensation that could be received by a private operator commissioned to manage the public service of road transport, in order to guarantee that there was no overcompensation that might fall within the scope of prohibitions of State aid.

- 8 It is important to note that, in the Spanish case, this undertaking may be public or private, depending on the chosen form of management of the service: direct—through a publicly owned company, for example—or indirect (see Section 2.2 below).

- 9 The text of the CETA agreement is available at: http://trade.ec.europa.eu/doclib/docs/2014/sepember/tradoc_152806.pdf

- 10 Article 8.15.3 of the CETA agreement states literally the following:
Without prejudice to Articles 8.10 and 8.12, a Party shall not adopt a measure or series of measures after the date of entry into force of this Agreement and covered by its Schedule to Annex II, that require, directly or indirectly an investor of the other Party, by reason of nationality, to sell or otherwise dispose of an investment existing at the time the measure or series of measures become effective.

- 11 See, for example, Fritz, T., *CETA and TTIP: Potential impacts on health and social services, Working paper commissioned by the European Federation of Public Service Unions (EPSU)*, April 2016, available at: http://www.epsu.org/sites/default/files/article/files/Working%20Paper_HSS%20in%20CETA%20TTIP_1604.pdf.

- 12 The rules mentioned hereafter underwent substantial changes, in aspects of relevance to the present study, as a result of the approval of Law 27/2013, of 27 December, on the Rationalisation and Sustainability of Local Administration (Law 27/2013). The main purpose of this law was to guarantee the observance of the principles of efficiency and financial sustainability in the operation of municipal public services. The transference of some of these principles to the current legal framework affected precisely the shaping, the scope and the alternatives for delivering local public services.

- 13 Article 26.1 lists those public services which all local authorities are obliged to provide (some in all municipalities and others depending on their size):

1. Municipalities must in all cases, on their own or in association, provide the following services:

a) In all municipalities:

Street lighting, cemetery services, refuse collection, street cleaning, provision of drinking water to homes, sewage disposal, access to population centres, paving of public roads and food and beverage control.

b) In municipalities with more than 5,000 inhabitants, also:

Public parks, public libraries, markets and waste treatment.

c) In municipalities with more than 20,000 inhabitants, also:

Civil protection, provision of social services, fire prevention and extinction, public sports facilities and abattoirs.

d) In municipalities with more than 50,000 inhabitants, also:

Public urban passenger transport and environmental protection.

The fact that the provision imposes the obligation to provide these services should not be confused with any obligation to operate them on an exclusive basis, i.e., as a monopoly. This latter point is dealt with in Article 86.2 of the LRLG, which after the reform brought about by Law 27/2013 has limited enormously municipalities' scope for action with regard to this decision on the provision of services on an exclusive basis.

14 In Catalonia, no other activity or service has been reserved in addition to those established in Article 86.2 LRLG, so the possibility of operating services as a monopoly is limited to the cases established in the aforementioned provision.

15 Within the scope of action of Catalan municipalities, the antitrust authority from which the report must be requested is the Autoritat Catalana de la Competència (ACCO).

16 We reproduce only those requirements that are specific to this procedure, notwithstanding other procedures that may be necessary in the processing of municipal dossiers.

17 Article 243.2 LD 2/2003.

18 Article 86.1 LRLG, Article 243.2 LD 2/2003 and Article 183.1.b RWAS. In accordance with Articles 243.2 and 244 LD 2/2003, in the case of activities reserved by law for local authorities, the study commission entrusted with drafting this memorandum must be comprised of members of the local authority, technical staff and representatives of the users.

19 Article 243.2 LD 2/2003.

20 Article 97.2 CTLG.

As regards when it is mandatory to request this opinion, some authoritative voices indicate that it could be considered to be mandatory not only in scenarios of municipalisation (establishment or creation of the local public service) but also in cases of remunicipalisation, if in the latter case the mandatory dossier for service provision on a monopoly basis was not processed prior to the decision to pursue indirect management. In other cases in which the dossier for provision on a monopoly basis was in fact processed and the initial decision was to engage in indirect management but was later changed, the opinion request may not be considered mandatory, but it would nevertheless be recommendable to conduct an internal analysis on the competition impact of the local authority's new decision. Colomé i Nin, A.; Grau i Arnau, S., "Remunicipalización de servicios locales y competencia", *Cuadernos de Derecho Local*, No. 43, February 2017.

