



THE PROVISION OF  
GENERAL INTEREST  
SERVICES AND BEST  
CORPORATE  
PRACTICES  
FEBRUARY 2014

SÍNDIC

EL DEFENSOR  
DE LES  
PERSONES



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The provision of general interest services and best corporate practices

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# **THE PROVISION OF GENERAL INTEREST SERVICES AND BEST CORPORATE PRACTICES**

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## INTRODUCTION

The evolution of our society has led to an enhancement of the rights of consumers and users, especially those referred to the management of services considered to be basic or essential for people's daily life.

An important part of these basic or essential services has evolved from its primary configuration as public services reserved for public administration to its current setup, in which they are rendered by private companies under the regulation of free market. The liberalization of the management of activities considered to be essential cannot diminish the rights or guaranties of consumers.

This process of liberalization and privatization of public services and activities means that the Administration is not the only entity to have public service duties, as certain economic private sectors have also these duties because of the activity they carry out.

In this new framework, the activities in private sectors that entail public service duties shall be monitored directly by the ombudsman, although it should be considered whether the tools thought to oversee public administration are suitable to monitor the private sector, in which the use of the same tools could interfere with the exercise of certain fundamental rights.

To deepen this discussion, the Catalan Ombudsman held three symposiums in which the Catalan Circle of Economics and the International Ombudsman Institute, among others, had active participation. As a result of these symposiums, we present you the following papers written by Joan-Ramon Borrell, Carles Ramió and Juli Ponce.



## THE CATALAN OMBUDSMAN AND GENERAL INTEREST COMPANIES

In its Article 78, the Statute of Autonomy of Catalonia attributes competencies to the Catalan Ombudsman to act in the realm of private organizations that provide universal and/or general-interest services.

The concepts of universal and general-interest services are economically and legally elastic, and this is not the place to define them. In any event, they are private services in which elements such as the universalization of benefits, public functions and even authority come into play, but they are private services that could affect people's fundamental rights, elements that are essential for an institution like the Catalan Ombudsman.

There are a number of actors who guarantee the quality and defense of consumers' rights: regulatory agencies, autonomous community consumer affairs agencies with broad competencies, authorities competent in State and autonomous community matters, local councils through OMIC's (Municipal Consumer Affairs Offices) or similar units, the judiciary, consumers' organizations, etc. Aside from these figures, companies regulate themselves through customer service and quality departments, customer advocates and corporate social responsibility departments (CSR).

Despite this constellation of actors making up the system of guarantees, in practice, consumers are still quite vulnerable. The regulatory entities of Spain (following the continental, not Anglo-Saxon tradition) are not very independent, politically speaking. They perform regulation of a political nature (e.g. political prices), addressing organization and competition in the sector, but they do not contemplate the defense of consumers.

The different public administrations have the problem of their overarching, cross-disciplinary outlook on issues, and due to their fragmentation, tend to seek solutions to incidents rather than resolution of problems in the realm of categories or systems.

Private companies that provide universal and/or general-interest services in Spain have many organizational problems in guaranteeing the rights of their users or consumers. They often give service to millions of users, and equip themselves with Fordist production models with an economic outlook, but that are not very flexible in handling specific incidents that affect their users, who are often left defenseless.

Consumers of general-interest services in this country are often left defenseless and poorly served. In light of these reasons, it could be considered that that supervision and analysis work that the Catalan Ombudsman could provide in these areas may represent greater added value in the defense of consumers' rights (and in a broader sense, of citizens, as rights are affected). The Catalan Ombudsman's perspective could be innovative in the proactivity, cross-disciplinary nature and depth in analysis, and highly effective in the formal and material protection in the defense of individuals' rights

### Expertise and goals

The Catalan Ombudsman has expertise in the defense of citizens' rights in the area of public administrations and their activities. Public administrations have been revamped and have a great deal of experience in service to vast customer bases. In this vein, their Fordist production systems are at times more flexible than those of private companies themselves. Therefore, best practices must be conveyed from the public to the private sector, and in this conceptual migration, the Catalan Ombudsman can play a significant role.

In the Catalan Ombudsman's activity with the corporate world, the phenomenon of outsourcing and public-private partnerships would also have to be taken into consideration. Thus, as the services are publicly owned, the Catalan Ombudsman would have to act on and supervise the responsible administration (the

principal), and not the companies (agents), and contribute to the improvement of the management, supervision and evaluation systems exercised by the principal over the agents. In any event, given the inhibition of most public administrations in the exercise of their functions as principals, the Catalan Ombudsman has all of the legitimacy to supervise and intervene directly in private companies providing public services.

As set out in the Statute of Autonomy of Catalonia, The Catalan Ombudsman's Office must process the complaints and reports from users of private universal and/or general-interest services just as it does with public administrations. The advantage is that the Catalan Ombudsman-Company relationship is much more agile than the Catalan Ombudsman-Administration equivalent (formalities and conventional case file management are not necessary, and it allows rapid contact with companies by e-mail or telephone). Companies are very permeable to these complaints, and problems can be resolved very quickly.

The Catalan Ombudsman's great strength must be put to use: publicity and denunciation of possible corporate wrong-doing before public opinion.. This power should only be used in very extreme cases.

The Catalan Ombudsman's Office must act with its full capacity to process complaints and perform ex officio monitoring of these private companies. That said, it must also prioritize as much as possible its preventive actions which, in our opinion, are those that could contribute the most value to the system and to society.

## 1. Guarantee of equality in the relationship

The Catalan Ombudsman's supervisory interventions must be especially aimed at correcting situations of contractual imbalance between the parties and in general, facilitating the identification of dissatisfactions with service provision, the diagnosis of problems and contradictory debate among supervisory institutions and suppliers, to make possible regulatory and organizational improvements in the services.

In the task of identifying the contractual imbalances which are often at the root of competition problems in deregulated services, we must look at very specific aspects.

## 2. Identifying contractual imbalance between the parties

It makes no sense to list activities that are of general interest or that must be essential. Rather, the emphasis should be on finding in which circumstances service provision does not fit with public interest, or does not achieve common good due to a number of specific circumstances that cause provision under a monopoly or competition scheme to not work properly.

There is a special need to identify the imbalances stemming from consumers' and users' information problems, and the strategic use of this information by suppliers. The problems originating in the behaviors and incentives of consumers and suppliers must also be identified.

Once the problems are identified and diagnosed, a debate must begin on how alternative regulatory and competition promotion designs can prevent abuses and facilitate more rational decision-making.

## 3. Cooperation and dissuasion

The Catalan Ombudsman must find his own field of action in the defense of citizens' rights, in a way that is respectful of the competencies belonging to sectorial supervisors and regulators, as well as those of the competition or consumer protection authorities of the administration, and the authorities in civil, commercial and contentious-administrative jurisdictions. The Ombudsman must modulate the intensity of his actions, so that each intervention can bring about real improvement in service provision.

## 4. Cooperation with supplier companies

The Catalan Ombudsman's Office, as it takes interest in claims, can play a key role, in terms of advising and dialog, to improve internal conflict resolution processes.

The Catalan Ombudsman's Office can fulfill advisory and mediation function with supplier companies as well as public administrations responsible for the service. Both are bound by law to cooperate with the Catalan Ombudsman to ensure the effective respect of rights and freedoms.

## 5. Making proposals

The Catalan Ombudsman holds a privileged position as a parliamentary institution. This position allows it to fulfill duties for which the rest of institutions are ill-equipped: the task of informing Parliament and administrative bodies of the executive branch, through what in other countries are called superclaims, on the legislative and organizational shortcomings hindering proper essential service provision and full respect for rights and freedoms, as well as the obligation of proposing legislative or organizational reforms that eliminate the causes of repeated and systematic grievances regarding citizens' rights and freedoms.

## 6. Think-tank

This way, the Catalan Ombudsman institution should configure itself as something of a think tank regarding subjects of defense of the rights of consumers of private services of universal and/or general-interest services. The Catalan Ombudsman's Office should set up a networked scope for its activity.

- It would be a matter of establishing networks, contacts and meetings with representatives of the companies, speaking about common problems and solutions and opening the possibility for exchange of experiences (good and bad practices) among the companies themselves in different areas of activity.
- Creation of networks, contacts and meetings among the different public agents involved in the defense of consumer rights.
- Establishment of mixed networks of public actors and private companies.
- In short, it is a matter of creating something of an epistemic community directed and managed by the Catalan Ombudsman that allows cross-disciplinary, integrated systems of conceptual and practical learning in the improvement of consumer rights defense.

Methodology of the Catalan Ombudsman could be:

- Detecting troublesome areas through the contacts in the above-mentioned networks, and the complaints received.

- Deciding to write a monographic report on a given area.
- Carrying out fieldwork on the sector that includes real problem detection systems such as the "mystery shopper" method.
- Writing a realistic report on the sector's situation and problems, and present it to the network of public actors and related private companies.
- (The Catalan Ombudsman) proposing in these meetings a package of improvements that must be carried out by private companies, as well as improvement in public actors' supervision of them. Following-up on and supervising these improvements.
- Writing a final report addressed to Parliament and the public opinion, of a more general and diplomatic nature, on the problems detected and the solutions and improvements agreed and implemented by all involved.

## 7. A real corporate compliance

It is a matter of understanding how the work of Ombudsmen, such as the Catalan Ombudsman, can help in the quest for (true) corporate social responsibility. In the supervision of the activity of private actors exercising public functions, and in the recommendations and suggestions that can be made, the Catalan Ombudsman can contribute to making these companies mindful of considerations relative to social cohesion and environmental sustainability, and incorporate them into their codes of conduct (which are referred to by the 2010 Code of Consumer Rights of Catalonia, approved by Law 22/2010, in several precepts), and improve, this way, their self-regulation.

It would be highly positive that the best practices detected by the Catalan Ombudsman inform the private codes of conduct in whatever way necessary, in an enriching, favorable mutual dialog; in a word, for the general interest.

The relationship between private companies and the Ombudsman can contribute to improving their corporate compliance (in other words, internal systems for supervision and monitoring of private companies' regulatory compliance) and consequently, design better internal procedures to guarantee good administration and the rights of the citizens/consumers/users.

## 8. Legislative boost in a new reality

The progressive transfer of functions and services to the private sector, on one hand, and the impact of the postulates derived from New Public Management in the public sector, on the other, are leading to a rapprochement of the respective accountability schemes of the two sectors, and the legal mechanisms that govern them.

The generation of a reasonable and effective combination of public law (including principles and rules) that accompanies the private exercise of public-origin power, with private law, derived from the applicable legislation,

including the protection of consumers and users, and contracts between parties, would require a regulatory clarification of the scope of the procedural obligations that should be applicable to the private parties, as has already been stated. These necessary regulations would have to consider the autonomy of the provider's will, and the consumer's ability to freely choose in a context of competition. Therefore, it would have to be a modulated administrative right for the guarantee of good (private) administration of public functions and constitutional, statutory and legal rights of the citizens/consumers/users that would supplement (not substitute or duplicate) the guarantee already offered by private law.

# THE ELUSIVE CHALLENGE OF IMPROVING ESSENTIAL SERVICE PROVISION

## 1. Executive Summary

In its Article 78.1, the Statute of Autonomy of Catalonia assigns to the Síndic de Greuges (hereafter Catalan Ombudsman) the following competency (bold print added to the statutory text):

The Ombudsman has the function of protecting and defending the rights and freedoms recognised in the Constitution and in this Estatut. To this end, he or she oversees, exclusively, the activity of the Administration of the Generalitat, that of any public or private related bodies that are associated with or answerable to it, that of private companies that manage public services or that carry out activities of general or universal interest, or equivalent activities in a publicly-subsidised or indirect way, and that of other persons with a contractual relationship with the Administration of the Generalitat and with the public bodies which are answerable to it. He or she also oversees the activity of the local administration in Catalonia and that of the private or public bodies which are associated with or answerable to it.

For the sake of better fulfilling this task, the Catalan Ombudsman sought my assistance in the organization of three days of discussion panels on the rights and liberties of citizens in the realm of essential services, as well as a final summary document that would include an analysis and the proposals derived from the discussions to advance toward the elusive challenge of improving essential service provision.

This paper contains the aforementioned summary of the analysis, and proposals originating from this plural exercise of reflection and debate that took place at the head offices of Foment del Treball, the Parliament of Catalonia and the Cercle d'Economia from September to December 2011.

In essence, this document states that in order to protect essential service provision, mechanisms

of protection of the rights and freedoms, and continued public discussion on the improvement of the provision must be designed, as the conventional instruments of administrative supervision, regulation and defense of competencies or protection of consumers in service provision are insufficient to ensure the respect of these rights and freedoms.

This work begins with economic analysis and the empirical evidence that public mechanisms of administrative and judicial control, as well as those of competitive pressure on the markets, fail, and that the best combination in the use of either type of instrument is one that varies both over the various services covered as well as in a single service over time.

Only a system of “checks and balances”, and an active commitment by citizens in the exercise of their rights and freedoms makes it possible for there to be a true improvement in these services.

This need prevails in the services provided, under a direct monopolistic scheme, by the public administrations themselves as well as those provided indirectly through public or private companies, and also in the provision of services, either through public or private suppliers, in a scheme of competitive concurrence in deregulated activities.

After three decades of reforms that have facilitated the introduction of competition and public-private cooperation in the provision of essential services, we have ample experience and lessons that can be drawn on the social benefits of deregulation, but also on the limitations of regulation applied to essential service providers, to ensure and guarantee the rights and freedoms of citizens vis-à-vis the quality of the service, universal access to services, an effective right to choose, a thorough and equitable attention to claims and, in essence, an improvement of services.

Until angels govern public affairs and private companies, the improvement in essential

service provision will depend on having supervisory bodies and the engagement in ongoing, contradictory debate that facilitates constant evolution (a revision, not a revolution) in the service provision models and actions for the supervision, regulation and defense of competition.

When services fail to improve it is because deliberative democracy, the commitment-by citizens and service providers alike-for improvement and innovation, and the promotion of constant reform from the system itself are failing.

To demonstrate that the reinforcement of democratic deliberation processes, commitment and constant dialog between consumers and providers, and the checks and balances among supervisory institutions are what lead to improvement in essential service provision, the document is structured into the following sections.

First, the document examines the compared experience in the continued reform of essential service provision, and draws conclusions on governments' and markets' imperfections.

Next, it discusses the most recent contributions to economic analysis, especially behavioral economics, which examine the reasons leading to dissatisfaction in the provision of deregulated essential services.

Last, it lists a number of proposals and reflections on how the Catalan Ombudsman institution can reinforce the processes of supervision and cooperative and contradictory deliberation in the democratic and institutional debate on the improvement in public service provision.

## 2. Til Angels Govern

A book written by three economists was published in 2006. In it, they foretold some of the financial regulatory shortcomings affecting the system before the fall of Lehman Brothers, under this suggestive title: *Rethinking Bank Regulation: Til Angels Govern* (Barth, Caprio and Levine, 2006).

The expression, "til angels govern" exemplifies the mistrust, both of governments and markets, before the inherent imperfections, of both public interventions as well as markets, when it comes to offering sufficient provision of services to citizens. Over the past 30 years, the academic

debate among economists in the realm of essential service provision has reached a consensus, sometimes called post-Chicago, that takes up this pragmatism on governments' and markets' inherent imperfections in service provision.

Interestingly enough, Alan Blinder (1988), professor of Economics at Princeton, and who was vice-president of the Federal Reserve from 1994 to 1996, sardonically said that economic policy was subject to a particular version of Murphy's Law:

"Economists have the least influence on policy where they know the most and are most agreed; they have the most influence on policy where they know the least and disagree most vehemently."

According to Blinder (1988), ignorance, ideology and self-interests are the factors that determine the persistence of Murphy's Law of economic policy.

Thus, in the area of essential service provision, economists have had spectacular influence in the design and application of the deregulation policies for provision of services that have traditionally been public, or strictly regulated in most countries of the world in the central decades of the 20th century:

Criticism, especially from the Chicago economists, of the operation of public companies and regulated private companies had great influence and prestige in the movement to redefine the role of the State that took place in the United States in the late 1960's, and as of the 70's and 80's in Europe.

It was an influence that went beyond what could be deduced from an economic literature that was bold in the world of ideas, but imprecise in the rigor that must prevail in theoretical and empirical analysis.

That said, the advancement of studies in industrial economy and public economy of the 1990's and afterwards have made possible a consensus between theoretical and empirical analyses that is much more detailed, and that brings to light the failings-on the part of markets and governments-in the provision of services to citizens. This consensus in the literature has had an apparently lesser effect on the redefinition of public policies.

According to Blinder (1988), in the area of micro-economic policies, such as those having to do with the provision of public services, Murphy's

Law comes true because politicians ignore experts' recommendations, especially when they are unanimous. The determinant factor behind the negligible influence of expert recommendations are the self-interests at play.

It has only been in a gradual, little-known way that the new economic literature has had an impact on debate and evolution of how essential services are configured.

The new literature has especially had an impact on the configuration of a European law on public services that is highly pragmatic, very oriented toward results analysis and highly respectful—as could be no other way—of the freedoms of the free movement of capital and right of establishment in a common market. This evolution in European law has fueled a silent revolution in the way essential services are organized in the EU.

According to Blinder (1988) it also seemed possible to break Murphy's Law in economic policy. Winston Churchill's quote on the Americans can be applied to economic policy: you can always count on them to do the right thing, after they've tried everything else. Specifically, it is possible to improve economic policies if we manage to separate political debate from more private interests and bring it closer to the common good.

