Following the considerations included in the report *Regressions on human rights: freedom of expression of elected representatives and separation of powers in the Kingdom of Spain*, of April 2017, and after the letter addressed to several European bodies, such as the Spanish Ombudsman and the Spanish regional ombudsmen on September 16, and the statement issued on September 20, the Catalan Ombudsman presents the following considerations to his European and Spanish counterparts for their information and so they can carry out the actions they consider appropriate regarding the guarantee of fundamental rights and freedoms.

First

The periodic penalty payments imposed by the Spanish Constitutional Court on September 20 may be a violation of article 6 of the European Convention on Human Rights (ECHR) in one of its most basic principles, which also inspires the Spanish legislation.

On the imposition of these penalty payments, the following observations must be made:

1. The nature of the periodic penalty payments as provided for in article 92.4 of the Organic Law of the Constitutional Court has been strongly debated, and the Constitutional Court, in the sentences resolving the unconstitutional appeals against the Organic Law 15/2015 (SSTC 185/2016, of November 3, and 215/2016, of December 15), declared that they were not of sanctioning nature, but were only implementing measures designed to ensure compliance with the Court's resolutions. In the case of article 92.5 of the Organic Law of the Constitutional Court (which justifies the imposition of the aforementioned penalty payments), failure to comply with resolutions that require the suspension of contested dispositions, acts or actions and in the case of circumstances of special Constitutional transcendence. However, the non-sanctioning nature of these penalty payments can be discussed, especially because there could be a conflict with the doctrine of the European Court of Human Rights (ECtHR), which has considered that sanctions exceeding 400 Euros, affecting the person directly and prejudicially, have a punitive nature and therefore involve the application of the guarantees laid down in article 6 of the ECHR (Engel doctrine, in the individual opinion of STC 185/2015 of Adela Asúa).

2. In case the periodic penalty payments imposed by the Constitutional Court have a sanctioning nature, then there is no doubt that the guarantees of article 6 of the ECHR should be applied, and if these guarantees were not met - as in the case of the penalty payments imposed by the Constitutional Court through the interlocutory decision of September 21- we would be facing a

violation of article 6 of the ECHR and of the most basic principles of law, recognized by the Spanish legislation.

3. But even if these penalty payments are considered not to have a sanctioning nature, the imposition of this type of payments is always accompanied by legal guarantees. This is the case, for example, of the periodic penalty payments imposed by the Administration, which, as administrative acts, must follow the established procedure and can be reviewed. It may be of special interest the imposition of periodic penalty payments by higher courts, which do not admit a subsequent appeal. In these cases, as with the European Court of Justice, the procedural guarantees are extended, ensuring the right of defence of the parties (art. 259 and 260 of the Treaty on the Functioning of the European Union -TFEU-, in the frame of the infringement of an obligation).

4. In the case of periodic penalty payments imposed by the Constitutional Court, however, they are imposed:

- *inaudita parte*: they can be imposed ex-officio or at the request of the Government (which in this case is one of the parts of a constitutional process that is still in process and not resolved), without even hearing the persons concerned. The report that is expected to be issued is merely to inform about the compliance of the Constitutional Court resolution (art. 92.4 of the Organic Law of the Constitutional Court) and, therefore, does not meet the minimum requirements of a prior hearing. But, in addition, the penalty payments can be imposed in some cases even if this report has not been issued (art. 92.5 of the Organic Law of the Constitutional Court). This is what happened with some of the persons to whom these payments have been imposed through the aforementioned interlocutory decisions.

- Without the possibility of a subsequent judicial review, since the Constitutional Court resolutions cannot be appealed. Even in the event of an appeal being admitted (which is not expressly provided for), it cannot be considered an appeal that allows the contested act to be reviewed judicially, given the contamination of the whole body if the penalty payment has been imposed by the Plenary (as is the case).

The fact that the penalty payments do not have a sanctioning nature does not mean that they are exempt from judicial review. Specially if they have been imposed without following any procedure in which the persons concerned have been able to exercise their right of defence, and have not even been heard.

- In addition, the request for a report on the compliance of the Constitutional Court resolutions may, in itself, violate the right of defence if criminal proceedings have been opened simultaneously, as is the case here, because in this case the persons concerned would be

compelling to declare against themselves, which directly constitutes a violation of the rights recognized in article 24 of the Spanish Constitution.