21 Article 86.1 LRLG and Article 183.2 RWAS.

22 Article 35.1.c of Law 39/2015, of 1 October, on the Common Administrative Procedure of public administrations (LCAP).

23 Article 8.3.k of Law 5/2005, of 2 May, on the Advisory Legal Committee.

24 Although Constitutional Court ruling 111/2016, of 9 June 2016, considered unconstitutional the section "Governing Council" introduced into Article 97.2 CTLG by means of the changes made

by Law 27/2013, in fact the need for approval by the Government of the Generalitat was also established, in the Catalan context, under Article 184 RWAS prior to those changes. Therefore, we must consider that the requirement continues to be compulsory in Catalonia.

- 25 Article 184 RWAS.
- 26 Colomé i Nin, A.; Grau i Arnau, S., “Remunicipalización de servicios locales y competencia”, *Cuadernos de Derecho Local*, No. 43, February 2017.
- 27 Report OB/19/2015 – INF art. 97.2 RDL 781/1986 Santa Maria d’Oló, of 26 March 2015.
- 28 The Andalusian Competition Authority puts forward the same arguments in its report 02/10 on the provision of the water supply service in the municipality of Vejer de la Frontera (Cádiz), by means of direct management and operating an effective monopoly, of 21 January 2010.
- 29 Report OB 35/2017 – INF art 97.2 RDL 781/1986, Vidreres, of 22 March 2017.
- 30 In fact, Article 187 RWAS refers expressly to the procedural requirements of Articles 183 and 184 RWAS in those cases in which local authorities providing essential services reserved by law on a free competition basis decide to switch over to operating them as a monopoly.
- 31 This is a consequence of, for example, the Supreme Court ruling of 23 May 1997, notice of appeal No. 6813/1991.
- 32 Article 85.2 LRLG and Article 249 LD 2/2003.
ACCO has expressly recognised in its reports that local legislation gives priority to direct management by the local authority itself, together with the figure of the independent local body, and only allows the use of local public business entities or trading companies when they prove to be more sustainable and efficient forms of direct management than the previous ones, taking into account criteria of economic profitability and return on investment. See the report OB 35/2017 – INF art 97.2 RDL 781/1986 Vidreres, of 22 March 2017, p. 8.
- 33 Article 277 of Royal Legislative Decree 3/2011, of 14 November, approving the consolidated text of the Law on Public Sector Procurement (RLD 3/2011).
- 34 Colomé i Nin, A.; Grau i Arnau, S., “Remunicipalización de servicios locales y competencia”, *Cuadernos de Derecho Local*, No. 43, February 2017.
- 35 Along the same lines, Gimeno Feliu states that neither [in]direct management is always more economic and efficient, nor all services are more efficient and sustainable with direct management, and that therefore maximalist aprioristic positions should be avoided and analysis should be conducted case by case. Gimeno Feliu, J.M., “Remunicipalización de servicios locales y derecho comunitario”, *El Cronista del Estado Social y Democrático de Derecho*, No. 58-59, February-March 2016.
- 36 Article 286.b and Article 287.2 of RLD 3/2011.
- 37 Gimeno Feliu, J.M., “Remunicipalización de servicios locales y derecho comunitario”, *El Cronista del Estado Social y Democrático de Derecho*, No. 58-59, February-March 2016; and Tornos Mas, J., “La remunicipalización de los servicios públicos locales. Algunas precisiones conceptuales”, *El Cronista del Estado Social y Democrático de Derecho*, No. 58-59, February-March 2016.

- 38 Directive 2014/23/EU of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts, OJEU L 94 of 28.3.2014, p. 1/64.
- 39 Directive 2014/23/EU has not been transposed in Spain yet. Although its eventual transposition could entail some qualifications to the arguments set forth below, neither the lack of transposition nor the possible direct effect of the provisions of Article 44 of the directive are particularly relevant to the viability of the arguments proposed.



Santa Coloma de Gramenet.
Besòs riverbed
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RESPONSIBILITY FOR THE EARTH

We hear about the state, the nation, perhaps even the homeland... identity, unity. But in metropolitan areas there is little mention of the concept *earth*, which underlies everything else. It is not a coincidence that it is the name of the planet we live on. Civilizations are created and developed through conquests of its surface. History is written as a result of these conquests, and so are politics and economics. The origin of almost all wars is territorial. There are borders, places of shelter: some are welcoming, some are not. There are urban and rural areas. Natural resources become subject to commercial interests. Good citizenship indicates a desire for institutions and the good behaviour of those who live in society. But nothing is as difficult as managing to live together in a world of individualists.