In the following paragraphs, I will list some of the thoughts on how sweeping changes have come about in the provision of essential services in Spain thanks to the spirit of European reform that has placed political debate closer to the common good and distanced it from self-interests. The paper will also examine forms of resistance to change, and dissatisfaction with the resulting service provision model.

I will specifically focus on how the classical, French-origin concept of public service has been transformed, giving way to the idea of services of general interest. The discussion will also establish a context on the contradictory views being debated on how to define general interest, public interest or common good.

### 2.1. From public services to services of general interest

The proposals to deregulate public services were born out of the opposition to the traditional public service model. This was a model of markedly vertical design: in response to political and social demands perceiving a service as essential, the legislative branch

commissions the provision of a service to citizens from a public administration, public company or private company (usually through a concession).

In this model, citizens' rights are mostly formed through channels of administrative law. Service providers usually act under a scheme of exclusivity. In terms of the taxonomy suggested by Albert O. Hirschman (1970) in his book *Exit, Voice and Loyalty*, the exit is not seen as a mechanism to discipline the service provider and make it fulfill its obligations.

In a monopoly scheme, the legislative branch and the Administration responsible for the service are the ones who delimit users' rights and providers' obligations. The responsible Administration often theoretically participates in the provider's administration or supervision bodies to ensure that the provider fulfills its obligations.

This model of service provision is the one that entered a crisis in the 1970's and 80's. There was social disenchantment with traditional public service. It was expensive, low-quality, protected against claims, and not innovative in new services or the use of new technologies. The model was accused of being rigid, highly bureaucratic and inflexible. Governments' failure as service providers justified deregulation.

Deregulation was then presented as a promising, easily-implemented alternative. It was a matter of giving freedom of entry to new suppliers and giving users freedom to pick their provider of choice.

In the face of exclusivity and monopoly, the value of being able to choose was claimed. The exit was the key to this model as a mechanism with which to discipline the service provider. The pressure to satisfy a well-informed, exacting and mobile demand is the driver to improve the provision of the service.

Before this lack of quality, improvements were promised, that would be spurred by the suppliers' competition to satisfy these demanding customers. Before the inflation of costs, price wars were promised that would make services cheaper. Before shortcomings in infrastructure investments, a race would begin that would lead to new investments. And before the innovation deficit, new battles were to be fought to introduce new technologies.

It was only a matter of granting the freedom for new suppliers to enter and provide the bulk of economic activities in sectors previously reserved for the public service monopoly, while only regulating the access to the activities, normally the networks, into which the entrance of new suppliers is not easy, nor possibly desirous, due to the duplication of costs. In essence, there was a promise of improvements in service provision through promotion of competition, whenever it was appropriate, and minimal and intelligent regulation when it was not.

In this redefinition, European integration has been the guiding principle for change, both legislative and jurisprudential, in the provision of essential services in Spain.

In the course of the discussion sessions, Carles Padrós suggested that it could even be said that the free movement of persons, goods and capitals, and therefore, the establishment of a common European market, was a death sentence for administrative law as we knew it before the entry into force of the Single European Act in 1993, in the realm of public service provision.

The former Article 86.2 of the European Communities Treaty (ECT), now Article 106.2 in the Treaty on the Functioning of the European Union (TFEU) subjected economic services of general interest to the rules of the treaty:

“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 primary objective of European Law is integration, and this imposes a general presumption that the free movement of persons, goods and capitals, and freedom of establishment are in the Union’s best interest.

It only allows restrictions of these freedoms when they are necessary, appropriate, proportional and non-discriminatory to achieve specific missions of public interest, which treaties recognize as deserving of exceptional measures.

Perhaps the Directive on Services is the European regulation that most accurately and clearly establishes this general favorable presumption for the freedoms granted by the treaties, and the legal presuppositions that allow restriction of these freedoms. Its Article 9.1 establishes that:

“Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

- a) the authorisation scheme does not discriminate against the provider in question;
- b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
- c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.”

Therefore, European law does not establish any preference in favor of public or private ownership of a service that is of general interest. What it establishes is a presumption against restrictions of the internal market and competition and therefore, the reservation of any economic activity by the public administration in general or any given public or private company.

European law sets a legal presumption favoring the freedom of economic service provision by multiple suppliers under a free competition scheme. Any restriction of this principle must be justified by a strict test of need, proportionality and non-discrimination.

Only the so-called non-economic services of general interest elude this principle. The distinction between economic and non-economic services is therefore key to this matter.

Non-economic services are those traditionally provided directly by the public administrations, such as the police, justice and mandatory social security schemes. These services, when they are not provided by economic suppliers according to the legal precepts of each member state, are not subjected to the rules of the internal market or competition treaties.

The distinction between economic and non-economic services does not depend on the sector or activity in question, but rather on whether each activity is provided within a

business scheme in exchange for remuneration. Therefore, some organizations can simultaneously provide services in the exercise of a public power not subjected to the rules of the internal market and competition, and commercial services that are subjected to the laws of the internal market and competition.

Oftentimes, the delimitation of a service's economic or non-economic nature depends on the legislation of each member state, and the interpretation made case by case in the EU Court of Justice.

For example, in Spain, the dispensation of medication is a non-economic activity, because Spanish legislation has reserved the exercise of this activity throughout the national territory for a regulated profession in a non-commercial scheme, although pharmacies also conduct commercial distribution activities in competition with other economic suppliers when they sell other products that are not medications.

On the other hand, the United Kingdom has only reserved the exercise of this activity to a dispensation system of prescription medications financed by the National Health Service. Within the NHS framework, only this activity is a non-economic service. The dispensation of prescription medications that patients pay for out of their own pockets, or through their health insurers, is an economic service, as are the rest of sales they make of products that are not medications.

Certain activities, however, are classified as economic services by European law, as is the case of community grid and network activities (electricity, gas, telecommunications and postal services), in the framework of specific regulation, just as there is specific regulation for transport, waste management and water.

In conclusion, the autonomy of Member States in defining a service as public and reserving it for exclusive provision by a public or private supplier has been significantly restricted by European law.

Furthermore, the legal frameworks of the Member States have incorporated European principles by which an activity of service provision can only be reserved for the public sector when it meets the criteria of a non-economic service.

In the event that a service has economic characteristics, the rules of the internal market

and competition can only be restricted if such a restriction is necessary, appropriate, proportional and non-discriminatory, and meant to achieve a specific mission recognized as being of European interest by the treaties.

In Spain, two rulings by the Constitutional Court have set the boundaries for restrictive public interventions: the first, STC 26/1981, which sets the limits to administrative interventions in general following conflict in the area of establishment of minimum services in case of strike (see Padrós, Borrell and Fernández-Villandangos 2008); and the second, which embodies European principles on restrictions of internal market and competition rules, sets the limits for the restrictions imposed on free movement of persons and goods, freedom of establishment (Article 139 of the Spanish Constitution), freedom of enterprise (Article 38 of the Spanish Constitution) and the right to private property (Article 33 of the Spanish Constitution) (STC 66/1991).

Restrictions are constitutional “as long as they are proportional, in such a way that, in their appropriateness, they contribute to the attainment of the constitutionally legitimate purpose they are meant for, and in their indispensable nature they are to be inevitably preferred over others that could imply, for the realm of protected public liberty, a lesser sacrifice.” (STC 26/1981, FJ 15).

As regards the restrictions, “to weigh the constitutionality of the challenged prohibition, in that which refers to the free movement of goods, as well as that which refers to the freedom of enterprise and the right to property [...] a judgment of proportionality must be performed in which, in addition to the objective sought in establishing the prohibition, and also examining its legitimacy, there is also verification of the relationship of causality and necessity that the prohibition must maintain with the objective, as a means to make it possible” (STC 66/1991, FJ 2, bold print added by author).

“Once the constitutionally legitimate purpose that the prohibition is meant to achieve has been determined, all that remains to be examined is whether, notwithstanding the prohibition, the measure, due to its repercussion on the free movement of goods, the right to private property and free enterprise, generates, as is insured in the claim, exorbitant effects to the what achievement of such an objective would require, and therefore justify” (STC 66/1991, FJ 4).

The precedence of the internal market and competition rules that European law has extended to the legal frameworks of Member States therefore implies a redefinition of the limits of how certain public interests, general interests or common goods can be achieved. European law has subjected restrictive public intervention in freedoms of establishment and movement to the severe criteria of proportionality and non-discrimination.

Further, in European law, treaties limit the cases in which a reason of general interest, public interest or common good can be invoked to restrict the rules of the internal market and competition.

Thus, the discussion must stop here to define what is understood as a reason of general interest, one of public interest or one related with common good.

## 2.2. General interest, public interest, common good

Without aiming to enter the complex terrain of what is understood as general interest, public interest or common goods, I will now mention some of the ideas put forth around this important issue during the discussion panels, which stand for perspectives on the same matter from different vantage points.

I will begin with the remarks of Juan José López Burniol. To Burniol, general interest can be defined as the counter-element of self-interest. Individual rights cannot be imposed on general interest. Self or group interests must be subjected to collective interests, and social organization through laws. The State is a judiciary system and laws are a binding plan for co-existence. They both organize the precedence of general interest over private interests. Understood this way, law is the minimal ethics that must be imposed to maintain minimal co-existence.

Seen from this standpoint, Politics must recover a leading role to make general interest prevail; it must react before the imposition of self-interests. Law (*ius* or *iuris*) is what judges impose as the best-suited solution at any given time.

Along such lines, when it comes to provision of general-interest services, the supervisory intervention, understood as what the Catalan Ombudsman could do, must be grounded in

situations of contractual imbalance among the parties: supervision must prevent abuse of the weaker party of the contract by the party holding a position of power.

Therefore, interventions will be those that work to favor general interest as long as they are aimed at preventing those abuses derived from the imposition of the interests of one party before the other in a contract situation.

To the contrary, Germà Bel believes there is no such thing as general interest. General interest does not exist; there are only self-interests in conflict. Following this logic, the general interest is what chooses at any given time which of the private interests will have precedence over the other interests in conflict. From this standpoint, general interest would be self-interest imposed on the rest by virtue of the public intervention that invokes it. This is what economists refer to as the regulatory capture mechanism.

In the same sense, Carles Padrós added that public administrations have taken ownership over the concept of general interest. Everything that administrations do is, by definition, of general interest. And this protects them before citizens. As opposed to civil lawsuits, in which the losing party pays the trial costs, in contentious-administrative jurisdiction, citizens always pay the costs. It is therefore very difficult to dispute the definition of general interest that all administrations invoke to justify their actions.

On the other hand, public interest, common interest or common good do exist. In an imperfect world (as the public and private realms are), the characteristics of service, and how it can be more socially useful, must be analyzed.

The improvement of the service is in the interest of the public or of public interest, common interest, or the common good that must be sought. Any action, whether public (restriction, financing, etc.) or private (production, management, contracting, etc.) must be analyzed according to its capacity to suitably promote the improvement in service to the public.

According to Josep Ramoneda, the concept of general interest emphasizes usefulness. On the other hand, the concept of common good further qualifies the idea: the emphasis is on the moral dimension of what a good life ought to be. It is a matter of passing from decent

society—one with institutions that do not humiliate the individual—to civilized society, which is that in which individuals do not humiliate one another.

In a world marked by conflicts of interest, common good is defined as that which makes it possible to achieve (1) the greatest benefit or usefulness, (2) respect for freedom of choice and (3) a broad political consensus on what the assets indispensable to achieving a good life are (teaching and learning, health, the option to have children, cultural co-existence, etc.).

Common good can not be articulated without a collective will to make cohesion the main aim of social sustainability: to make this major benefit or usefulness reach those most in need. Along these lines, the primary aim of public administrations is to attend to the needs of the other before private action.

Making this view of the common good a reality thus requires a setting of shared priorities; therefore, the deliberative function of democracy is essential. The growing indifference toward politics is a serious problem. Society's capacity to pursue the three elements that characterize the common good is deteriorating. Therefore, the infrastructures of civic life (everything that makes life interesting), and the culture of responsibility (Kant's unsocial sociability) must be reconstructed.

The conclusion of the debate was clear: the concepts of general interest, public interest and common good are legally indeterminate objects. Their application inevitably depends on the recognition of the conflict of interests inherent to life in society, and a social agreement on how to resolve the tensions between organizing services to achieve maximum usefulness for the public—the respect for their freedoms—while also attending to the needs considered basic and essential for the sustainability of life in society.

To meet these goals, there are decisions that must be taken on three fronts: that of organizational improvement in service provision, the expansion of rights and freedoms of choice, and deliberative definition on what services have an essential and indispensable character and how to provide them.

We will now focus the discussion on how the decisions on these three fronts have combined in the processes of deregulation and privatization of public service provision in recent years.

### 2.3. The paradox of deregulation

The deregulation processes we have witnessed over the past decades bring a paradox to the fore: the promises of deregulation and privatization do not arrive without a dynamic, intelligent and constant public activity. That said, it is an activity of a different nature.

As conditions, the reorganization of services and freedom of choice are insufficient for the improvement of services. There must also be a civic commitment, on a public and private level, to ensure the ongoing improvement of the services provided.

How can civic commitment be defined? We define it as the development of a debate that is (1) plural, (2) deliberative, (3) contradictory and (4) responsible for effective competition among service providers to be a source of improvement in service:

1. A plural debate, by the participation of various agents and institutions involved in the different responsibilities related with service provision: providers, beneficiaries, consumers and users, financing authorities and taxpayers, public subsidies (if any), horizontal supervisors (competition and consumer protection), sector regulators (local, regional and central), judiciary and legislative bodies (through parliamentary committees and ombudsman's offices) and others.
2. A deliberative debate, as it must be structured so as to facilitate the implementation of the perceptions, analyses and proposals of all agents, while also facilitating a shared synthesis on the diagnosis of the problems affecting service provision.
3. A contradictory debate because it must allow the conflicting party interests to be transparently expressed.
4. A responsible debate for each agent and institution to take part in the dialog according to their inherent functions and competencies, and that each agent and institution can enrich the perception of reality, and conceptual bases of their decisions, while strengthening their capacity for initiative and innovation.

Currently, it is not the fragility of the markets that justifies, as was the case in the past, a return to traditional public service in certain sectors. It is now the weakness of the civic commitment processes, of debate among actors

and institutions involved in the provision of essential services that generates crises of trust in the deregulated model of public service provision.

The public actors and instruments needed to improve the quality of essential services are different from those of the traditional service provider model: we must go from a large provider administration to an administration highly effective at promoting competition, regulating access to common networks, technologies and quality improvement, and supervising the obligations of service imposed on companies.

If the government is not always a good provider of services, why believe that it will be a better regulator of them?

Experience shows that the promises of deregulation do not arrive only to allow the entry of new suppliers, and for the sake of freedom of choice. The challenge is in how to ensure provision of services that continue to be essential for society with those public interventions that are necessary, appropriate and proportional.

The roles of the public and private sectors need to be redefined. A public sector that is a promoter of competition, a regulator and a supervisor truly made up of organizations independent from party interests (whether private, related with groups in the government or opposition) and with thoroughly capable professionals who carry out their work with a long-term civic commitment, especially with loyalty to the political process, in such a way that they generate a perception of fairness in society.

A new private sector is also needed, one that maintains the “interested” commitment to hearing the voices of customers and users, and that allows the constant reform of their organizations to respond to society’s demands.

We know that the traditional model does not work. It suffers a number of problems. It is too vertical. But, as it turns out, the new regulation model for services provided by competing suppliers working on shared networks and grids does not work as we expected, either. In both models, the voices of consumers, their complaints, lack sufficient power to drive good service provision at reasonable prices.

In a model of civic commitment, what is needed is to take the debate toward realism,

toward the terrain of diverse perspectives, toward the diagnosis of common problems and the evaluation of imperfect alternatives.

Along these lines, I will now demonstrate which recent contributions to economic analysis, especially the sub-discipline of behavioral economics, have revised the causes for dissatisfaction with deregulation and privatization of public services.

### 3. Analysis of dissatisfaction with deregulation

#### 3.1. Elements critical for deregulation to work

In the traditional model of public services, society detects a problem and fears that a service will not be appropriately provided. Lawmakers reserve an activity for the public sector, and provide it through the Administration or through a public company, or private concessionaire company. The administration or provider company has a vertical relationship with users.

This system does not work when users do not have enough voice, when their rights are not respected, when the organization becomes self-justifying, does not innovate, overburdens itself with costs or does not provide services at reasonable prices. Furthermore, the political authority supervising it may have difficulties reforming the Administration or provider company, and making it provide quality services at reasonable costs.

When faced with these difficulties in the provision of services, such as those of energy, telecommunications or transport, we do away with the traditional model. We transplant and adopt into our judicial and political framework a deregulation model (introduction of competition) and we only regulate those activities in each deregulated sector in which it is difficult to introduce competition.

We allow new telecommunications suppliers to enter, using existing networks; new energy generators that can provide users with gas and electricity over existing grids. We allow new energy marketers to operate, with no need to have their own generation or energy distribution grid. We use regulation to ensure investment in networks and grids, quality of service and respect for new suppliers.

In the reform of public services, the objective was to go from a model of public service provision to a model of regulation and supervision that would bring many elements into operation.