5. Therefore, it can be concluded that the imposition of periodic penalty payments by the Constitutional Court through the aforementioned interlocutory decisions constitutes a violation of the most basic principles of defence inherent in a democratic State governed by the rule of law, notwithstanding that they may also represent a violation of article 6 of the ECHR. It is painfully paradoxical that the highest body to guarantee the fundamental rights of the Spanish State is absolutely incapable of offering any legal guarantee to the persons to whom it imposes economic penalty payments that can seriously affect them.

Second

Since September 20, in addition, the Government of Catalonia has been intervened for the first time since 1978, with a real attack and a suspension of the right to self-government through a procedure of dubious legality and foreseeable unconstitutionality. The Organic Law 2/2012 has not been respected and there has been a covert application of article 155 of the Constitution without following the established procedure.

The Organic Law 2/2012 on budgetary stability establishes a **monthly submission of information**, specifically in its first additional provision and in supplementary regulations that develop it (especially Executive Order 17/2014), and since Catalonia is part of the Regional Liquidity Fund, the Order PRE/2454/2015, of November 20, gave publicity to the Agreement of the Delegate Commission of the Government for Economic Affairs (CDGAE), which established that the General Intervention of the Government of Catalonia had to submit a certificate to the Spanish Ministry of Finance on a monthly basis on the amount of authorized and committed credits, obligations recognized in the budget, unpaid expenses recorded in non-budgetary accounts, other expenses and total payments made.

Regarding the **weekly submission of information**, the Order PRA/686/2017, of July 21, gave publicity to the Agreement of the CDGAE under which the previous monthly certification became weekly.

As a legal basis of this specific measure, the regulations governing the Regional Liquidity Fund program were invoked, which introduces the possibility of establishing a reinforced control, with remission of additional information and special monitoring, of the execution of the public expense of the Catalan region.

To justify this measure, it was invoked, firstly, the certification by the General Supervision Department of the Government of Catalonia of the recognition of obligations and authorizations of expenditure under the budget program regarding "organization, management and monitoring of electoral processes". And secondly, it was also invoked that some representatives of Catalan institutions had expressed their willingness to proceed with the celebration of a referendum in Catalonia on which the Constitutional Court had suspended the validity of budgetary provisions. At the discretion of the CDGAE these two facts put at risk, without further explanation, the financial stability and the normal functioning of the Administration and the regional institutions.

As acknowledged in the explanatory statement of the Order HFP/878/2017, of September 15, until September 6, 2017 the Government of Catalonia had weekly submitted several certifications in compliance with the measure derived from the Order of July 21, 2017.

Finally, **the announcement of the non-compliance of the weekly submission** was made by letter on September 13, 2017, in which the Vice-President of the Government of Catalonia and Minister of Economy informed the Spanish Minister of Finance that the weekly submission of information was left without effect under an agreement of the Government of Catalonia. To justify this decision, it was stated that the Government of Catalonia had adopted, under the international law, an exceptional legal system aimed at regulating the celebration of a referendum on self-determination in Catalonia that "is incompatible with the measures adopted in the CDGAE Agreement (...) as they represent a political control that has no relation with the objectives of budgetary stability nor with the purposes of the state legislation in this matter".

Regarding the Order HFP/878/2017, of September 15, which publishes the Agreement of the Delegate Commission of the Government for Economic Affairs of September 15, 2017, of adoption of measures in defence of the general interest and in guarantee of the fundamental public services in Catalonia, it is necessary to emphasize the following:

1. Request to the President of the Government of Catalonia to adopt and notify within 48 hours to the Ministry of Finance an agreement of non-availability of its budget on all matters other than essential services.

The detail of services not affected by this measure can be found in Annexes I and II of the aforementioned Order PRE/2454/2015. Some of the essential public services that are not affected are those related to health, education and social assistance. Other priority public services are, among others, payroll, the administration of the Government's finances, traffic, public security, civil protection, roads, transport, ports, waste management or public debt. This implies that, once this agreement of non-availability of budget has been

adopted, the Government of Catalonia cannot pay for new expenses that have not been previously budgeted, except in the case that they affect essential public services or priority services. **In other words, the Government of Catalonia is financially suspended and prevented from acting in such important social areas as, among others, culture, agriculture or sports.**

2. The Spanish Ministry of Finance will adopt the Agreement of non-availability of budget if the Catalan President does not do so within the established 48-hour deadline.