The concepts of state, nation, homeland, identity and unity have brought people together. However, it sounds conservative to say that we have to preserve the earth, and this is the capitalist trap with which we are faced. In times of poverty, in the

1950s, it was understandable for places like Mallorca to sell off the coastline, because the land on the coast was worthless. The first souvenirs were cockles taken from the beach—the locals would have been stupid not to make money from such an abundant, free resource.

Since then, with the connivance of most political parties, it is widely thought that if you don't take advantage of natural resources, you are stupid. But it is one thing to take advantage of them and quite another to over-exploit them. In fact, natural resources are never free. Nobody wanted to miss out, but some people gave warnings of the dangers of exploiting resources for easy money. The critics were branded condescendingly as boring do-gooders, and *politically correct* and *morally superior* became insults. In comparison with the increasingly ambitious projects that made the country, nation or state great, defending the earth was whimsical.

If somebody went too far (like the *Rainbow Warrior* against oil prospecting), they were called "activists",

which sounds like “terrorists”. If someone came out against illegal housing developments, they were called anti-system, hippies or dreadlocks, according to the period. It was a nuisance to free, unscrupulous business development. Protecting coves, the seabed and Posidonia meadows is incompatible with the massive arrival of cruise ships. Protecting the fauna and flora of the beaches is incompatible with the construction of seaside apartments and hotels. Placing sunshades and hammocks on the sand is incompatible with public space. Three-lane streets harm the health of the residents. But when someone criticizes these practices, the answer is that we shouldn't go against our nature: if we are a tourist destination, if we are urban, we have to exploit it to the full.

Nature is never for tourists or urban, and economies based on excessive exploitation fail sooner or later. But before that happens they will have destroyed the ecosystem. We have seen this with the powerful motor industry. Years had to go by before we became aware of its effects. And every time a small victory is won, the global forces start again, questioning climate change and the Kyoto Protocol.

Barcelona opened up to the sea during the Olympic Games. With the arrival of low-cost airlines, it had a makeover and became the largest shop in the world (and putting on

make-up to sell yourself has a name). Five years ago, 72% of Barcelonans defended the arrival of new tourists. Today, tourism is considered the main problem of the city and is linked to the lack of affordable housing. Gentrification is now affecting the whole city. This is due to a lack of land in the most populated areas, leading to high population density (La Florida, in L'Hospitalet, has the highest number of inhabitants per square kilometre in Spain) and forcing people to move to other neighbourhoods (the Ciutat Vella district has lost 11% of the autochthonous population in the last decade; the Gothic Quarter has lost half).

The number of property sales in Spain is now higher than in 2008, just before the real estate bubble burst. But there is a difference: one in four buyers is now a foreigner. Global megafortunes are forcing out the local classes. The paradox arises when the property is bought by the investment funds that represent the savings of the people who are forced out. The prices per square metre in the Eixample, Sants-Montjuïc and Horta-Guinardó districts have risen by 20% in the last year. By the domino effect, the first and second metropolitan belts have also become more expensive: Molins de Rei, Cornellà and Mollet del Vallès have been the towns most affected. The same for Montgat and Castelldefels, not so much by the expulsion of residents from the cen-

tre as by the arrival of tourists. Rental prices have soared and are becoming unaffordable for people on local salaries. At present, only 5% of the apartments in Barcelona are rented for less than €800 per month.

The difference between a cosmopolitan city and a tourist city is that in the latter tourists have more rights than residents. The residents have become extras in their own home, which has become an enormous stage set decorated with establishments that, like invasive species, displace the emblematic ones that once distinguished the city. But we must not complain, because this brings wealth, they say. Are you sure? For whom?

We are told how much money tourism brings in, but not how much it costs. We are told that it creates many jobs, but not that these jobs are unstable (the hotel industry has lower than average wages: about €15,000 per year).

Access to decent housing is a fundamental right and in no case should it be a business; and it should not form part of the black economy. It should not be regulated according to market laws, but according to social needs. Measures must be taken, as in all industries, so that they develop in a balanced way. But it is difficult to do so, because these measures are restrictive and unpopular. And what is needed, above all, is for everyone to accept responsibilities.