Specifically, the critical elements were the following:

1. Promotion of competition. Separation of activities in which competition is inappropriate (unduplicable infrastructures that must be shared, and common technological elements) in order to ensure that privileged access to common assets does not distort competition in the other activities in which competition is appropriate.

2. Defense of competition. Avoid actions restricting competition in the activities in which it can be developed. Avoid agreements among service providers to restrict effective competition in the market as well as abuses of dominant positions by certain actors over others, to the detriment of users. Also avoid business concentrations that reduce effective competition in the markets. Ensure that public aid does not distort competition among suppliers.

3. Establish and supervise the regulations that ensure equitable access to common assets (indivisible infrastructures and common technological elements), as well as the financial viability of these activities and users' and consumers' access with a reasonable quality of service at non-abusive prices.

Some aspects of service quality can also require specific regulations when competition among operators could generate undesirable processes of quality deterioration.

4. Protection of consumers (1) that prevents abusive commercial pressure on consumers and users, (2) that prevents problems of information prior to contracting and (3) that limits surprises following contracting.

For example, ensuring that there is rational and informed consent in the contracting of services, rate changes, etc., through different mechanisms, such as the setting of procedures, protocols and commercial and advertising standards; incorporating waiting times for responses to temper citizens' impulsive reactions to new offers; forbid and punish inequitable or abusive contract clauses, and improve claims processes for disagreements with the service provider.

When one or several of these critical elements does not work, the deregulated model does not fulfill the promises expected of it. This is especially so in that we cannot assume that these critical elements will work when consumers do not act according to the prototype of a rational economic actor, with full capacity to make decisions based on their own interests.

In many realms of economy, the assumption that actors will work under this perfect paradigm of rationality is being thoroughly questioned, as Reeves and Stucke (2011) have asserted. In the following passages, I will outline Reeves's and Stucke's (2011) revision of behavioral economics' contribution to the defense of competition, applying their conclusions to the area of essential service provision.

As stated by Reeves and Stucke (2011), behavioral economics is a fashionable sub-discipline that is having a profound influence on other sub-disciplines such as finance, labor economics, public economics, industrial organization or even the economy of regulation and competition policies.

Both theoretical and experimental studies indicate that consumers do not behave as traditional economics models have assumed. In particular, they show that human behavior is characterized by what Reeves and Stucke (2011) refer to as the following three traits: (1) bounded rationality, (2) bounded willpower and (3) bounded self-interest.

Each of these three has important consequences on the way we contract essential services, as well as how service suppliers behave, as many of their employees and executives are also subjected to these traits.

We will now briefly examine these traits of human behavior and their consequences in contracting essential services:

### 1. Bounded rationality

People do not act in a perfectly objective manner, analyzing the available information and updating our knowledge according to our life experience. Rather, we analyze information from the subjective perspective that fits with our ideals and goals. We make decisions using personal rules of behavior (heuristics).

Because of this biased way of making decisions, the contracting of services depends to a great degree on how the information for contracting is presented. Specifically, our contracting decisions have the following biases:

a. We are risk-averse in gains but risk seeking in situations of potential loss. We would rather be given 70 euros for sure than play a lottery in which we had an 80% chance of winning 100, when the expected value of the lottery prize would be higher (80 euros) than the certain gift (70 euros). In this case, we are risk-averse in the case of gains.

On the other hand, we would rather enter a drawing in which we had an 80% chance of losing 100 euros than have to give 70 euros for sure. The expected value of the loss in the drawing (80 euros) is higher than the certain loss (70 euros). Therefore, we are risk seeking in the case of losses.

This is especially important when it comes to contracting deregulated services in which there is uncertainty regarding the future prices to be paid; for example, when we are offered the chance to contract energy (electricity or gas) that will be served in the future at an uncertain price, to be set according to the spot market, or short-term, evolution.

For example, in this case, we tend to prefer a worse known price than the uncertainty of accepting a contingent contract, even though the probability that we will end up paying a much higher price is relatively low. This leads more consumers to stay in the standard tariff segment than would be considered normal.

b. Our decisions depend on the definition of the status quo. More often than we should, we accept the option offered by default even if it is worse than all other options (status quo bias).

Once again, in deregulated sectors such as energy (gas and electricity), what are called last-resort tariffs play a very important role and affect in a determinant way the price offers in the contracting of energy on a deregulated market. It is especially true that evergreen contracts generate fewer supplier switches than those that have to be renewed every so often.

c. If someone fixes a standard value of a quality, price, etc., this standard affects our subsequent decisions, as they are different from what we would have decided if the standard did not exist (anchor effect).

For example, people tend to complain more when there is a standard quality of reference for a service. On occasion, there is a rise in claims regarding a service not when there is a reduction in quality, but when quality falls below the expected standard. In much the same way, on occasion very low service qualities do not generate complaints because there is not a standard that sets the quality level of reference.

d. Whether we know of cases similar to the one we are in affects our decisions (availability heuristic). Not knowing similar cases hinders our decision-making.

For example, in the case of telephony companies, we are only willing to change when we know people who have changed and received better service thanks to that change.

Thus, there can be segmentations in consumer groups: no one changes if no one in their environment does, and everyone changes if the people in their environment speak to them of successful change experiences.

e. People overestimate their abilities (overconfidence bias). Some executives believe that, despite implementing risky strategies, they will be able to succeed without putting the service company they work for in jeopardy.

Many of the borrowing strategies in the banking, finance and service companies that we have witnessed in recent years can be at least partly explained by this overconfidence.

f. People are optimistic by nature. We believe that more good things will happen to us than to the rest of people and, on the other hand, we will face fewer obstacles than the rest (optimism bias).

This bias is what leads to what is known as the winner's curse: In tender processes to adjudicate service provision, the overly-optimistic company tends to win the tender, and ends up unable to fulfill the terms of the contract. This partly explains the constant renegotiations in contracting of public services or in the adjudications of public tender processes.

g. We believe something is more likely to happen if we know that it has really occurred before (hindsight bias). On the other hand, we believe that it is less probable that something will happen if it has never happened, or we do not remember it ever happening.

Part of the operating risk management strategies of service companies responsible for electrical, gas or telecommunications networks and grids can be explained by the fact that the companies discount the operating risks beyond what is rational, because after many years without suffering any operating accident (electrical black-out, gas explosion, breakage of logistic chain, congestion of the network, aerial incidents, etc.) they have deleted from their memories that these risks even exist.

## 2. Bounded willpower

Bounded willpower refers to a limited self-control capacity: we let ourselves be induced to take actions that we know to be contrary to our own long-term self-interest. Though we try to avoid it, we end up overeating, overspending, saving less than we should, getting less exercise than recommended, etc.

Facing this weakness in our actions, human beings use commitment mechanisms to attenuate the harmful effects of our own weak willpower: we join a health club so we feel obligated to exercise, we open a certificate of deposit with withdrawal restrictions to force ourselves to save, etc.

In these commitments, we sometimes lose by self-correcting: we pay the health club dues even if we never go, we receive lower interest than we would have obtained with more volatile products for our money deposited in CD's or pension plans, etc.

In essential services companies with complex tariff schemes, the fear of not having enough willpower to watch for price changes in short-term markets and recurrently change suppliers in search of the best alternative may lead us to continue at a certain tariff when it is no longer the most appropriate for us.

Thus, in services open to competition, this lack of determination may make consumers continue with the established supplier despite the existence of better offers on the market. And since these suppliers know it, this lack of determination to change tariffs or suppliers winds up meaning that competition does not lead to the promised improvements in well-being.

## 3. Bounded self-interest

People do not make decisions only in pursuit of their maximum material well-being and personal wealth. There are other items taken into consideration, even when they involve denying part of our material well-being and personal wealth.

We want to treat, and be treated, fairly and equally. In short, we are marked by a sense of strong reciprocity. We are willing to make sacrifices for the good of others, as long as others also make sacrifices for us. At the same time, people are bothered by, and punish, others' behavior when they are only guided by their own material self-interest.

People will cooperate as long as the group of persons they are interacting with does not deviate from what we consider to be a reference point in mutual reciprocity.

In the realm of essential service provision, users accept restrictions on their contractual freedom as long as they believe that these restrictions are equitable and meant to achieve a shared goal, such as attending to groups that deserve a certain protection.

We can thus accept cross subsidies in the tariffs of essential services: equal tariffs in rural and urban settings, when providing the grid or network services is more expensive in the countryside than the city, and income-based subsidized tariffs for groups with special economic difficulties, such as subsidized electricity tariffs.

This said, users do not see it as equitable when there is treatment in favor of groups that do not deserve special protection, or that practice an abusive use of the services.

In the same way, people do not only act according to monetary incentives. Rather, more weight is given to the intrinsic motivation to act according to the rules of one's profession, the local community or even ethical or moral rules derived from humanistic or religious beliefs. It is even true that on occasion, a monetary incentive can reduce or distort the intrinsic motivation. In the same way, monetary punishment may not be effective to deter a human behavior that is not a guide for material satisfaction.

This is an important matter in the provision of essential services. On one hand, some

professionals of the service suppliers may work for their intrinsic motivation in the provision of an essential service. With deregulation, there is often an incorporation of monetary incentives to some of the groups of professionals that can distort their intrinsic motivation or that of the rest of the professionals.

On another note, some services require the active participation of the users, who act intrinsically motivated to make the service work. This motivation may disappear when the service is deregulated.

### 3.2. Dissatisfaction with deregulated markets. Example: electricity in the United Kingdom

The case of electricity in the United Kingdom is a good example of how simply opening a market to competition, promoting rivalry among alternative suppliers and defending competition is not enough for an essential service to be provided with the full satisfaction of customers, supervisors and the public opinion.

It is a good example of the failure of some of the previously mentioned critical elements that make deregulation work. It also shows that part of behavioral economics' contributions are being taken into consideration in the processes of debate and revision of protection, supervision and regulation of a service such as electricity.

The debate in the United Kingdom shows that there can even be conflict between the policies of competition and consumer protection when in the markets there are severe user information problems and objective difficulties for consumers to make the decisions best-suited to their interests.

Last February 2011, following a probe of the electricity marketing and distribution sector, Ofgem, the English energy regulator, made it clear that there were serious problems in the industry.

Ofgem published an unflinching diagnosis of the sector's problems in the Retail Market Review: "Although competition in the sector has risen, we find poor conduct on the part of suppliers [...]". "The performance against our 2008 Probe reforms has been patchy [...]" "Consumers still have deep mistrust of suppliers [...]". "Consumers believe that the least credible source of information in the energy contracting

process is the information that comes from suppliers, and their websites, marketing, information or telephone calls".

The 2008 report was entitled Energy Supply Probe. In this report, Ofgem concluded that there was not sufficient evidence to attribute to the energy suppliers any behavior prohibited by the competition regulations, such as the formation of a cartel in the energy market, or an agreement among distributors to restrict effective competition on the market.

Nonetheless, it did state that there was a need for a transition toward an effectively competitive market through a number of actions focused on (1) ensuring that energy suppliers had to treat consumers more honestly in the energy marketing stage, when switching supplier and after-sales; and (2) they had to substantially improve the quality and accessibility of the information directed to consumers, for them to be able to make better-informed decisions, and have more capacity for active and effective engagement in the markets.

This is a good example of how promoting competition alone is not enough to improve public services. Economists know that there are sectors in which consumers have great difficulties making rational decisions that are in their best self-interest.

Economists have detected problems in the habits and behaviors of users that lead them to overpay and not correctly choose the best offers. We have also identified many activities in which, due to the lack of information for consumers, competition among suppliers leads to deterioration in service quality.

For that reason, between 2008 and 2011, Ofgem took a number of actions ranging from the revision of the conditions for service supplier licenses to the establishment of a number of recommendations on how service suppliers should act and communicate with their customers. Even though they were not binding regulations, the actions of the suppliers could be evaluated against these recommendations.

The center of attention in Ofgem's (the regulator's) policy was the transition from a policy of competition to the policy of consumption. Follow-up on their 2008 recommendations revealed a completely unsatisfactory state of affairs: non-compliance with the activity guidelines, or even with the terms of supplier licenses.

In light of this evidence, Ofgem's Retail Market Review made a number of proposals. One of the most noteworthy aims was to improve the comparability of tariff offers made by electricity suppliers. The proposals were based on recent behavioral economics theories that show that consumers may suffer from four types of problems when comparing offers:

1. Limited comparability capacity: Suppliers design especially complex offers to make comparability, and with it, switching supplier, more difficult. Consumers disengage and lose money because they do not switch to better offers, or because they make mistakes when switching.
2. Status quo bias: Most consumers prefer not to change from the situation they are in. This is made possible by the fact that the contracts do not have renewal or termination dates (evergreen contracts). Consumers never find themselves in decision points to consider whether to reconsider their service contracts.
3. Loss aversion: Consumers would rather avoid a loss than try to secure a gain, even if they both have the same monetary value. Further, they overestimate the expenses that can be involved for them in changing supplier (billing errors, supply problems in the transition, etc.).
4. Time inconsistency: Consumers place higher value on the gains of today than those of the future, beyond temporary discounts involved in an analysis of a cost and profit flow over time. In the same way, they overestimate the costs of today more than those they may have to bear in the future. This implies greater resistance to change, as the costs of change are incurred in the present, and the profits come in the future. Furthermore, consumers accept future charges in their bills beyond reasonable limits.

The Ofgem Retail Market Review proposed that companies be able to offer at the most one type of evergreen contract per standardized payment method, so that consumers could easily compare the tariffs of different companies.

On another note, it proposed that suppliers be able to offer other non-standardized tariffs as long as they had a limited duration over time. In any event, non-standardized tariffs must show their equivalent prices against the standardized tariff.

The details on how this proposal can be implemented are now in a phase of public consultation and have not been applied.

#### 4. Thoughts on the Catalan Ombudsman's Activity

Gathering the ideas and lessons taken from the compared experience detailed in the foregoing sections, I will now list several proposals, ideas and criteria that would be advisable to take into consideration in the Catalan Ombudsman's tasks in the defense of essential services customers' and users' rights.

##### 4.1. Guiding principles

1. Any mechanism for provision of services, either directly through the Administration, public or private companies under a monopolistic scheme (by contract or concession) or through various suppliers in a competition scheme is, by nature, imperfect.
2. The Catalan Ombudsman's supervisory interventions must be especially aimed at correcting situations of contractual imbalance between the parties and in general, facilitating the identification of dissatisfactions with service provision, the diagnosis of problems and contradictory debate among supervisory institutions and suppliers, to make possible regulatory and organizational improvements in the services.
3. It makes no sense to list activities that are of general interest or that must be essential. Rather, the emphasis should be on finding in which circumstances service provision does not fit with public interest, or does not achieve common good due to a number of specific circumstances that cause provision under a monopoly or competition scheme to not work properly.
4. Revision of service provision must include activities organized according to traditional public service schemes as well as those organized through the entire range of private participation systems. It is a matter of revising how suppliers, whether public or private, interact with their consumers.
5. In the task of identifying the contractual imbalances which are often at the root of competition problems in deregulated services, we must look at very specific aspects, and discuss the capacity that regulatory and supervisory

institutions may have to promote changes, regulations and procedures that tackle these problems.

6. There is a special need to identify the imbalances stemming from consumers' and users' information problems, and the strategic use of this information by suppliers.

7. The problems originating in the behaviors and incentives of consumers and suppliers must also be identified.

8. Once the problems are identified and diagnosed, a debate must begin on how alternative regulatory and competition promotion designs can prevent abuses and facilitate more rational decision-making.

#### 4.2. Cooperation and deterrence

9. Following the legal empowerment of Article 78.1 of the Statute of Autonomy of Catalonia, the Catalan Ombudsman must write new chapters on how to effectively defend the rights of citizens in essential service provision. It is key that the institution find proportionality in its conduct, the field of action and the intensity of its intervention in order to achieve the best exercise of rights causing the minimum distortion in the activity of public administrations and private companies responsible for service provision.

10. The way the institution acts must be effective in achieving the maximum cooperation from service suppliers with respect to citizens' rights, and not so much becoming a special supervisor of suppliers, as supervisory functions are exercised by the public administration through the sectorial state and autonomous community ministries, or through specialized bodies.

11. In the same way, the Catalan Ombudsman must find his own field of action in the defense of citizens' rights, in a way that is respectful of the competencies belonging to sectorial supervisors and regulators, as well as those of the competition or consumer protection authorities of the administration, and the authorities in civil, commercial and contentious-administrative jurisdictions.

12. Last, the Catalan Ombudsman must modulate the intensity of his actions, so that each intervention can bring about real improvement in service provision.

#### 4.3. Cooperation with supplier companies

13. Many complaints can be resolved by the suppliers themselves through customer service or customer advocate departments.

14. The Catalan Ombudsman's Office, as it takes interest in claims, can play a key role, in terms of advising and dialog, to improve internal conflict resolution processes.

15. The comparison of success stories from Catalonia and the rest of the world can guide this advisory and mediation function with supplier companies as well as public administrations responsible for the service. Both are bound by law to cooperate with the Catalan Ombudsman to ensure the effective respect of rights and freedoms.

#### 4.4. Cooperation with specialized administrative bodies and the judiciary

16. Most complaints that are not resolved by suppliers' customer service or customer advocate departments can be solved by supervision, regulation and competition bodies.

17. The Catalan Consumer Affairs Agency and the OMIC (Municipal Consumer Information Offices) are prepared and specialized to handle most claims for service deficiencies, billing errors, warranty coverage, etc. on both an individual level in the course of normal provision as well as when there is an extraordinary service outage.