3. The Government of Catalonia shall notify the State of all payments concerning budgetary appropriations related to essential public services or to priority services, financed through the monthly resources (ordinary or extraordinary) that the State transfers to the Government of Catalonia from the general State budget.

In this communication, the Government of Catalonia must certify that these payments will not be used to finance any illegal activity or any activity contrary to the decisions of the courts.

4. In relation to the previous point, the State will not make new transfers of resources to the Government of Catalonia but will directly make the payment of essential public services or priority services such as, for example, invoices from suppliers and payrolls of public employees. This is another demonstration that the Catalan finances are suspended, although in this case the possible actions derived from the budgetary projections are not suspended nor blocked but are totally subject to the decisions of the State.

5. The legal basis of the measures adopted lies within the Organic Law 2/2012 (especially the first additional provision) and the Executive Order 17/2014 (especially articles 22 to 27), which regulates the instruments in the hands of the State to control the compliance of the budgetary stability by the different Spanish regions, especially those who have joined the Regional Liquidity Fund**.**

6. The measures adopted are justified with the announcement of the celebration of the referendum of self-determination of Catalonia and with the non-compliance of the adjustment plan deriving from the adhesion to the Liquidity Fund due to the lack of transmission of the information in the required weekly deadline.

In particular, it is stated that for these reasons the action of the Government of Catalonia endangers the principle of budgetary stability and that, as a result, the State must ensure that no resources are allocated to activities contrary to the law but only to essential public services and priority services.

Thus, once the exposed facts have been analyzed, we make the following legal assessment:

1. The legal arguments for the implementation of the measures established in the Order HFP/878/2017 lack a more precise explanation of the reasons why the action of the Government of Catalonia implies a general impact on the budget stability. In fact, **the measures adopted do not follow the graduation of preventive, corrective and coercive measures of Chapter IV of Organic Law 2/2012 but are directly coercive measures that can only be founded on the first additional provision of Organic Law 2/2012**. This provision, in its section 5, establishes that the non-compliance by a Spanish region of the adjustment plan will result in the application of the coercive measures provided for in articles 25 and 26 of the Organic Law. In this regard, the announcements made by the Government of Catalonia, especially the non-compliance with the weekly submission of information, could be considered a breach of the adjustment plan.

2. The coercive measures adopted by Order HFP/878/2017 do not respect articles 25 and 26 of the Organic Law 2/2012 for the following reasons:

a) **The 15-day deadline between the non-compliance and the adoption of the Agreement of non-availability of budget** by the region of Catalonia has not been respected, since the Government of Catalonia has only been granted 48 hours.

b) The material scope of the Agreement of non-availability of budget and of the assumption by the Spanish State of the payments on essential public services and other priority services does not seem to respect the proportionality required legally, given that it has a very general dimension and not limited to loans directly linked to the compliance of a specific objective of budgetary stability.

c) There are no plans to create a committee of experts to assess the situation and propose measures.

d) The adoption by the Ministry of Finance of the Agreement of non-availability of budget, on the assumption that it is not adopted by the Government of Catalonia, implies, as expressly reflected in article 26.1 of Organic Law 2/2012, a covert application of article 155 of the Spanish Constitution without following the procedure established in this constitutional precept, that is, without the specific request to the President of the Government of Catalonia and without approval by the Senate of the specific measures to be adopted.

The Official State Gazette (BOE) of September 21, 2017, publishes the Order HFP/886/2017, declaring the non-availability of credits in the budget of the Catalan autonomous region for 2017.

Under this Order, the execution of the measures included in the previous Order is completed, so that, since the Catalan President has not adopted the Agreement of non-availability of budget, the Agreement is adopted directly by the Spanish Ministry of Finance.

With regard to this measure, it should be remembered that it lacks a material and procedural basis, since such a decision does not comply with the Organic Law 2/2012. From the material point of view, it is not proportional to invoke the principle of budgetary stability, linked to resources from the Regional Liquidity Fund to justify a non-availability of budget of a very large extent when the resources eventually destined to referendum expenses would be very limited. From the procedural point of view, the adoption by the Spanish Government of the aforementioned Agreement is not being made, as would be mandatory (article 26.1 of the Organic Law 2/2012), following the procedure of article 155 of the Constitution (absolute majority vote at the Senate) and, therefore, it implies a covert application of this constitutional precept.