If we are not careful, the metropolitan area will not only lose quality of life; it will lose its life itself, which

lies in the neighbourhoods. Failing to set limits means that there is no way back. Let's consider Ibiza and Venice, where it was thought that tourism would level out, but it is still increasing year after year. Beyond the name as a brand, there is nothing left of these cities. On the other hand, Minorca has earned the reputation of protecting the land.

Turismophobia (which sounds like xenophobia, the same as “activist” sounded like “terrorist”) is nothing more than the natural defence of the territory. In this defence, the residents who have loved and respected this city—this land, although it is not mentioned—feel increasingly abandoned and need a reason for cohesion. The danger is that the whole of Barcelona will be left without residents to defend it.

Land is an authentic value, a common good with future prospects. What was already there and what remains. The rest is superfluous. Preserving it arises from an atavistic, holistic feeling. And it is right for it to be above individual interests, because it reflects and represents us. It is what we share, what we are.

Llucia Ramis



Barcelona. Raval neighbourhood
© KIM MANRESA

FIRST, GOOD GOVERNANCE

Despite the announcements of the end of ideologies, the emergence of liquid societies and the triumph of weak thought, the truth is that political life seems to have a mind of its own and goes down opposite paths. That “placid” disaffection of a few with politics has given way to widespread intemperate indignation. Indifference has mutated into mistrust. The struggle to occupy the political centre is replaced by nods of complicity towards the extremes. Moderation and prudence, the old virtues of the ruler, seem cowardly, and radicalism and daring are required. And if freedom of speech is still threatened by the abuse of political correctness that has become a thought police, it is no less true that it is increasingly harmed by shamelessly intolerant opinions.

Summed up like this, it may seem (and be) an exaggeration. But the growth or consolidation of far-right parties in central and northern Europe, Donald Trump’s pyrrhic but effective victory in the USA and the equally narrow but decisive majority for Brexit in the UK, all suggest that the picture is pretty much like I’ve

described it above. We could also find counterexamples indicating zigzags and about-turns along this road. And it might be that we are simply in a time of transitional uncertainty conducive to the most eccentric expressions. Here’s hoping!

Indeed, in an attempt to find a positive side, it could be argued that this crisis of democratic political culture can lead to a critical reflection on what has brought us here, and above all, a rediscovery of what is most valuable and indispensable in it. For example, the importance of using comprehensible language and abandoning the barricades behind which politics tends to hide its shame. Or the need to encourage the participation of citizens beyond asking them for their vote at every electoral confrontation. Or informing citizens properly. And above all, the present crisis must make us realise that unless a consistent and proven trust is re-established, power can only be wielded in an authoritarian way, that is, without authority.

It is in this framework for reflection that I would like to make some

brief points on the importance of the notion of good governance. Precisely because in times of a heightening of the clash of discourses and narratives—rather than ideologies—we might think that goodness of governance only belongs to one of the sides—our own, of course—and not that of the others, the idea of good governance forces us to fix our gaze once again on what is common, that which favours agreement between opponents, in the aim, if not of the common good, at least of the general interest. Let us take a look at this.

Firstly, the notion of good governance has the advantage that it stands above any particular option. Whether the government is in the hands of the left or the right, the moderates or the radicals, a catch-all party or a coalition of minorities, good governance can be demanded of all of them. Even before the implementation of programme commitments, the fundamental issue is that they must respect the general principles that will guarantee the recognition of their democratic legitimacy by both one's own and one's adversaries. Thus, the strict separation of powers, the radical extirpation of all forms of

corruption and the transparency of decision-making processes and their enforcement, to give a few examples, apply to everyone. Likewise, utmost respect for minorities, commitment to equity, the guaranteeing of safety, the pursuit of justice, the promotion of culture and respect for scientific knowledge, love of freedom and the fostering of understanding, are all fundamental components of good governance.