18. Sectorial regulation and supervision bodies (whether they are sectorial state or autonomous ministries with their claims offices, or regulation and supervision bodies), are prepared to intervene in cases of breach of sectorial regulations, or impingements on the guarantees of quality, universal access and other specific regulations such as those dealing with tariffs, interconnection, etc.

19. Last, the competition authorities are prepared to take action when suppliers engage in restrictive practices (agreements among themselves or abuse of dominant positions by one or more) that significantly restrict or impede free competition in service provision.

20. In all such cases, the Catalan Ombudsman has the capacity to analyze and convey the claims to those institutions that are prepared, as specialized bodies of the executive branch,

to undertake and resolve the grounds of the claim, promote understanding between users and service suppliers or declare any irregular actions to be illegal and levy penalties.

21. The bodies of the executive branch, as parts of the public administration, have the obligation to cooperate with the Catalan Ombudsman to ensure effective respect of rights and freedoms.

22. In these three realms (sectorial regulations, competition or consumer affairs), claims can be processed simultaneously by administrative bodies or before different jurisdictions, either of contentious-administrative or mercantile law. The Catalan Ombudsman and judiciary bodies are also bound to faithfully cooperate in the pursuit of their respective functions.

#### 4.5. Superclaims

23. In the performance of the mentioned tasks of cooperation, with companies as well as specialized bodies of the executive or judiciary branch, the Catalan Ombudsman holds a privileged position as a parliamentary institution.

24. This position allows it to fulfill duties for which the rest of institutions are ill-equipped: the task of informing Parliament and administrative bodies of the executive branch, through what in other countries are called superclaims, on the legislative and organizational shortcomings hindering proper essential service provision and full respect for rights and freedoms, as well as the obligation of proposing legislative or organizational reforms that eliminate the causes of repeated and systematic grievances regarding citizens' rights and freedoms.

25. In the performance of this task, it is essential that the Catalan Ombudsman endow his arguments on legislative and organizational problems with robust, disciplined economic analysis of supplier incentives, and an economic analysis of users' behavior, as both are key parts of understanding why repeated and systematic grievances occur.

26. This analysis of incentives and behavior must also guide proposals for reforms in order for them to have the maximum desired effects and minimal distortions of essential service provision.



## THE PROVISION OF GENERAL INTEREST SERVICES

### 1. General initial considerations on provision of general interest services

In a society that aims to be civilized, a significant building block is institutionalization. A society where abuse of power is minimal. The key element that leads to abuses of power is inequality, asymmetry and more specifically, according to the economists, asymmetry in matters of information. This must be regulated; it must be institutionalized to achieve, to the greatest degree possible, a civilized society where there is no abuse of power. Many believe that *institutionalizing* means approving laws, implementing regulations and later, in the case of the courts, judging and levying penalties. Beyond that, at most, a few regulative activities. But the contemporary concept of “*institutionalizing*” is underpinned by three concepts: on one hand, the rules, which would be laws, but on the other, the rules of play by which we operate, and values.

Rules form its framework, but are not enough on their own. They are, in fact, an indispensable condition, as it is true that the more one legislates, the further away the compliance with this legislation, with this philosophy, will be. Therefore, the underlying factor is to establish rules of play among ourselves and a type of values with which to avoid these abuses of power, inequality and asymmetries. Specifically, the information asymmetries that could occur between large corporations and the people who are their customers. Therefore, it makes sense to work in this field of rules and values.

This is not as tangible as written rules. It is the *soft* part of institutionalization, but it is very important, and the Síndic de Greuges (Catalan Ombudsman) has a role to play in it. This soft side of institutionalization has to do with establishing codes of ethics in companies on a general level, which is a task the Catalan Ombudsman may be able to do. It has to do with best practices, with the self-regulation of these organizations. It has to do with corporate social

responsibility. It has to do with the initiatives for there to be a customer or user advocate inside the companies themselves. It is also in line with the Catalan Ombudsman’s intervention, for which the office is empowered by the new Statute of Autonomy of Catalonia.

Therefore, these elements, which could be viewed as “gaseous” as they are not very “solid”, provide a very important added value, which is to institutionalize, through rules and values, which is always much more difficult or more fundamental.

A second very important idea is that of legal security, essential for there to be economic development in a system. Economic development is nothing more than a means to the ultimate end, which is human development. Many public institutions have neglected to provide the market, the system, with legal security, to promote economic development, and then human development, to the greatest degree possible.

Public institutions must work to establish and guarantee the foundation necessary for there to be legal security. There is, however, a more significant concept linked to this: not only strictly legal security, but also *institutional security*, are needed. Institutional security means that economic and social development will be promoted not only if public institutions establish a groundwork for security, but that companies, the private institutions themselves, must work on standards of general interest, public interest, by criteria that also bring to the system a high degree of security in the relationship between citizens and users and these organizations.

In this sense, we are all the State. Not only public institutions, but the private companies, and especially, the large private corporations that provide something as critical and hard to define as services of general interest or public interest. These companies are also the State at this level of discussion. If public institutions do their job,

and these corporations do not generate relationships of trust with these customers, there will be neither institutional security, nor economic or human development.

The third element to be discussed is that, more than seeking out the general interests and making a list of them, a diagnosis must be performed to detect where the imbalances exist, and where there are breeding grounds for abuses of power; in other words, where inequalities occur. This can be of greater assistance to us because it comes down to focusing on what is tangible, fundamental, with a view to writing codes of best practices regarding these organizations, and also to set a context for the Catalan Ombudsman's area of intervention.

The Catalan Ombudsman may need to act in a way more akin to active collaboration: seeking complicity *in* and *with* the companies, acting more on the front of prevention, and not so much in inspection and penalization. It would make for a good start. Prevention is the area in which it is easiest to build the necessary complicities. Attending to claims, along with this complicity, can dynamically define the Catalan Ombudsman's area of activity, well beyond establishing a formal or primary framework, which may be more difficult to apply in practice.

Today's crisis is also having an impact on the subjects discussed. It's not just any crisis. It has already transformed many things and will continue to do so. Therefore, when we speak about the crisis we're not just speaking about a matter of opportunity, but also structural matters. Here I would like to make a statement, that I will try to keep from being ideological, although it has a lot to do with ideology. It is about the transformation that could be underway, and here labels can be tricky, from a welfare state to a welfare society. What will change is the role of the public administration, but also the role of private companies, especially those that provide services of general interest.

What are the sources that provide citizens with welfare? If Andersen's classical scheme is followed, there are a total of four: the market, the state, the family and the third sector. These are the four main sources that provide welfare.

That said, in the current crisis, two of these sources are being phased out. In traditional Anglo-Saxon models, the market is the source with the most weight. In the European model, the weight of the market and the weight of the state are balanced. And in southern Europe,

there is a three-legged balance: market, state and family.

But this crisis is generating difficulties in the maintenance of the current welfare state standards, and the capacities that public administrations have to provide citizens with welfare. There is a certain withdrawal of public administrations, in the same way that, due to demographic and social changes, there is a certain withdrawal of the family as a source and distributor of welfare.

This means that the market will have an increasingly predominant position in our cultures. We are at a more central juncture in which neither the State nor the family will play the leading role; rather, they will exist in connivance with the market and the third sector. This third sector appears robust, but we must proceed with caution, as it is widely diverse.

In terms of corporate social responsibility, in this new future scenario, what can companies do? Specifically, these large corporations that must change their role and give users and consumers more. The *user* and *consumer* label may now be obsolete. The companies themselves make increasing references to people. They have people, not customers. People serving people. People have more needs than customers and users. One way to conduct corporate social responsibility may be to give something more to these "people", who are more than just users and consumers.

Analyzing the transformations of society, we see that there is a growing number of people who live alone, more single-parent families. There is less of a family network, less of a social network where people can be taken in, and sheltered from the aggressions of life and their surroundings. As it happens, there are many people whose only conversation with another thinking person, aside from the waiter in the local café, takes place with an employee at a banking institution, who they see every month, and ask questions that have to do not only with money, but also their capacity to personally and socially articulate themselves. It may be that bank employees are doing today what priests once did. It used to be that you had to go to confession to "confess". Every town used to have a priest, a teacher and a pharmacist. Not any more. Considering all this, we could design a classification system for the problems faced by these people who live alone, who have no chance to interact with anyone beyond the bank employee. What kinds of additional services

could they be given to accompany them? It is an idea of how progress could be made toward corporate social responsibility. Corporate social responsibility was born out of environmental and sustainability problems. The golden age of corporate social responsibility are the times globalization and imbalances between advanced and developing societies.

What could the third step be? It could be the new role to be played by the market and these companies in their relationship not only with users and consumers, but people and citizens.

Because the other idea is that it may be necessary to come up with a blend of public entities and private organizations. The existence of two separate worlds is becoming less obvious. I don't know if we have to come up with a single code of administrative law that applies to everything or if there does not need to be such a definition of legal codes. It is true that for over two decades, public administrations have been importing many management techniques inherent to private organizations; some have been successful, others have not. But we are looking to the private sector for inspiration with greater frequency. The heart of the matter is this: why couldn't it also work in the opposite direction? Why can't private organizations, especially these large corporations that provide universal services of public and general interest, look to the public administration for inspiration, in a matter such as rights and obligations? In fact, the labels were swapped around a long time ago. On an anecdotal level, in the public administration they stopped referring to citizens long ago, calling them customers instead, which has ideologically perverse effects as it implies a very superficial view of the matter.

I once taught a course on organizational matters for executives of El Corte Inglés chain of department stores. I was talking to them about organizational subjects and I said: "When a customer walks into your department store, a number of organizational mechanisms are set in motion." Then I heard a murmur rise up in the class, and one of the executives, who must have been more executive than the others, stood up and said, "Professor, at El Corte Inglés we don't have customers," I was taken aback. "Well, if you don't have customers, what do you have?" He answered, "At El Corte Inglés our customers have more rights than standard customers. Our customers are citizens."

The world turned upside-down: now El Corte Inglés has citizens and the public administration

has customers. In other words, this blend has already happened. If in their advertising they say they have "people", it may be that this blend, like in El Corte Inglés, has already happened. And they have to respond well beyond the strict provision of service from a technical and business point of view.

Another matter is the fine print, how it has to be articulated, because here we will encounter differences. But I have been surprised to find that the differences are not too many. In other words, this blend, as happens in the world of law, has existed for many years, and makes it possible for things to be more transferable.

## 2. The Catalan Ombudsman and companies that provide universal services of general interest

1) In its Article 78, the Statute of Autonomy of Catalonia attributes competencies to the Catalan Ombudsman to act in the realm of private organizations that provide universal and/or general-interest services.

2) The concepts of *universal and general-interest services* are economically and legally elastic, and this is not the place to define them. In any event, they are private services in which elements such as the universalization of benefits, public functions and even authority come into play, but they are private services that could affect people's fundamental rights, elements that are essential for an institution like the Catalan Ombudsman. Thus, services such as water, gas, electricity, telephony, transportation, etc. would form part of this package.

3) A few decades ago, most of these services were rendered by the public sector. With privatizations, they have gone into private hands. The public sector loses ownership of them and only performs regulatory functions. The regulatory function is imperfect. Other kinds of supplementary guarantees are necessary to preserve the rights of citizens/users.

4) The previous elements legally and materially justify the Catalan Ombudsman's participation in this realm of private management.

In any event, the opposite could also be argued:

- Could it be that lawmakers were wrong to assign this competency to the Catalan Ombudsman?

- Isn't this a form of interloping by the public administration in the private world?

- Isn't it pie in the sky? After all, there is little the Catalan Ombudsman can do to supervise big corporations.

- Wouldn't the Catalan Ombudsman's participation in a constellation of public and private actors that offer many guarantees for customers and consumers be redundant?

Indeed, there are a number of actors who guarantee the quality and defense of consumers' rights. regulatory agencies, autonomous community consumer affairs agencies with broad competencies, authorities competent in State and autonomous community matters, local councils through OMIC's (Municipal Consumer Affairs Offices) or similar units, the judiciary, consumers' organizations, etc. Aside from these figures, companies regulate themselves through customer service and quality departments, customer advocates and corporate social responsibility departments (CSR).

Is there any redundancy with this new competency assigned to the Catalan Ombudsman?

The answer is no, as it could be argued that, clearly, there is a space for the Catalan Ombudsman's participation in the defense of consumers of private universal and/or general interest services.

There are several reasons:

- Some analyses performed clearly show that, despite this constellation of actors making up the system of guarantees, in practice, consumers are still quite vulnerable.

- The regulatory entities of Spain (following the continental, not Anglo-Saxon tradition) are not very independent, politically speaking. They perform regulation of a political nature (e.g. political prices), addressing organization and competition in the sector, but they do not contemplate the defense of consumers. Along these lines, they supervise companies very closely when it comes to tariffs and competition, and as a trade-off, are quite lax when it comes to consumer defense. On another note, according to regulation theory, there is a problem of regulatory capture.

- The different public administrations have the problem of their overarching, cross-disciplinary outlook on issues, and due to their fragmentation, tend to seek solutions to incidents rather than resolution of problems in the realm of categories or systems.

- Companies see customer service, quality and CSR more as parts of a marketing strategy than a true defense of consumer rights.

- CSR has little conceptual content, and little practical and effective development (basically focused on topics of environment and globalization, but less concerned with defining and delving into the rights of consumers in a broad, responsible manner).

- Private companies that provide universal and/or general-interest services in Spain have many organizational problems in guaranteeing the rights of their users or consumers. They often give service to millions of users, and equip themselves with Fordist production models with an economic outlook, but that are not very flexible in handling specific incidents that affect their users, who are often left defenseless.

The final conclusion is that the consumers of general-interest services in this country are often left defenseless and poorly served. Companies do not place a high priority on "servuction" (improvement in service provision and service to users), as they design standardized, rigid mass production systems conceived in the dimension of scale economies that benefit the internal structure of organizations, foregoing the needs and specificities of their citizens/customers. On another note, the constellation of administrative institutions that regulate and supervise the system suffer fragmentation, and lack a cross-disciplinary vision, which leaves many material spaces in which there are gaps in effective protection for the users of these kinds of services. In light of these reasons, it could be considered that that supervision and analysis work that the Catalan Ombudsman could provide in these areas may represent greater added value in the defense of consumers' rights (and in a broader sense, of citizens, as rights are affected).

The Catalan Ombudsman's perspective could be innovative in the proactivity, cross-disciplinary nature and depth in analysis, and highly effective in the formal and material protection in the defense of individuals' rights.

### 3. The Catalan Ombudsman's best practice methodology toward companies providing universal services of general interest

1) The Catalan Ombudsman has expertise in the defense of citizens' rights in the area of public administrations and their activities. There is not much difference between public and private management of universal and/or general-interest services: service to vast customer bases (sometimes numbering in the millions), Fordist production systems, need to guarantee fundamental rights, or those that affect citizens' dignity, the exercise of authority in the broad sense of the term, etc.

Public administrations have been revamped and have a great deal of experience in service to vast customer bases. In this vein, their Fordist production system are at times more flexible than those of private companies themselves. Therefore, best practices must be conveyed from the public to the private sector, and in this conceptual migration, the Catalan Ombudsman can play a significant role.

2) An example of the previous point: code of best practices for companies providing general-interest services in relation to the code of public administration best practices already developed by the Catalan Ombudsman's Office. The Catalan Ombudsman's experience in the defense of citizens' rights before public administrations can be partially conveyed to and used in its application to the private sector.

3) In the Catalan Ombudsman's activity with the corporate world, the phenomenon of outsourcing and public-private partnerships would also have to be taken into consideration. Thus, as the services are publicly owned, the Catalan Ombudsman would have to act on and supervise the responsible administration (the principal), and not the companies (agents), and contribute to the improvement of the management, supervision and evaluation systems exercised by the principal over the agents. In any event, given the inhibition of most public administrations in the exercise of their functions as principals, the Catalan Ombudsman has all of the legitimacy to supervise and intervene directly in private companies providing public services.

4) The Catalan Ombudsman's Office must process the complaints and reports from users of private universal and/or general-interest services just as it does with public

administrations. The advantage is that the Catalan Ombudsman-Company relationship is much more agile than the Catalan Ombudsman-Administration equivalent (formalities and conventional case file management are not necessary, and it allows rapid contact with companies by e-mail or telephone). Companies are very permeable to these complaints, and problems can be resolved very quickly.

5) The Catalan Ombudsman's great strength must be put to use: publicity and denunciation of possible corporate wrong-doing before public opinion. A denunciation by the Catalan Ombudsman could have more social repercussion than that of a consumer affairs agency (people interpret their role, and they do not have as much media impact as the Catalan Ombudsman could have). This power, which should only be used in very extreme cases, makes for a situation in which the Catalan Ombudsman-Company relationship is very fluid, as companies become concerned about this potentially negative publicity.

6) The Catalan Ombudsman's Office must act with its full capacity to process complaints and perform ex officio monitoring of these private companies. That said, it must also prioritize as much as possible its preventive actions which, in our opinion, are those that could contribute the most value to the system and to society.

7) This way, the Catalan Ombudsman institution should configure itself as something of a think tank regarding subjects of defense of the rights of consumers of private services of universal and/or general-interest services. The Catalan Ombudsman's Office should set up a networked scope for its activity.

- It would be a matter of establishing networks, contacts and meetings with representatives of the companies, speaking about common problems and solutions and opening the possibility for exchange of experiences (good and bad practices) among the companies themselves in different areas of activity.