Ultimately, with this measure and the one already established by the previous Order, the Government of Catalonia is subject, without following the appropriate procedure, to a very remarkable intervention or suspension of budgetary availability by the Spanish State. It cannot access any credit to deploy powers in matters as important as culture, agriculture or sports, among others. And in matters related to essential public services (health and education, for example) or priority expenses (payrolls of civil servants) the Government of Catalonia must request the authorization of the payment of each specific expense to the Spanish State, who actually does the payment.

Third

The searches and arrests that took place on September 20 could mean a degradation of the democratic process and a forced use of criminal law, as was the case of the public prosecutor, who summoned over 700 Catalan mayors.

There have been continued possible attacks on the freedoms of people in Catalonia, and new transgressions with different situations lacking in proportionality.

Attention should be drawn to the searches of different departments of the Government of Catalonia and the arrest of Government officials, based on the

case concerning former senator Santi Vidal of the Court of Instruction number 13 of Barcelona, which is the court that has ordered these searches. That is, a particular case in this court has ended up in the intervention on several departments and dependencies of the Government of Catalonia. It should be added that the arrests of people that have occurred within the framework of these searches have been particularly rough. In some cases, these are public officials and servants. Both actions, and also the summoning of more than 700 mayors by the public prosecutor, are immensely disproportionate.

Attention should also be drawn to the search of several printing offices throughout the Catalan territory, during which workers and company directors had to wait for hours for the court order to be provided. Although, a priori, this fact is not illegal since the searches were made with a court order, it is necessary to question the proportionality of the measure, considering the hours it took for the court orders to arrive.

Regarding the search procedures of two law firms, the court orders must be accompanied by the special guarantees of the process pursuant to the case law of the European Court of Human Rights. In addition, it is important to remember the safeguarding of professional secrecy, established in article 542.3 of the Organic Law of the Judiciary.

In addition, according to the information received from the Barcelona Bar Association (ICAB) regarding the arrests of September 20, the communications of the arrests were significantly delayed.

Two of the people arrested are lawyers, and there is no evidence that the arrest was reported to the ICAB. It seems that the ICAB has learned of the detention by the lawyers who have assumed the defence of these people.

Fourth

It is also important to emphasize the attempt to search without a court order the headquarters of a political party (CUP) in Barcelona by several agents of the Police Intervention Unit.

As already stated in the report *Regressions on human rights: freedom of expression of elected representatives and separation of powers in the Kingdom of Spain*, of April 2017, in accordance with the case law of the European Court of Human Rights, freedom of expression is particularly important also for political parties and their active members. It should be taken into account that these represent their voters and, therefore, an attempted search at a party's headquarters without a court order, that is, without due procedural guarantees, represents a frontal attack on the whole society, especially if this is supposed to be democratic and plural.

SÍNDIC
EL DEFENSOR DE LES PERSONES

Fifth

Finally, there may have been an attack on the freedom of information in different media, such as the newspapers *Vilaweb*, *El Punt Avui* or *El Nacional*, to restrict the right to free speech and information. The possible limitations to this right, contained in article 10 of the European Convention for the Protection of Human Rights, must pass a proportionality test. In this regard, according to settled case law of the European Court of Human Rights, any limit to the exercise of a fundamental right must be necessary and proportionate, and authorities have the obligation to demonstrate that the measure imposed is the least restrictive and it is compatible with democratic principles, and to ensure that a lighter restriction is not sufficient, guaranteeing in any case that the right in itself is not endangered.

Freedom of expression is essential in a democratic society and it is especially serious to damage it also when it affects the press freedom.

FINAL CONSIDERATIONS

For all these reasons, the Catalan Ombudsman wishes to inform you on the different democratic deficiencies and lack of respect for the fundamental rights that have taken place over the last few days, and would like to ask you to participate in a joint action within the framework of your competences in order to guarantee that human rights are respected and to address immediately, as I have already previously asked for, the necessary political dialogue to resolve the current situation.

We reiterate that problems of rights and political diversity cannot be solved through these instruments and call for the necessary dialogue and negotiation among the highest representatives of institutions.

The Catalan Ombudsman will continue to work, as established in article 78 of the Statute of Autonomy of Catalonia, in the defence of rights and freedoms, and reiterates its full availability to study any complaint about these matters, which will be submitted to European authorities.