Secondly, the pre-eminence of good governance, as the first and principal demand to be made of any government, can be the foundation for a proper understanding of democratic tolerance. I say “a proper understanding” because often tolerance is only demanded from the top down, or becomes the expression of condescending authoritarianism. Here, when I say democratic tolerance I mean not only resigned acceptance of a ruling majority but a call for critical participation particularly at this higher and prior level that defines good governance. It is not a matter of asking our adversaries to temporarily forgo the defence of their principles

and interests. But it is necessary to get them to participate in the definition and control of those good practices that must characterise the goodness of governance. It is no easy task to establish a high level of trust between adversaries. But it would be desirable for political confrontation to lie in a reasoned debate on the appropriateness or otherwise of a particular decision, its advantages and consequences, not—as is usual—in stirring up doubts on the opponent's repute.

And lastly, this is the crux of good governance: to build a solid critical trust in the functioning of the institutions out of which the general interest is to be constructed. Ingenuous as it may seem, I insist on the idea that the general interest must be built democratically. As we already know, the starting point is the clash of often irreconcilable interests. All the more so in a complex society such as ours, in which the discussion is no longer two-sided, as is held by today's populism (those on top and the underdogs; the people and the elites; the pros and the antis), but takes place on multiple crisscrossing planes. In this regard, the idea of good governance

also becomes increasingly complex, it is true. And precisely for this reason, all governments and their institutions should be required, as well as—and before—applying their programmes, to devote a large part of their time, concerns and resources to practising good governance.

In 1338 and 1339, in the Sala della Pace of the Palazzo Pubblico in Siena, Ambrogio Lorenzetti painted three scenes on the criteria for good governance and its consequences, and also on the effects of bad governance, commanded by Tyranny. Beyond the beauty of these magnificent frescoes, there are the representations of the fundamental virtues of this good governance I have been talking about. But if I had to single out some of their elements, I would mention the place occupied by Wisdom, Justice and Concord, and alongside the cardinal virtues, Peace and Magnanimity. All in all, some magnificent “food for thought” for all of us who are concerned about good governance.

Salvador Cardús i Ros



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SUMMARY

PRESENTATION

A new open window on transparency	5
<i>Ada Colau Ballano</i>	

INTRODUCTION

In the light of new times	11
<i>Gemma Calvet i Barot</i>	

LIGHTHOUSE

Can it be done?	15
<i>Natza Farré</i>	
A localized evil	19
<i>Carles Casajuana</i>	

OUR PILLARS

The transparency obligations of private entities that receive public funds or provide public services or services of general or universal	23
<i>Isabel Baixeras Delclòs</i>	
Legal analysis of the possibilities of remunicipalising services of general interest, from a competition perspective	59
<i>Stefan Rating and Yolanda Martínez Mata</i>	

LIGHTHOUSE

Responsibility for the earth	87
<i>Llucia Ramis</i>	
First, good governance	91
<i>Salvador Cardús i Ros</i>	

Contributors	95
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What we do

The main objectives and actions promoted by the Transparency Agency are as follows:

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LUX BARCELONA

Light (*Lux, lucis* in Latin). «Physical agent, one of the forms of energy to which eyes react, making things visible».

This magazine, supported by the Barcelona Metropolitan Area, aims to be a converging point for brainstorming and generating useful materials for good governance. It is well aware of the unique opportunity to work for a contemporary humanism which adopts the challenges that the 21st century democracies are facing. Public policies must dig down to the roots for them to guarantee the future of an ethical and fair society. In this matter, the metropolitan administration is a governance tool for cities, and thus it cannot disregard the democratic transformation. This series of texts intend to lead this transformation and shed light on the idea of good governance that had illuminated the world during the Enlightenment.

This very first number of Lux Barcelona includes a preface written by **Ada Colau**, as president of the Barcelona Metropolitan Area (AMB), as well as an essay by **Gemma Calvet** about the value and the challenges of applied transparency, towards a *democracy of authenticity*.

Public services of general or global interest are the basis of this number. They are approached from a transparency as well as from a good governance point of view. On the one hand, **Isabel Baixeras** details the transparency duties of the public service providers and bodies receiving public funds. On the other hand, **Stefan Rating** and **Yolanda Martínez** analyse the remunicipalisation options for services of general interest, from a competition law perspective.

Lux Barcelona also includes four approaches that, under the heading “Lighthouse”, encourage the reflection from a humanistic point of view. In this case, **Natza Farré**, **Carles Casajuana**, **Llucia Ramis** and **Salvador Cardús** are the lights guiding us. The magazine is complemented with photographs about the reality and the metropolitan policies by the renowned photographer **Kim Manresa** and the graphic opinions by **Jordi Duró**.