- Creation of networks, contacts and meetings among the different public agents involved in the defense of consumer rights (regulating agencies, autonomous consumer affairs agencies, local councils, etc.) to define priority areas for future study and analysis.

- Establishment of mixed networks of public actors and private companies.

- In short, it is a matter of creating something of an epistemic community directed and managed by the Catalan Ombudsman that allows cross-disciplinary, integrated systems of conceptual and practical learning in the improvement of consumer rights defense.

8) Revitalizing the work methodology of the Catalan Ombudsman:

- Detecting troublesome areas through the contacts in the above-mentioned networks, and the complaints received.

- Deciding to write a monographic report on a given area.

- Carrying out fieldwork on the sector that includes real problem detection systems such as the “mystery shopper” method.

- Writing an unflinching, realistic report on the sector’s situation and problems, and present it to the network of public actors and related private companies.

- (The Catalan Ombudsman) proposing in these meetings a package of improvements that must be carried out by private companies, as well as improvement in public actors’ supervision of them. Following-up on and supervising these improvements.

- Writing a final report addressed to Parliament and the public opinion, of a more general and diplomatic nature, on the problems detected and the solutions and improvements agreed and implemented by all involved.

9) One initial action by the Catalan Ombudsman should be, and it is discussed later in this paper, to write a code of best practices for companies providing universal and/or general-interest services. The methodology could be as follows:

- To write an initial draft of a code of best practices for companies providing universal and/or general-interest services.

- To work in cooperation with the private companies and the public institutions directly involved in a consensus version of a general code of best practices.

- To differentiate by major sectors the private general-interest services that have their own specificities. For example: a) utilities for households and businesses (water, gas and electricity); b) telephony; c) mobility (transit).

- To carry out a study for each of these broad sectors on the issues and pathologies detected, and draw up a code of bad practices as a preliminary step in the design of sectorial codes of best practices. This task would have to be performed in cooperation and consensus with the private and public actors of each sector:

#### 4. Proposal for a code of best practices

This section presents a proposal for a code of best practices for private companies providing universal and/or general-interest services. This draft code of best practices could be articulated in two sections: on one hand, principles, and the other, criteria.

The principles should refer to the best practices linked to values that companies must have in their relationship with the people who are their customers. The Code of Best Practices written for the administration by the Catalan Ombudsman in 2009 has been used as a model, with the modifications, deletions and extensions derived from its adaptation to private universal and/or general-interest services. The criteria refer to the best practices linked to service provision processes, which range from contracting to cancellation of the service.

## CODE OF BEST PRACTICES: PRINCIPLES

### I. EQUALITY AND NON-DISCRIMINATION PRINCIPLE

#### 1. Best practices to guarantee material equality

- Companies must allow the use of all assistance tools and instruments that make possible accessibility to all services by persons with physical or mental disabilities. Beyond physical accessibility aspects, companies should establish special mechanisms for service to persons with mental disabilities that would not be subjected to any form of tutelage.
- Companies should prioritize service to elderly persons and help them ameliorate age-related impairments (mobility, hearing, comprehension problems, etc.).

#### 2. Best practices to ensure non-discrimination

- Companies need to make a special effort in the realm of linguistic communication to facilitate proper service provision to persons who are not fluent in either of Catalonia's two official languages.
- Companies should plan and offer support systems in their face-to-face or telephone citizen/customer services that could provide additional assistance to anyone expressing difficulty in understanding the administrative procedures.

### II. PROPORTIONALITY PRINCIPLE AND ABSENCE OF ABUSE OF CORPORATE POWER

#### 1. Best practices in the exercise of companies' activities and non-abuse of corporate power in the provision or cancellation of a service

- In the exercise of their activities, companies are subjected to the principles of adequacy and proportionality. Therefore, they must weigh the benefits and disadvantages of one or another action according to citizens'/customers' interests, not only those of the com-

pany. This principle is especially relevant in the decisions of cancellation or termination of a service, and complaints filed by a company for possible non-payment.

#### 2. Best practices regarding the use of force by companies' security personnel

- When the exercise of a fundamental right and the protection of the company's security come into conflict, the security personnel's response must always be proportional.

### III. IMPARTIALITY AND OBJECTIVITY

#### 1. Best practices in the exercise of supervision activities

- Companies must define and publicize the quality indicators for services which make it possible for them to be objectively measured, thus facilitating compliance with their obligation to ensure the proper operation of these services.
- Companies must also ensure that their employees do not have incompatibilities, or conflicts of interest in the performance of the tasks assigned to them.
- Companies must establish and maintain service management supervision bodies that are citizen/customer-oriented, and as independent as possible (outside the company's hierarchy of command). Citizens/customers should have access to these bodies through their complaints.

#### 2. Best practices in service provision

- All clauses and agreements between the company and the citizen/customer must be established in writing, and must stipulate the commitments made by the company and the considerations agreed to by the citizen/customer. The document must be very clear and concise to avoid divergent interpretations to greatest extent possible.
- None of the clauses or agreements between company and citizen/customer may establish considerations, limitations or exceptions that could be considered abusive by the citizen/customer.

## IV. CLARITY, GUIDANCE AND LEGITIMATE EXPECTATIONS

### 1. Best practices for informing on the rights of citizens/customers and the rest of citizens

- The company must provide sufficient information and guidance to citizen/customers on their rights and the procedures affecting them in a clear, comprehensible way.
- When a citizen/customer complains that they have suffered damages from a deficient service provision, the company must inform them on the actions and procedures it has carried out, and the channel and rights available to them to claim compensation for the damages they believe they have suffered.
- When a citizen who is not a customer of the company complains about damages derived from negative externalities in the provision of the service, the company must inform them on the actions and procedures it has carried out, and the channel and rights available to them to claim compensation for the damages they believe they have suffered.

### 2. Best practices for informing on procedural requisites

- Companies must draft their correspondence, bills and formal notices addressed to citizens/customers in comprehensible language that does not generate confusion in the addressees.
- Companies must inform and advise consumers not only on the requisites to request their services, but also all of the technical aspects derived from the service provision, and they must do so in a simple, comprehensible manner.

## V. COURTESY AND PROPER TREATMENT

### 1. Best practices for the treatment of citizens/customers addressing the company

- Company employees must treat citizens/customers respectfully, in face-to-face as well as telephone communications, or any made in writing.
- In order to ensure quality service, the company must apologize, either proactively (when it

detects a case) or in reaction (in case of complaint), if they treat citizens/customers erroneously, or cause them any grievance with their activity.

- The company must apologize, either proactively (when it detects a case) or in reaction (in case of complaint), if they cause citizens uninformed with their service provision any grievance with their activity.
- Company employees responsible for correctly answering citizen/customer questions must have a proper level of training in addition to sufficient and appropriate information.
- When performing customer service duties, company employees must be clearly identified with their name, surname and the post they hold.
- Companies must ensure that their customers/citizens have quick access to the employees with the training and information to resolve their doubts or problems. They must devote all the resources necessary to ensure that the intermediate steps (persons or telephone filters) are the minimum possible.

### 2. Best practices to ensure appropriate treatment for an individual's personal circumstances

- Companies have to offer services suited to the needs of citizens/customers, in accordance with their particular circumstances. To do so, they must provide the professionals responsible for interacting directly with citizens/customers with specific training.

## VI. OBLIGATION TO EXPLICITLY RESPOND

### 1. Best practices for the obligation to expressly respond

- Companies must provide written or oral responses to the matters that citizens/customers and all other citizens address them with. If they have been addressed in writing, the response must also be in writing, even if a telephone response has been made previously to attend the query sooner.
- The lack of competency or coherence of the queries received does not exonerate the company from its obligation to respond, except in cases in which an organized collective query

meant to overload the company's response system has been detected.

## 2. Best practices for response content

- The company's explicit responses must be reasoned, intelligible and congruent with the queries or allegations received so as to not cause defenselessness or legal insecurity to the citizens/customers addressing them.
- Companies must avoid issuing standardized responses, as this could violate the right to a congruent response. Furthermore, responses must focus on the specific matter of concern to the interested party.

## 3. Best practices for responses via electronic media

- Queries sent by citizens/customers by e-mail must be answered by this channel with the same guarantees and treatment as those sent by standard mail.

## VII. LINGUISTIC RIGHTS

### 1. Best practices to guarantee the right to use official languages

- Companies must guarantee the possibility to use any official language in their interactions with citizens.
- The language used is determined by the territory where the service is provided, not the territory where the company is headquartered.

### 2. Best practices regarding the use of unofficial languages

- Companies need to make a special effort in realm of linguistic communication to facilitate proper service provision to persons who are not fluent in either of Catalonia's two official languages.

### 3. Best practices regarding the availability of resources to guarantee linguistic rights

- Companies must avoid situations in which, due to a lack of foresight (in their forms, computer programs, etc.), users are unable to

address and be attended to orally or in writing in the official language they choose.

- Companies must require their employees to have sufficient linguistic training (oral and written) in the official languages for them to be capable of fulfilling the duties inherent to their job post.

## VIII. ACKNOWLEDGEMENT OF RECEIPT

### 1. Best practices for acknowledgement of query receipt

- In its acknowledgement of receipt, the company must identify the person responsible for responding.
- If the citizen/customer sends a query to a unit or body of the company that does not have competencies in the matter, this unit must automatically relay it to the body responsible and notify the interested party that this has been done, in the event of a possible delayed response.

## IX. THE RIGHT TO BE CONSULTED AND INFORMED

### 1. Best practices regarding the right to be previously consulted and informed in the event that the supplier makes significant changes to the service provision

- Regardless of whether it is legally permissible, suppliers may not cancel any service, or make modifications to contractual conditions, without previously informing the citizen/customer, or without having gathered information on the individual situation of the citizen/customer.

## X. REASONABLE TERM

### 1. Best practices to avoid procedural delays

- Suppliers must make every effort to solve incidents (suspensions in service provision, etc.) as quickly as allowed by technology, and beyond the legal terms allowed to them.
- The system of attending users by appointment in the supplier's face-to-face customer service

department must achieve improvement in the service, not postpone the presentation of queries due to a lack of resources or staff.

- The concept of reasonable time must be applied in the telephone service provided to citizens/customers. Companies must implement the technological means to detect when a citizen/customer has been waiting on hold too long, or contacts them by telephone on repeated, successive occasions.
- The company must resolve in a reasonable time period all of the queries in the order they are received, and must prioritize certain queries on justifiable grounds.

## **XI. DUTY TO STATE GROUNDS**

### **1. Best practices regarding sufficient grounds**

- A company's decisions and rulings must be grounded in a clear, comprehensible manner. Technical reasons must be written and explained in plain, easy-to-understand language.

### **2. Best practices for grounds in the company's exercise of discretion**

- If it must choose between several correct and possible options, the company must choose that which it considers most beneficial for the citizen/customer, except for cases in which there is damage to the interests of other citizens, or damage to the general interest.
- The criteria established for the previous best practice must be incorporated into the company's action protocol, and must be applied to any future similar situations, regardless of whether there is a query or complaint.

## **XII. NOTIFICATION OF DECISIONS AND INDICATION OF THE POSSIBILITY TO APPEAL**

### **1. Best practices on the content and practice of notifications**

- When a company makes notifications, it must do so with the mechanisms that allow the

addressee to be aware of this act and be informed of how to exercise their rights of defense.

- Regardless of whether it is legally permissible, suppliers may not cancel any service, or make modifications to contractual conditions, without previously informing the citizen/customer, or without having gathered information on their individual situation.
- Once it has attempted the various mechanisms of contact with the citizen/customer (telephone, e-mail or visit to their home) to express the decision to cancel a service, it must use the post (by registered mail with acknowledgement of reception), and allow a grace period before applying the measure.
- In its notifications, the company must outline the interested party's options to challenge or revert the decision.

## **XIII. PERSONAL DATA PROTECTION**

### **1. Best practices for personal data information and processing**

- All data provided by citizens/customers are confidential, and it is completely prohibited to use them for purposes outside the specific service requested and accepted by the user.
- Citizens' and customers' personal data in the company's power should be used proactively toward improvements in the service.
- Companies should ask their users whether they want their data to be used by the company to inform them on new services, offers and other commercial and marketing promotions.
- When a third company is handling the personal data included in the files of the principal company, the contract must expressly stipulate the security measures to be applied, and guarantee that the data will not be used for any purpose other than that established in the contract, nor will they be conveyed to other companies or persons.
- Companies cannot repeatedly contact citizens in a generalized way, as potential customers, by telephone, personalized post or e-mail, or visits to their homes. Even if citizens'/customers' data are public, the principle of non-interference must be respected.

## XIV. ACCESS TO INFORMATION

### 1. Best practices in the provision of information services

- Companies must duly inform citizens/customers on their rights and obligations with regard to the service provided.
- The company must be proactive in the dissemination of information to avoid later demands for information, clarification or claims.
- Companies must previously provide information (charters of service), define the objectives of the service and make a commitment with their citizens/customers. This is one of the main tools that will make it possible to guarantee transparency in service provision.
- Companies must guarantee information and communication mechanisms suited to the needs of citizens/customers depending on their individual circumstances.
- Companies must implement formulas to improve coordination among their departments or auxiliary companies intervening in the same service or family of services so that citizens do not have to repeatedly provide their personal data.

## XV. THE RIGHT TO COMPENSATION

### 1. Best practices regarding compensation mechanisms

- Companies must proactively compensate for damages caused to citizens/customers at the time in which they detect poor service provision, which must be compensated.
- The company cannot require users to produce evidence beyond what would reasonably be considered sufficient and essential.

## XVI. THE RIGHT TO PARTICIPATION

### 1. Best practices to promote participation

- The company must promote participation of citizens/customers in processes to make decisions that could affect them, to boost the legitimization of company activities and as a means of preventing and resolving conflicts.

## CODE OF BEST PRACTICES: CRITERIA LINKED TO SERVICE PROVISION

### I. CRITERIA FOR SERVICE PROMOTION AND MARKETING

- Marketing and promotion must be regulated by strict ethical codes by which the companies will refrain from making statements that any part of society could find offensive.
- The commercial information must center on specificities; the advantages and quality of the company's services, and not consider accessory elements even if they may be impactful.
- When advertising their services, companies must express price in a clear, visible and simple manner, and avoid establishing conditions and exceptions to the greatest extent possible.

### II. SERVICE CONTRACTING CRITERIA

- Companies must provide every convenience for citizens to be able to contract their services, with a broad range of contracting systems, especially in cases in which the services provided do not operate in a system of competition.
- Expediency in contracting procedures, along with the guarantee of rights, are criteria that must be considered essential.
- Information relative to the contracting process must be clear, brief and very simple. This also applies to the document signed as a contract.
- Contracts must set very clear rules on conditions, quality and prices that avoid generation of exceptions or clarifications.
- Contracts must be written in easily-understood language. If technical terms are used, their meaning must be indicated in parentheses, and in no case should they lead to confusion.
- When contracting parties repeatedly ask the same question, the company must take the initiative to make the necessary improvements to avoid such clarifications in the future.

### III. SERVICE PROVISION CRITERIA: PRODUCTION

- Companies must regularly validate their service through satisfaction and quality controls carried

out through written and telephone communication with their users.

- Companies must return calls made by citizens/customers that could not be duly handled for technical matters or because additional information was necessary that did not allow the resolution of the citizen/customer's query, and avoid to the extent possible unnecessary waiting times by the citizen/customer on the telephone.
- When the contracted service cannot satisfy the citizen/customer in the agreed conditions, the company must directly and personally contact the citizen/customer to propose alternatives to the service conditions.
- Companies must inform sticky citizens/customers in a timely manner of the possible promotions that the company may be carrying out and that improve the quality and service of the contracted service.
- Companies must provide personalized service to the citizen/customer from the standpoint of the company with which the citizen/customer has contracted the service, and avoid resorting to explanations that focus on how the company is structured, organized or provides service to justify not resolving the problem.
- Companies must have personalized service points for citizens/customers, that are equitably distributed throughout the territory, regardless of the existence of telematic services. Information on these service points must be visible in their communication materials.
- Companies must include a clearly visible toll-free telephone number for customer service and information in their communication materials with citizens/customers (invoices, websites, etc.) to facilitate claims.
- Transfers of citizen/customer telephone calls must be as agile and fast as possible. In any event, a system must be established that allows personalized service.

- Whenever there is a shortfall in the provision of a service, the company must notify citizens/customers that such an incident has occurred, immediately inform them that it will be compensated, and the conditions in which this will be done.

#### IV. SERVICE PROVISION CRITERIA: BILLING

- Bills must have a simple appearance, with the basic information of interest to the citizen/customer clearly indicated, with a contact telephone number if they require any clarification.
- Under no circumstances can elements that have not been contracted be billed, unless there has been a prior notification of the citizen/customer, and their express acceptance of such elements.
- Billing complaints must be handled immediately. If such complaints cannot be resolved in the first contact, the responsible person with whom the user is to make future contact must be identified. This responsible person must get in touch with the citizen/customer.
- In the event of a service billing error, companies will proactively contact the customer to inform them of this matter and clearly explain to them how the faulty collection will be modified.

#### V. CRITERIA FOR SERVICE TERMINATION OR SUSPENSION

- The procedural steps to cancel a service must be as fast and agile as those used to contract a service, and virtual media must be prioritized over face-to-face contact.
- Services can only be canceled once the citizen/customer has been informed and their consent received. The company must make every effort to contact the customer and inform them, and may only in exceptional or extreme cases terminate a service without previously informing the customer, and only when they can prove that every possible attempt has been made to contact the citizen/customer.

# THE DEFENSE OF CITIZENS' RIGHTS AND GOOD ADMINISTRATION IN THE PRIVATE EXERCISE OF PUBLIC FUNCTIONS: THE ROLE OF OMBUDSMEN WITHIN A DECENT SOCIETY

## 1. 1. General considerations

### a. Exercise of public functions by private actors, privatizations and deregulations

The phenomenon of private actors performing public functions, that is, in an initial approach, cases in which “a private entity is granted the possibility to perform administrative activities or the provision of public service by third parties, in substitution or place of the Administration” (Sánchez Moron, 2011, p. 432), is nothing new. There are numerous, well-known cases of notaries, registered conveyancers, ship captains, concessionaires and contractors, bodies governed by public law, sport federations and private companies that act in the framework of general interest services, or collaborating entities devoted to inspection and monitoring in industrial, environmental and other settings, to give but a few examples.

The privatization and deregulation processes conducted in Spain and other countries, following the postulates of New Public Management, have meant that, beyond the conventional tenets, others have been more recently added (the case of companies that provide deregulated services). Therefore, the financial crisis, taken together with the application of Directive 2006/123/CE, and national legislation transposing it, foretell a growth in cases of outsourced public functions with the increasing substitution, as a general rule, of previous administrative supervision schemes through authorizations for inspections and supervision subsequent to prior notifications or responsible statements issued.

In such a context, this study examines the role of modern public law before this evolution, as well as the specific function that, within the mechanisms for supervision of the administration's activity, ombudsmen can carry out in general and, using the specific case of Catalonia, what can be done by the Catalan Ombudsman specifically.

Although up to now the doctrine and case law have been focused on the limits of deciding to transfer public functions to the private realm, there have been fewer discussions on the matter of which sort of guarantees of citizens' rights can be related with these private actors, once the transfer has been made, so that our legal code should establish, at the same time, service of the general interest to be covered by this activity.

In the matter of decisions to transfer public functions to private actors, although this is not the objective of our study, it should be noted that even if it is difficult to find a mention of activities constitutionally reserved for public administrations (Canals, 307, 309), it is possible to extract from the Spanish legal framework, in our opinion, “a general statutory principle: administrative law is the common law of public administrations, and must be applied whenever there is an exercise of administrative authority, even by private parties, in which case private law must necessarily be displaced,” as “[...] pursuant to the legislation in force, there seems to be a general principle according to which unilateral decisions that imply the exercise of administrative authority exclusively correspond to the public administrations that adopt them according to the rules and principles of administrative law. Only on an exceptional basis may private parties engage in public functions of this type, and when they do so, “they should also have administrative law applied to them when they exercise authority” (Ponce, 1999, pp. 1,255 and 1,259).

Beyond this final statement, which will constitute the core of this analysis, now all that is left is to underscore that the general legal standard could be formulated as follows: wherever there is an exercise of authority, there must be a public administration and administrative law that guides and limits this exercise, in guarantee of citizens' rights and the general interest. It is worth repeating that we say it is a standard that can be induced on a legal, not constitutional, level, and that it is

general, or of principle, as it allows exceptions, to the degree in which (as is known) there are public functions with the exercise of authority that are performed, outside administrative organization, by private parties through regulatory assignment, which Canals (2003, p. 309 and following) believes should be statutory, with very reasonable arguments, even though this is not always so in practice.

Indeed, before this situation, although traditionally the guarantee of citizens' rights and the general interest was demanded of administrations by public law, when the public sector delegates public service provision or public functions to private actors, can the persons affected by private decisions allege rights inherent to public law and react in the same way as they would have before activities of the Administration (Hoehn, 2011)? What is the situation in the case of Spain, and what proposals for improvement could be made, if any?

To discuss these and other related items, I will structure my analysis as follows: First, I will demonstrate how private actors engaged in public functions are certainly capable of making decisions that adversely affect citizens. Then I will discuss whether private law can, on its own initiative and independently, offer adequate protection to public interests, constitutional, statutory and legal rights (among which is that of good administration) and the general principles of law implied in the exercise by private actors of public functions. Though I disclose my negative conclusion here, I will later consider which guarantees of good administration and other rights, and also of general interests, the Spanish legal framework should establish (and currently does not).

Among these guarantees, in the second part of the study, I will specifically analyze the role of ombudsmen and analyze the duties conferred by the legislative branch to the Catalan Ombudsman for the supervision of private actors engaged in public functions. Last, as a result of the previous considerations, I will set out a number of final ideas, among which I will include the apparent progressive rapprochement between forms of control over the public and private sectors, and the exchange involving the adaptations of similar accountability mechanisms, which seems clear when the private sector engages in public functions. In short, privatizations and deregulations are not a reduction of the administration's role, but rather a redefinition of it, as its extended scope

(Cueto, 2008, p. 214) must penetrate (in modulated fashion, which is a challenge) relationships between private actors in the guarantee of citizens' rights and the general interest.

## **b. Human rights and the absence of domination in decent societies**

Decisions made by private companies (as contractors, general interest service providers, entities collaborating in tasks of inspection, monitoring and certification, for example) on the access and use of a public service (health care, allocation of social housing, access to public transport, etc.), decisions on access, suspension and cessation of the supply of general interest services essential for life (electricity, telecommunications, etc.), and decisions on the capacity of certain goods and activities to take place without risk for general interest (technical vehicle inspection, environmental certifications, etc.) may have an impact on the rights of citizens (non-discrimination, free enterprise, service continuity, good administration, etc.) and violate general principles of the right that regulates the exercise of power (irrational or unjustified decisions that violate the principle of prohibition of arbitrary decisions, disproportionate measures that violate rights when less restrictive alternatives are available, etc.).

It seems unnecessary to insist on something so evident: the rights and interests of citizens can be affected not only by decisions and activities of public administrations but also by those of private actors, which "because of their economic muscle may be in a position to take decisions which at the present time are not subject to scrutiny and which could be unfair or adversely affect the public interest." (Woolf, 1986).

The Council of Europe has been mindful of this situation. In Resolution 1757 of 2010, on human rights and companies, the Council of Europe Parliamentary Assembly, citing a recommendation prior to number 1858 (2009), having to do with military, security and law enforcement companies, and the erosion of the State's monopoly on the use of force, underscored that, "while the responsibility to protect human rights is primarily that of states themselves, businesses also have responsibilities in this area, especially where states have 'privatised' classic state functions such as certain areas of law enforcement or military activities. The Parliamentary Assembly calls for the legal vacuum in this area to be filled [...]"<sup>1</sup>

In the report written by Mr. Haibach of the Committee on Legal Affairs and Human Rights, which preceded approval of the 2010 recommendation, discussion focuses on the fact that, in recent decades, governments have increasingly privatized functions that traditionally belonged to the state, such as law enforcement, health care, education and telecommunications. In some cases this has led to what Professor Clapham, quoted in the report, describes as the “evaporation of controls which were placed on the sectors to ensure respect for civil and political rights”.<sup>2</sup>

Should these controls be reinstated? If so, how? As for the first question, there is no doubt that there is a compelling need to design effective controls over the private actors exercising public functions. At stake are citizens’ rights, and their dignity as members of decent societies which, to be so, must necessarily have this respect (Margalit, 1997), as the Constitution of Spain (hereafter CS) establishes in its Article 10.1, stating that “the dignity of the person, the inviolable rights inherent to them, the free development of personality, the respect for the Law and the rights of others are the foundation of political order and social peace”. One cannot responsibly speak of citizens’ freedoms if they are dominated, or subjected to a possible arbitrary interference, as would be the case of not taking into consideration the interests and ideas of the person suffering from this interference, committed either by a public or a private entity (Petit, 1997).

The question remains; how to recover, or if possible, strengthen these controls in activities transferred to the private sectors, and in other cases in which private actors perform public functions

**c. Public law and private law in the protection of general interests, constitutional rights and good administration, when there is a private exercise of public functions**

What are the roles of private law and public law in the establishment of judicial controls that guarantee the rights and interests of citizens, their dignity and freedom, and service to the general interests?

Before anything else, it is good to highlight the progressive blurring of the once-rigid boundaries between the two; as is known, the former is often applied to the public sector, while the second, as we will discuss, should be applied on an increasing basis to a private sector engaged in a growing number of public functions. That said, we believe that the mere application of private law is insufficient to guarantee the constitutional, statutory and legal rights involved in the transfer of public functions to the private sector.

First, it must be stated that even if a private company is providing public services, or services qualified as being of general interest, or is performing duties of supervision, inspection or certification, constitutional, statutory and legal rights granted to citizens by the legal code are still present and in effect. It must be borne in mind that Article 9.1 also binds private actors in the respect for the constitution and that, for example, Article 37.1 of the Statute of Autonomy of Catalonia underscores that the rights it recognizes “bind, in addition to public authorities [...] and, pursuant to the nature of every law, private citizens”. Thus, this discussion is within the realm of the effectiveness of rights recognized by public law among private citizens. Consumers are, after all, still citizens when the body wielding power is a private organization; therefore this body cannot discriminate against them.

The application of the contract between private parties, when one exists, cannot ignore these constitutional and statutory rights. It is true that part of citizens’/consumers’ rights can be protected by the regulations on the rights of consumers and users (Royal Legislative Decree 1/2007, of November 16, see Article 8, or Catalan Law 22/2010, of July 20, on the Code of Consumer Rights of Catalonia). Nonetheless, it is only a part: when the citizen/consumer/user finds themselves before decisions made by the other contracting party in the exercise of the public authority delegated in one way or another by the administration, the consumer rights legislation (although it may be reinforced in this point <sup>3</sup>) and the contract itself appear, in our opinion, to be insufficient, because they are inadequate to protect rights

<sup>1</sup> <http://assembly.coe.int/Main.asp?enllaç=/Documents/AdoptedText/ta10/ETS1757.htm>.

<sup>2</sup> The report can be consulted at:

<http://assembly.coe.int/Main.asp?enllaç=/Documents/WorkingDocs/Doc10/EDOC12361.htm>.

<sup>3</sup> Cal tenir en compte el Projecte de llei pel qual es regulen els serveis d’atenció al client destinats als consumidors i usuaris (BOCG, 10 de juny de 2011, núm. 131-1), que parteix de la constatació expressada en l’exposició de motius que “amb tot, la normativa vigent no sembla que hagi aconseguit el resultat perseguit. La pràctica administrativa en la gestió de les queixes o reclamacions dels consumidors i usuaris revela que hi ha un element comú en la major part d’aquestes queixes, manifestat a través d’un creixent descontentament quant a l’atenció al client”. Amb aquest projecte es pretén, segons l’article 1, “establir els paràmetres mínims obligatoris de qualitat dels serveis d’atenció al client” en determinats sectors inclosos en l’article 2 (“sectors de serveis de subministraments d’aigua, gas i electricitat, serveis de transport de viatgers, serveis postals, mitjans audiovisuals d’accés condicional i serveis de comunicacions electròniques”) i establir diverses obligacions jurídiques de les empreses privades referides, per exemple, al termini de resolució de queixes (art. 16).

and principles from the exercise of the authority. This is the *raison d'être* of administrative law, which, over the centuries, has designed mechanisms to limit and guide the proper exercise of public authority. Neither consumer rights legislation nor contracts are concerned with limiting the arbitrary or disproportionate exercise, or any lacking proper procedure or grounds, of private actors' authority to decide on access, suspension or termination of the supply, among other factors.

Thus, when this exercise is conducted by private actors, there is no reason not to apply the mechanisms laboriously designed by public law over hundreds of years, without incurring in any automatic translation that does not consider the context of the private realm, where the autonomy of willpower and the possibility that the citizen/consumer/user has to choose from among several competing companies are present. To the contrary, there are significant reasons derived from the Rule of Law for administrative law (adapted where and if necessary) to continue as a shadow in the exercise of public authorities.

These significant reasons begin in the Constitution itself, where, although it is not possible to identify a constitutional reservation of certain tasks for the Administration, there can be found a constitutional reservation of procedure, grounds and justification for the case of exercise of public authorities, wherever the exerciser is, in accordance with constitutional principles of good administration, such as the absence of arbitrary decisions, proportionality, impartiality or objectivity (Art. 1.1, rule of law clause from whence the case law derives the principle of proportionality; 9.3, prohibition of arbitrary decisions; 103, impartiality and objectivity, and 105, CS, Ponce, 2011; Cueto, 2008, p. 36, along the same lines).

Unfortunately, up to now, general and sectorial lawmakers have not been mindful of the need to accompany the transfer of public functions with a design to supervise and guide the powers derived from administrative law. Cueto has carefully analyzed the different current expressions of the exercise of public functions by private parties and their sectorial regulations, and reached the following conclusion: "The application of administrative procedure by private actors when they exercise public functions, or when they perform activities of general interest, has hardly been undertaken, although in some cases certain minimum guarantees in the regulations are established when we find ourselves before the exercise of

these public functions or before the provision of essential services", although, "[...] there is no justification for the exercise of these public functions not to be accompanied by the same guarantees as when they are exercised by the administrations directly, as it should not be forgotten that they could all be assumed by the Administration itself." Despite this, lawmakers have only established, and not in all cases, a number of "pseudo-procedures" that aim to minimally safeguard the position of the private citizen, but it is true that regulations are disparate in intensity and form, and their treatment as case law, limited and oscillating" (Cueto, 2008, p. 38, 39 and 41).

The most recent legislation has made progress in the right direction, as is shown, for example, by the regulation of collaborating entities in Law 26/2010, of August 3, on the Judicial and Procedural System for Public Administrations of Catalonia (Title VIII, "Inspection and supervision authorities", chapter II, articles 91-101) as well as the supervisory possibility of the Catalan Ombudsman, to which the second part of this study will be devoted. However, in general terms, and in the Catalan law alluded to, the regulatory treatment of this matter continues to be insufficient. In the case of Catalan Law 26/2010 (hereafter JPSPA), our opinion is that the regulation should not only be limited to supervision and inspection duties of the so-called *collaborating entities*, but rather, on a general level, should include a statute for any private actor exercising any public function. The same lack of cross-disciplinary, overall treatment can be found in recent autonomous regulations.

Furthermore, given the role of Article 149.1.18, of the CS in the distribution of competencies in this matter, this regulation should not only be general, but also of a common, state level (Ponce, 2001). Therefore, various legislative options could be studied *de lege ferenda* to fill the existing legal vacuum. One could be to include the private actors that exercise public functions in the subjective realm of JPSPA application (art. 2), directly applying, and modulating when necessary in each chapter, the demands already established for the exercise of public functions by administrations. Another option would be to use the formula used in the second additional provision for public law corporations; in other words, the subsidiary application of the JPSPA in light of the lack of a specific sectorial legislation. A third possibility would be to generate a specific title of the law (as the Catalan law has done) that includes (as opposed to the Catalan law) all cases of private

exercise of public functions, and regulates them in a general and cross-disciplinary way.

That said, whatever the formula used, in these cases, the regulations should employ the requisites linked to the constitutional principles of good administration, impartiality and objectivity (abstention, recusal, incompatibilities, conflicts of interest, requirement for diligent weighing of rights, interests and events taken into account in making the decision, adversarial procedure, etc.) the prohibition of arbitrary decisions (sufficient and rational support and grounds for the decisions); proportionality principle (see Article 39.1 bis of the JPSPA); and establishment of citizens' rights when public functions are exercised (extending, on a modulating basis, the obligations of Article 35 of the JPSPA to private actors if necessary), at a minimum (for the case of the US see Aman, 1999, 13 and 14, which proposes the modulated extension of the Administrative Procedure Act of 1946 to cases of private actors exercising public functions; for Spain, see the proposal of Cueto, 2008, p. 40 and 41).

In any event, it shall be necessary, as is frequently done sectorially and in Catalan Law 26/2010, although only in the case of collaborating entities, to reconstitute discrepancies between the citizen/consumer/user and service/public function provider to a final decision by the Administration through the relevant appeal. However, this provision is insufficient if the parameters, minimum judicial standards to ground and justify according to which the administration will solve the claim (either due to lack of contradiction in the decision made, or lack of grounds, due to breach of obligations to allow access to the case file, etc.) and according to which it must resolve, if necessary, the judicial conflict that may arise (article 2.d of the Contentious-Administrative Jurisdiction Act<sup>4</sup>) and the possible appeal for the violation of fundamental rights, if any may exist (imagine, for example, a justification of a private supplier's discriminatory act, with violation of Article 14 of the CS). As is known, the Constitutional Court procedurally overcomes the impossibility to accept actions for infringement of constitutional rights by private actors through the mechanism of attributing this violation to the judicial bodies that have not put it right (STC 18/1984, FJ 6, STC 51/1988, FJ 1, or STC 129/1989, FJ 2).

Furthermore, this becomes crucial in cases of collaborating entities that offer their technical *know-how* to the Administration, as if we presume, as Canals states, that in the resolution of these inapplicable executive appeals the Administration may not enter to control the essence of the matter, but only matters linked to decision-making (we hesitate to call them formal matters, as they have to do with grounding and justification and, therefore, indirectly but indissolubly, with the essence of the matter), and only by clearly establishing these procedural and grounding standards may the defense of the citizen before private arbitrary decisions have any chance of success.

In conclusion, the exercise of public functions by private actors requires specific regulation of the decision-making process, of how the decisions are grounded and principles of supervision over the private exercise of power. There is no comprehensive regulation of this kind, not even of a basic statewide nature.

This regulatory shortfall that has been brought to light, and that we hope can be solved in the future, conditions the possible supervision that can be conducted nowadays in Spain and in other countries, including that which Ombudsmen may carry out, as will be outlined in the following passages. But at the same time, it grants to Ombudsmen the chance to extend their control over arbitrary decisions and good administration to spaces occupied by private actors exercising public powers, as will be shown in subsequent sections.

## 2. Possibilities and limits of supervision by Ombudsmen: the example of the Catalan Ombudsman

Concern for the protection of citizens' rights in their interaction with private actors exercising public functions is extending internationally. With respect to the role of administrative law and Ombudsmen, this concept was confirmed, to cite one example, with the celebration of the World Conference of the International Ombudsman Institute (IOI) in June 2009, which brought together 340 delegates and observers from over 90 countries, with speeches delivered by former Secretary General of the United Nations, Kofi A. Annan, and the

<sup>4</sup> Contentious jurisdiction recognizes "administrative supervisory or monitoring acts decided by the conceding Administration, with respect to the instructions for concessionaires of public services that imply the exercise of administrative authorities that have been conferred on them, and also the acts of the concessionaires themselves, when it may be possible to appear directly before this jurisdictional order pursuant to the relevant sectorial legislation."

United Nations High Commissioner for Human Rights<sup>5</sup>. During this conference, a specific discussion panel studied the role of Ombudsmen outside the public sector. In their paper, it was stated that the ability of administrative law to respond to the exercise of public power by organizations not integrated in the public sector would depend largely on its ability to overcome the limitations imposed on it by the public-private dichotomy (Malik, 2009).

An example of this extension of public law—that we do not have to circumscribe only to regulation of judicial supervision over the contentious-administrative jurisdiction, as is obvious—occurs in the Spanish legal code, specifically in the regulation of the Catalan ombudsman’s role.

**a. Article 78 of the Statute of Autonomy of Catalonia and Article 26 of Law 24/2009, of December 23, on the Catalan Ombudsman**

As previously stated, in the slow and tedious progression of limiting private arbitrary decisions in the exercise of public powers and guiding private actors toward good administration, mention must be made of the innovative Article 78.1 of the Statute of Autonomy of Catalonia (SAC) and the Catalan Ombudsman Act that implements it.

Article 78.1 of the SAC states the following:

“The Catalan Ombudsman has the function of protecting and defending the rights and freedoms recognised in the Constitution and in this Estatut. To this end, he or she oversees, exclusively, the activity of the Administration of the Generalitat, that of any public or private related bodies that are associated with or answerable to it, that of private companies that manage public services or that carry out activities of general or universal interest, or equivalent activities in a publicly-subsidised or indirect way, and that of other persons with a contractual relationship with the Administration of the Generalitat and with the public bodies which are answerable to it. He or she also oversees the activity of the local administration in Catalonia and that of the private or public bodies which are associated with or answerable to it.”

Article 26 of the Catalan Ombudsman Act states that:

“Article 26. Parties subject to supervision

In the exercise of its competencies, the Catalan Ombudsman institution shall supervise the activity of the following parties:

d. Private companies that manage public services or that carry out, through agreements or concessions, activities of general or universal interest or their equivalent, and other persons contractually linked with the administration of the Autonomous Government of Catalonia or with the public bodies that depend on it, in the terms outlined in article 78.1 of the Statute.”

A reading of the reports presented by the Catalan Ombudsman to the Parliament of Catalonia since the approval of the SAC demonstrates that, in the realm of consumer affairs, actions having to do with privatized public services or services of general interest (the only case of the exercise of public functions by private actors specifically mentioned) show that the matter is far from being merely theoretical: 237 such interventions were made in 2007 (out of a total of 461); 202 interventions were made in 2008 (out of a total of 471); 199 in 2009 (of 381); 157 in 2010 (of 419), and 157 in 2011 (of 391).

The reading of the two transcribed precepts reveals slight variations in the Law with respect to the SAC, and also profuse use of judicial terminology (public services, agreement, concession, activities of general or universal interest) and a final clause that overcomes formalities and rigidities to refer to “equivalent activities”. It is worth looking further into some of these matters.

1. In the realm of service provision, the SAC and the Catalan Ombudsman Act refer to “private companies that manage public services”. The reference to the well-known cases of indirect management of public services by contract, now outlined in Article 277 of the Public Sector Contracts Act, seems clear.

2. Furthermore, reference is also made to private companies that carry out activities of general or universal interest, and do so through agreements or concessions.

<sup>5</sup> The documents referred to in this conference are available at: <http://www.theioi.org/publications/the-stockholm-2009-conference-papers>

a. As for the activities of general interest, from the literality of the precept, it can apparently be inferred that any private company performing an activity with any degree of general interest could enter within the Catalan Ombudsman's supervisory remit (meaning everything from small companies receiving a subsidy to the so-called *external public services*, or, activity that is merely private but that, given its relevance for the general interest, is subjected to a unique legal framework, in that it is intensely subjected to public intervention, as has traditionally been the case of taxi and pharmacy services, for example).

This being granted, from a systematic and teleological interpretation of the precept (Art. 3.1 of the Civil Code), the adjective that accompanies the type of activity ("or universal") and the fact that supervision makes sense to "protect and defend the rights and freedoms recognised in the Constitution and in this Estatut", make us believe that perhaps lawmakers were thinking more in terms of the so-called *services of general (economic) interest* and within these, the so-called *universal services*, which would seem more logical.

As is known, in the framework of the European Union, the public service deregulation process has given rise to a debate, as yet uncompleted, on citizens' demands of general interest with relation to deregulated services. With the development of this debate, a doctrine has been built on services of general interest, the basic grounds of which can be found in several of the Commission's documents on services of general interest in Europe.<sup>6</sup> These documents originate in the idea that the services of general interest are an essential element of the European model of society; an idea that has been transferred into a number of legal regulations, such as Article 14 of the Treaty on the Functioning of the European Union (hereafter TFEU) or Article 36 of the Charter of Fundamental Rights of the European Union.

A proper understanding of the concept of *services of general interest and services of general economic interest*, as the two expressions are used with meanings, as will be seen, that are not identical, implies beginning with community regulations on free economic competition and its exceptions. The European Union allows public and private ownership of companies (Article 345 of the TFEU). Even so, community regulations impose, as a general rule, the impossibility for Member

States to dispense to public companies favorable treatment that distorts free competition. Therefore, they cannot grant them exorbitant rights, powers or prerogatives, even if they are meant to benefit citizens or users. This is referred to in Article 106.1 of the TFEU.

The TFEU allows exceptions, privileges or prerogatives, even with affectation of free competition with private companies, when it is necessary to guarantee the provision of these services of general economic interest, a possibility confirmed by the case law of the European Court of Justice (hereafter ECJ) when it has had to make its position known on the matter.

This determines the importance of specifying what these services are. Although it is a matter in constant evolution, Annex I of the *White Paper on Services of General Interest published in 2004* lists a number of definitions of terms with a view to contributing to clarifying misunderstandings in European debate caused by "terminological differences, semantic confusion and different traditions in the Member States".

Consequently, according to this terminological guide and the case law of the ECJ, the services of general interest are those that public authorities classify as being of general interest for their relevance (note, among other factors, respect for territorial and social cohesion and the guarantee of basic rights) which, subject to market and nonmarket discipline, are to specific public service and universal service obligations, as in any event, there is a public responsibility in the guarantee of general interest.

These obligations may be diverse and refer to different aspects, such as service quality standards, creation and maintenance of certain infrastructures, tariff limits, guarantees of access to service for persons with disabilities, guarantees for consumers and users, etc. These obligations may be imposed by European or national legislation, with clear inspiration in the North American model of *public utilities*.

As for services of general economic interest, they would be services of general interest consisting of provision of goods or services to

<sup>6</sup> Papers of 1996 and 2001, *Green Paper* of 2003 and *White Paper* of 2004. Also noteworthy is the project for the European Charter of Public Services (or services of general economic interest) of 1994..

the market (covering in particular certain services provided by the big network industries such as transport, postal services, energy, communications, and all others with similar public interest demands, deduced from European or national legislation, naturally under the supervision of the ECJ). The non-economic services of general interest, however, are those in which a civic or social purpose is predominant over economic profit, and intimately linked to solidarity and citizenship, related with what several Member States, Spain among them, have traditionally considered to be public services. The ECJ case law and statements of the Commission (among them the aforementioned 2006 paper, although not done in a conclusive manner, and in a process of constant evolution and redefinition) indicate that educational, health care, social security or social housing services could form part of this category, although there is still certain confusion on various statements made by the European Commission itself, with regard to its possible consideration of the latter category as a service of general economic interest.

An expression of all of these phenomena in Spanish legislation is found in the various legal declarations of certain services previously subjected to public monopoly, in the framework of sectorial deregulations, frequently as services of general interest. Such is the case of various Spanish laws, such as Law 43/2010, of December 30, on universal postal service, and the rights of users and the postal market. In its Article 2 it states that “postal services are services of general economic interest provided under a scheme of free competition”.

It is also the case, on the autonomous community level, of various laws, such as Catalan Law 2/1997, of April 3, which declares funeral services to be “essential services of general interest” provided “under a system of competitive concurrence” (Article 1.1). In the same way, Catalan Law 4/2006, of March 31, on rail service, states that rail transport is “a service of general interest provided, in principle, under a system of free concurrence” (Article 31.1. and 2).

Other instances in the Spanish legal system of this terminology, with its clearly community origin, can be found in laws applicable to sectors outside the phenomena of deregulation, such as Law 40/2003, of November 18, on protection of large families, Article 13 of which is entitled, “services of general interest”, and alludes to the activity of the general Spanish administration, so that providers of general

interest services or activities “subject to the obligations inherent to public service” grant more favorable treatment to members of large families, or the Catalan Law 18/2007, of December 28, on the right to housing, Article 4.1 of which states that, “the activities associated with provision of housing meant for social policies is configured as a service of general interest to ensure dignified, suitable housing for all citizens”.

The consequences of considering an activity as a service of general (economic) interest are linked to the possibility of making exceptions to rules of free competition (article 106.2, TFEU) and establishing regulations for the guaranteeing of general interest; those obligations of public service and universal service already referred to. Now, according to the proposed interpretation, these activities would be under the supervision of the Catalan Ombudsman.

b) That said, the fact that the Catalan Ombudsman supervises the activities of private companies when their activity is qualified as a service of general (economic interest) does not mean that the Catalan Ombudsman has to supervise every activity of private companies and all of their relations with their customers. The *raison d'être* of public law and Ombudsman supervision (that is, as Article 78 of the SAC states, to “protect and defend the rights and freedoms recognized by the Constitution and this Statute”) mean that the Catalan Ombudsman must be limited to supervising private decisions and actions that make for an exercise of power and that damage the rights of citizens.

Decisions such as admission to use of service, suspension or termination of supply, denial of the provision of public and/or universal service obligations are areas in which there is an exercise by private actors of public functions, and in which supervision acquires its meaning as a guarantee for the user/citizen and respect for the general principles that regulate the provision of public services and services of general interest (continuity, changeability, equality, quality and affordability).

The Catalan Ombudsman can play an interesting role in ensuring service continuity, the violation of which could make for impingement of citizens' constitutional and statutory rights; changeability and compliance with the obligations of quality, security and public service in sectors such as electricity (Articles 10 and 48.3 of Law 54/1997, of November 27, on the

electrical sector), the post or telecommunications (Article 22.5 Law 43/2010, of December 30, universal postal service, users' rights and the postal market and Article 25 of Law 32/2003, of November 3, dealing generally with telecommunications); for the absence of discriminations; and also when supervising the compliance with the progress clause that guarantees citizens provision in suitable conditions (Article 48.1 of the Electrical Sector Act); and in controlling cases of affordability indicated in the law, such as maximum tariffs or prices (Article 10 and 11 of the Electrical Sector act), last resort tariffs (Article 34 of the Universal Postal Services Act) or even free services such as those established in article 25.4 of the General Telecommunications Act ("In any event, the obligation to route calls to emergency numbers not entitled to economic consideration of any kind must be assumed by the operators providing electronic communication services to the public, as well as those operating public electronic communications networks. This obligation is imposed on the aforementioned operators with respect to the calls to the 112 emergency telephone number and others determined by royal decree, including those made from public pay phones, without any need to use any form of payment in these cases").

Nonetheless, it is not up to the Catalan Ombudsman to supervise conflicts that could arise between customer/consumer and company, in which consumer rights legislation and the contract between the parties grant sufficient protection and there is no exercise of authority.

c) Furthermore, supervision extending not only to services of general (economic) interest formally declared as such, but also to other "activities of general interest", in the literal terms of the SAC and the Law, should not be ruled out. Obviously, general services, in the aforementioned legal technical meaning, are "activities of general interest". But these activities are not limited to those services, as there are private activities of general interest that technically are not configured as services of general interest, but that could fit within this regulatory clause. Here note should be taken of the aforementioned *external public services*, as they are called within the Spanish judicial

doctrine. Along these lines, reflection should begin on activities with an extraordinary impact on general interest and with a broad administrative regulation which, indubitably, are private activities of general interest, as could be the case of banking institutions.<sup>7</sup>

3. The final reference by the SAC and the Law to "equivalent activities" leads us to think of the real teleological reason that these precepts exist: that the Catalan Ombudsman's supervision to guarantee citizen's rights be performed whenever there is a transfer of public functions for them to be exercised by private actors, whatever the denomination of this act or title of the transfer. This final clause would allow the Catalan Ombudsman to protect the rights of citizens before collaborating entities as are referred to in Law 26/2010, already alluded to, and that would not have fit in any of the prior expressions.

4. Last, the specification of the Law that the provision of these services be carried out through "agreement or concession" does not seem very appropriate, nor does it have its origin in the SAC, which only alludes to the performance of equivalent activities in "an agreed or indirect fashion", which is quite different from the legal text. As is known, public regulation of private companies operating in sectors declared to be of general economic interest is carried out through, among other regulatory techniques, authorizations as is the case of telecommunications (Muñoz Machado, 2004, p. 1,210 and subsequent), to which the Law does not allude. Therefore, Article 26 of the Catalan Ombudsman Act must be interpreted in accordance with article 78.1 of the SAC to avoid any restrictive interpretation that may contradict it.

## **b. Legal obligations of the service provider and the role of the Catalan Ombudsman**

### **i. Right to good administration and exercise of public functions by private actors: current regulatory shortcomings and supervisory possibilities**

As already stated, until now the sectorial and cross-disciplinary procedural legislation (at

<sup>9</sup> For more on the high level of administrative regulation as a function of the impact of these activities on general interest, see the recent Royal Decree Law 24/2012, of August 31, on the restructuring and dissolution of financial institutions. The European Union acknowledges the possibility that banking institutions conduct activities that are services of general economic interest: see the Report of the European Commission to the Council of Ministers: Services of general economic interest in the banking sector, adopted by the Commission on June 17, 1998 and presented to the Council of ECOFIN on November 23, 1998).

levels of the Spanish state and autonomous communities, except, in the latter case, for certain autonomous communities that have not implemented complete regulations of the phenomenon) have not established a general framework of submission to administrative law mechanisms for private actors performing public duties. Therefore, the Catalan Ombudsman's supervision, originating in this surmountable shortfall, with the necessary regulatory reforms, could be a vehicle to remedy the situation.

The lack of a complete regulation does not mean that the Catalan Ombudsman is totally devoid of constitutional, statutory and legal references for the defense of citizens'/users' rights through supervision of private companies exercising public duties.

In fact, the CS establishes constitutional principles of good administration also applicable to private parties exercising a delegated public power. Furthermore, at a minimum, a formalized procedure must be followed for the decision grounding it, with more or less intensity. Additionally, thorough grounds must be given for why a private company is adopting a decision considered adverse to citizens.

All of these requisites (among others) have crystallized into the constitutional traditions of the Member States of the European Union, in the case law of the ECJ, the General Court of Justice, and lastly, in the Charter of Fundamental Rights of the European Union, Article 41. The case law of the Supreme Court and the autonomous communities' High Courts of Justice have repeatedly applied this right to good administration, some statutes and part of the autonomous legislation have recognized and regulated it.

Among these regulations are the SAC and Catalan Law 26/2010.

Article 30 of the SAC states the following:

“Rights of access to public services and good administration

1. Each individual has the right of equal access to public and economic services of general interest. Public Administration bodies shall set the access conditions and quality standards for these services, regardless of the system for their provision.

2. Each individual has the right to be treated impartially and objectively by the public

authorities of Catalonia in matters affecting them, and that the action of the public authorities be proportional to the ends justifying it.

3. The law shall regulate the conditions for exercise and ensuring the rights referred to in Sections 1 and 2 above, and shall determine the circumstances in which Catalan Public Administration bodies and any public services dependent on them shall adopt a charter of user rights and service providers obligations.”

As for Article 22 of the Catalan Ombudsman Act, it states that:

“Article 22. Right to good administration

1. Citizens' right to good administration includes:

a. That the action of the administration be proportional to the ends justifying it.

b. The right to participate in decision-making, especially the right to a hearing and the right to present allegations in any phase of an administrative process, pursuant to the terms of applicable legislation.

c. The right for decisions of public administrations to be grounded, in the legally established cases, with a succinct reference to the facts and legal grounds, identifying applicable regulations and mentioning the possible circuits of appeal if necessary.

d. The right to obtain an explicit resolution and to be notified within the legally-established time frame.

e. The right to not resubmit information or documents that the public administration already has in its power, or could have access to.

f. The right to know at any time the processing status of the procedures in which (the citizen) is an interested party.

2. Public administrations of Catalonia must promote citizen participation in the administrative activities of its competency, with the aim of gathering citizens' proposals, suggestions and initiatives, through preliminary information and debate processes.”

Although it is contained in a separate precept, the content of this law's Article 23 also bears mentioning:

“Article 23. Right to quality public services

1. Each citizen has the right to:
  - a) Access public services in conditions of equality, and that these be quality services.
  - b) Make suggestions and complaints on the operations of administrative activity.
2. As concerns the Autonomous Administration of Catalonia, the Government must establish by decree the specific procedure for attending and responding to suggestions, claims and complaints regarding provision of public services under its responsibility.
3. Public administrations of Catalonia must promote application of charters of services and other instruments of quality, in the terms established by the relevant regulations.”

As has been argued (Ponce, 2011), the existence of this right to good administration, whether developed by public entities or private companies exercising public functions, requires the guarantee of a proper procedure for making decisions with impact on citizens, and appropriate grounds and justification of these decisions. Due process and grounds are guarantees typical of administrative law, which should also be applied to private actors exercising public functions to guarantee the right to good administration and respect for all other rights involved.

Here, the Catalan Ombudsman, basing his action on judicial doctrine, and European and Spanish case law regarding the right to good administration (in a hope-inspiring future mutual dialog), has an interesting field of action to protect citizens’ rights in the exercise of public functions, because, as is stated in Article 4.c of the Catalan Ombudsman’s 2009 regulating law, one of the office’s competencies is in fact, to “work to ensure that the administrations guarantee the right to good administration and the right to access in equal conditions all public services and economic services of general interest”. Taken in this light, a statement contained in the 2008 *Report to Parliament* is all the more relevant:

“When reference is made to good administration or good administrative practices, one of the

elements to be taken into account is the obligation to explain to the party affected, in comprehensible language, the reasons on which a decision unfavorable to them is based. If this is so for public administrations, it must also be so for companies managing essential services, at least as regards the incidents in the provision or billing of these services”.<sup>8</sup>

## ii. Actors in supervision of the private sector: the Catalan Ombudsman’s unique position

On another note, consideration must be given to the fact that supervision of the private sector is not only carried out by “conventional” ombudsmen (in the Catalan case, the Síndic de Greuges institution), but co-exists with other figures. This could be the case of sectorial ombudsmen (non-existent in Spain, but present in other countries, such as the Australian Telecommunications Industry Ombudsman, studied by Stuhmcke, 1998, or the British case of *Ombudsman Services*),<sup>9</sup> for public bodies and entities belonging to the Administration (consumer protection organizations, such as municipal and county consumer information offices, or the Catalan Consumer Affairs Agency, in Catalonia), of independent regulatory authorities of the sector declared a service of general interest (such as the Telecommunications Market Commission) and private advocates who, within private companies, defend the rights of customers.<sup>10</sup>

Furthermore, the conventional ombudsman’s supervision of private activity can be conducted indirectly (through control of the administration that has assigned the authority to protect the rights of consumers and users, and regulation of the service of general interest<sup>11</sup>) or directly, by supervising the exercise of public functions by private companies as the Ombudsman defends the rights of citizens/consumers/users.

In light of this co-existence and crossing-over of supervisions, it is advisable, on the one hand, to specify the type of activity that the Catalan Ombudsman must accomplish concerning private companies (a) and, on the other, his role with relation to all other actors, public and private, working in a sector where there is private exercise of public functions (b).

<sup>8</sup> P. 107, consultable at: <http://www.sindic.cat/site/unitFiles/2420/INFORME%202008%20CASTELLA.pdf>

<sup>9</sup> <http://www.ombudsman-services.org/>, which operates in the realms of telecommunications, and energy, among others.

<sup>10</sup> An example in the telecommunications sector is the customer advocate service of Telefonica: [http://info.telefonica.es/es/servei\\_defensa\\_client/html/](http://info.telefonica.es/es/servei_defensa_client/html/).

<sup>11</sup> See 2008 *Report to Parliament*, p. 97 and subsequent in the Catalan version, regarding actions relative to municipal and county consumer information offices, and those of the Catalan Consumer Affairs Agency, consultable at: <http://www.sindic.cat/ca/page.asp?aneu=20>

a) With regard to the Catalan Ombudsman's activity, the office's statutory and legal mandate does not consist of repeating existing controls having to do with the contractual relationship between private parties in the framework of consumer affairs legislation. The Catalan Ombudsman's supervision must be focused on the private exercise of public functions by private actors, in the described scenarios, among others, the indirect management of public services, the provision of general interest services (access, suspension and termination of supply<sup>12</sup>, fulfillment of public and universal service obligations linked to the principles of continuity, changeability, equality, quality and affordability, and protection of constitutional, statutory and legal rights<sup>13</sup>, guarantee of good administration<sup>14</sup>, supervision of respect for the constitutional rights of prohibition of arbitrary decisions and proportionality). It is this way that the Catalan Ombudsman seems to conceive this institution's role.<sup>15</sup>

b) Regarding the Catalan Ombudsman's interaction with the rest of public and private actors, the office's function of supervision to guarantee good administration of the administrative structures (of consumer affairs, and independent authorities) that limit and regulate the activity of private companies is clear. In the area of private advocates in companies, though they can be considered positive for customers, it is true that the Catalan Ombudsman as an institution, as opposed to these private advocates, has elements that guarantee the institution's legitimacy, impartiality and objectivity (parliamentary election and accountability, safeguards against incompatibilities, statement of interests, length of term and immovability, financing and autonomy, as guaranteed by Law 24/2009). Therefore, the institution's legitimacy has been enhanced to guarantee good private administration in the exercise of public functions and the rights of end users, citizens and consumers. Consequently, there should not be

any confusion between a valuable commercial service with a statutory control mechanism for good administration (an analysis along these lines of the Australian Telecommunications Industry Ombudsman by Stumhmcke, 1998, p. 832, expressed doubts around the position as simple consumers of citizens and the design of the TIO, which "seems ideally suited to industry").

This unique position of the Catalan Ombudsman and the doubts expressed in other countries about sectorial ombudsmen who may obtain their income from the same sector they supervise (the case of the Australian TIO), must forewarn us against future experiments that may compromise the impartiality and independence in supervision of good administration, and also affect a cross-disciplinary vision of public and private activity in the exercise of public functions, which makes it possible to give the supervision performed coherence and stability.

Along these lines, it seems more than reasonable, and institutionally better-suited, to strengthen in the future a multidisciplinary office, as already exists in Catalonia with the Catalan Ombudsman (although internally, it may have organizational, probably progressive specializations depending on the sectors to be supervised) than to have a profusion of sectorial ombudsmen (whose objectivity could be questionable depending on their organizational design and financing).

### iii. Powers and limits of the Catalan Ombudsman's supervisory activity

Last, it is worth reflecting on the authority that the Catalan Ombudsman has to actually perform this direct supervision of the good administration of private companies exercising public functions, and also the limits that the institution faces when carrying out this activity.

<sup>12</sup> *Report to Parliament 2010*, p. 58 of the Catalan version: "In the realm of basic or essential services, one of the matters that is frequently the source of users' complaints is the suspension of utility supply due to non-payment." 2011 Report, p. 60 of the Catalan version, on the need to duly notify in case of future utility termination, and explain the reason why the requested service is not immediately available.

<sup>13</sup> *Report to Parliament 2011*, p. 62 of the Catalan version, discussing mass transit users' right to be politely treated by the staff in charge of its management.

<sup>14</sup> See *Report to Parliament 2007*, p. 83 of the Catalan version, consultable at <http://www.sindic.cat/ca/page.asp?aneu=20>, which underscores citizen's right to receive a response to their queries to telecommunications suppliers and that these suppliers' decisions be duly grounded. *Report to Parliament 2008*, p. 86 of the Catalan version, on citizens' right to receive a response.

<sup>15</sup> See *Report to Parliament 2007*, p. 82 of the Catalan version..

As for its powers, Law 24/2009, of December 23, outlines the Catalan Ombudsman Office's possibilities for action, indistinctly from when the institution supervises the public or private sector. Likewise, Articles 55 and subsequent stipulate the cooperation obligations of public or private supervised subjects, in identical terms.

Nonetheless, when supervision is over private parties exercising public functions, certain aspects may require an additional reflection and present specific difficulties, as has been demonstrated by Ribó (Ribó, 2009, p. 8)

The question is, what happens if the private actor refuses to cooperate? Article 61 of the 2009 Law distinguishes between lack of cooperation and hindrance, reduced to two scenarios: blocking access to case files, information, data and the documentation necessary in the course of an investigation, or blocking access to the spaces that must be accessed to obtain the necessary information in the course of an investigation, in other words, the legal obligations of the supervised party established by Articles 55 and 56 of the Law, respectively.

In the case of access, it must be borne in mind that the right to domestic privacy established in Article 18 of the CS shall obviously be in effect. Therefore, judicial authorization will be required to access the domicile of private companies performing public functions.

That said, what is to be considered the domicile of private corporate persons has been defined by the case law of the Constitutional Court (for example, SCC 137/1985, 69/1999), by which a domicile is considered, for the effects of the protection granted by Article 18.2 of the CS, those spaces requiring reservation and non-interference by third parties due to the activities carried out there; in other words, places used by representatives of the corporate entity to conduct their internal activities, either because the company's usual management and administration are performed there, or because they are used to keep documents and other media derived from the company's daily activity or establishment. All of this shall be observed regardless of whether it is the fiscal domicile, main offices or secondary offices, so that, in these cases, judiciary authorization or the consent of the interested party is required.

To the contrary, establishments open to the public or in which an occupational or commercial activity is performed by a corporate entity, and that are not associated with the management of the company, or the safekeeping of its documents, do

not benefit from this protection. Nor are offices where commercial products are merely exhibited, or warehouses, shops, depots or similar facilities protected.

In these cases of hindrance, the law itself establishes the type of reaction that the Catalan Ombudsman shall have (Art. 61.3) and offers a reminder in Article 63 of the possibility that "authorities and civil servants who hinder" the Ombudsman's activity may incur in criminal responsibility, of which the institution must inform the Public Prosecutor for it to take any necessary action.

At this point, it is necessary to ask whether a person working in a private company exercising public functions (a concessionaire of public services, collaborating entity, company working in the realm of general economic interest services, and that works to meet public service obligations, for example) who hinders the Catalan Ombudsman's investigation would incur in criminal responsibility derived from Article 502 of the Criminal Code. The response, in light of the breadth that Article 24 of the Code confers to the criminal law definition of *public civil servant* ("anyone who by immediate provision of the law, by choice or by appointment of the competent authority participates in the exercise of public functions") must be affirmative: for criminal law purposes, private subjects exercising public functions can be considered public civil servants.

In any event, the 2009 Law seeks for the supervision outlined in Article 78 of the SAC to be conducted in the framework of free will, to the extent possible, as a legal expression of the principle of proportionality, between the institution and private companies. That is why Article 58 refers to the need to "promote the formalization of agreements with administrations, organizations, companies and persons referred to in Article 26 in order to create a collaboration framework and facilitate mutual communication." This has been progressively done in recent years (See Ribó, 2009, and the Catalan Ombudsman's Reports to Parliament, in which these agreements are described in detail).

Last, as regards the limits of the Catalan Ombudsman's actions with relation to private companies, it is clear that, aside from respecting the constitutional and statutory rights of the private actors (such as the already-mentioned right to domestic privacy) and the terms of the 2009 Law, the actions of this public institution are limited and guided, in any event, by the constitutional principles of non-discrimination

(Art. 14 SC), prohibition of arbitrary decisions (which means that the institution's actions and decisions must be rational and justified) and proportionality (which implies that the office's supervision of private companies must seek the purpose set out by the Law, and must choose the mechanism least restrictive for the rights of private actors, as long as it guarantees the effectiveness of the office's actions. Further, the costs and benefits generated by the office's possible action must be weighed, in accordance with the three conventional filters present in the case law of the European Court of Human Rights, the European Court of Justice, the Constitutional Court and the Supreme Court).

### 3.3. Final considerations

#### a. The progressive similarities between supervision of the public and private sectors as a consequence of New Public Management

The preceding pages, beyond the specific supervision by Ombudsmen, and returning to more general considerations, seem to lead us to the conclusion that the progressive transfer of functions and services to the private sector, on one hand, and the impact of the postulates derived from New Public Management in the public sector, on the other, are leading to a rapprochement of the respective accountability schemes of the two sectors, and the legal mechanisms that govern them (Mulgan, 2000).

If this were to be expressed graphically, in a table, it could be done as follows:

Public administrations	Private companies exercising public duties
Service of general interest (Article 103 of the CS)	Corporate social responsibility
Good governance and obligations linked to good administration: due administrative process and reasonable grounds	Corporate governance and obligations derived from the right to good administration: due decision-making process and reasonable grounding of decisions
Codes of good governance, codes of conduct, codes of ethics	Codes of conduct
New Public Management (effectiveness, efficiency, economy) and obligations of consumer protection	For-profit nature and obligations of consumer protection

Binding constitutional rights	Binding constitutional rights
Supervision by ombudsman	Supervision by ombudsmen when they exercise public functions and fulfill public or universal service obligations
Judiciary control: contentious-administrative jurisdiction in the case of exercise of administrative powers	Judiciary control: Article 2d of the Contentious-Administrative Jurisdiction Act

A few of these items will be discussed briefly in the following passages.

#### b. The necessary functional approach to the role of public law: shadow of exercise of public authority

This rapprochement between the public and private sectors is reflected in the role and *raison d'être* of administrative law: successive waves of "administrative law drain", privatizations and deregulations could give the impression that entire plots have been "uprooted" from administrative law, and that it is being suffocated by the ever-growing presence of private law. This notwithstanding, if it is considered, as has been discussed, that administrative law is the law that accompanies the exercise of power, whether by administrations or by private actors in delegation, in either case, administrative law is not starving to death as much as it is mutating and jumping the hurdles that separate the public and private spheres.

Along these lines, years ago we asked, "...are we witnessing the formation of a Spain with a hybrid administrative law, that would have to be based on case law, formed partially by rules of public law and partly those of private law? Is there a gradual convergence between the model of *droit administratif*, traditionally in force in Spain, and the model of *common law*, inherent to the Anglo-Saxon realm?" (Ponce, 1999, p. 1,270). It appears that the phenomenon of attributing public functions to private actors would lead to an affirmative response to this question.

#### c. Improvable regulation of the exercise of public functions by private actors

All things considered, the generation of a reasonable and effective combination of public

law (including principles and rules) that accompanies the private exercise of public-origin power, with private law, derived from the applicable legislation, including the protection of consumers and users, and contracts between parties, would require a regulatory clarification of the scope of the procedural obligations that should be applicable to the private parties, as has already been stated. These necessary regulations would have to consider the autonomy of the provider's will, and the consumer's ability to freely choose in a context of competition. Therefore, it would have to be a modulated administrative right for the guarantee of good (private) administration of public functions and constitutional, statutory and legal rights of the citizens/consumers/users that would supplement (not substitute or duplicate) the guarantee already offered by private law.

**d. Social corporate responsibility, codes of conduct, *corporate compliance* and criminal responsibility: the Catalan Ombudsman's contribution to good management**

Last, one final and brief remark on a topic that requires more development than can be given to it here. It is a matter of understanding how the work of Ombudsmen, such as the Catalan Ombudsman, can help in the quest for (true) corporate social responsibility. In the supervision of the activity of private actors exercising public functions, and in the recommendations and suggestions that can be made, the Catalan Ombudsman can contribute to making these companies mindful of considerations relative to social cohesion and environmental sustainability, and incorporate them into their codes of conduct (which are referred to by the 2010 Code of Consumer Rights of Catalonia, approved by Law 22/2010, in several precepts), and improve, this way, their self-regulation.

In the same direction, and in the line of the Code of Best Administrative Practices of 2009, the institution has an interesting path before it, with the experience it has in the supervision of private companies, and can also promote best practices in the case of private actors performing public functions. In the same way, it would be highly positive that the best practices detected by the Catalan Ombudsman inform the private codes of conduct in whatever way necessary, in an enriching, favorable mutual dialog; in a word, for the general interest.

On another note, the relationship between private companies and the Ombudsman can contribute to improving their *corporate compliance* (in other words, internal systems for supervision and monitoring of private companies' regulatory compliance) and consequently, design better internal procedures to guarantee good administration and the rights of the citizens/consumers/users. This, without a doubt, can help in practice to avoid future criminal responsibilities in private companies for not having had "due supervision" in the exercise of the public functions assigned to them, pursuant to the terms of Article 31 bis of the Criminal Code. For example, this could be the case of provision of a public service of general interest leading to the discrimination of a citizen/user, which violates Article 14 of the CS, the principle of equality in public services, and incurring in a violation described in Article 511 of the Criminal Code, for example, due to the lack of clear internal protocols on diversity management within the company. Fruitful cooperation between ombudsmen and private companies can prevent these and other cases of maladministration (which could lead to criminal responsibilities on the part of the private corporate entity).



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