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The energy transition before the highest State Courts

Laura Presicce*

1. Introduction.

In 2017 the jurisprudences of the Constitutional Court and the Supreme Court in the area of electrical energy have been of particular interest, especially concerning the regulation of self-consumption.

The energy transition is understood as the transformation of the energy model to change from one based on conventional primary energy, fossil fuels in a highly centralized system, to another model that is more decentralized and de-carbonized to achieve an authentically sustainable society. From this perspective, the decisions of the highest courts on the regimes of renewable energy and self-consumption are very significant in the definition of the juridical structure that supports the energy model of a country.

Specifically, we analyse here the ruling of the Constitutional Court 68/2017, dated 25 March and the ruling of the Supreme Court 1542/2017 of 13 October, relating to Royal Decree 900/2015 of 9 October, which regulate the administrative, technical and economic conditions of the energy supply modalities with self-consumption as well as production with self-consumption. We also analyse the Constitutional Court ruling 36/2017 of 1 March, on some articles of Royal Decree 413/2014 of 6 June, which regulates the activities of producing electricity from renewable resources, cogeneration and waste are regulated.

2. Analysis of the most outstanding jurisprudence.

Self-consumption in the jurisprudence of the Constitutional Court

* Associate Professor of Administrative Law at the Rovira i Virgili University and pre-doctoral researcher FI of CEDAT, Centre for Environmental Law Studies of Tarragona.

The Plenary Session of the Constitutional Court, in ruling 68/2017 of 25 May 2017, resolved the positive conflict of jurisdiction raised by the Government of Catalonia in relation to various precepts of Royal Decree 900/2015 of 9 October, which regulates the administrative, technical and economic conditions of the electricity supply modalities with self-consumption and production with self-consumption[601] (hereinafter RD Self-consumption).

The Constitutional Court analysed the issue of implementing a Self-Consumption Register and the prohibition of "shared self-consumption", considered as the true novelty introduced by the ruling under analysis. [602]

In relation to the administrative register of self-consumption of electricity, Law 24/2013 of 26 December, of the Electricity Sector (hereinafter LSE) established in Article 9.4 the obligation for consumers under the electrical self-consumption modalities to register in the administrative record of self-consumption, created for this purpose by the Ministry of Industry, Energy and Tourism. The article left to the Government the regulatory development of the creation, organization, and the procedure for registering and communicating data to the self-consumption register.

The Constitutional Court, in its ruling 32/2016[603], confirmed the constitutionality of the creation of the registry and the obligation of consumers to register. However, the same court added "the Government's use of referral to the regulation may, where appropriate, be subject to the corresponding control, by appropriate procedural means, before this Court or before the ordinary jurisdiction". [604]
The Government of Catalonia has challenged the articles 19 to 22 of Royal Decree 900/2015 of October 9, which regulates the registration of self-consumption of

[601]RD 900/2015 constitutes the regulatory development of art. 9 of Law 24/2013 of 26 December, of the Electricity Sector in which electricity self-consumption installations are regulated.
[602]Preliminarily, the Constitutional Court places the controversial precepts in the constitutional system of distribution of competences, considering that it is a conflict in energy matter and, in particular, in the electric sub-sector. The CC establishes that prevailing competency titles to resolve the controversy are those derived from article 149.1.13 ("bases and coordination of the general planning of economic activity") and 149.1.25 ("bases of the energy regime"), given the relevance of the electricity sector as a strategic sector for the Spanish economy.
[603]Resolving the appeal filed by the Government of Catalonia in relation to various precepts of Law 24/2013, of 26 December, of the electricity sector.
[604]See CCD 32/2016, of 18 February, 2016. Appeal for unconstitutionality 1908-2014.

electricity in accordance with the provisions of Article 9 LSE, arguing that they incur the same violations of powers that were highlighted in the aforementioned resource.[605] The issue was that these provisions constitute an invasion of powers because the State not only created the registration of self-consumption facilities, but also the regulation on the procedure for registering and managing the registration process; therefore, in this group of precepts it was detailed and confirmed that everything was in the hands of the State.

Thus, in CCD 68/2015 of 25 May, the Constitutional Court considered unconstitutional the regulatory development of the creation of a single registry, declaring null and void articles 19, 20, 21 and 22[606] of RD 900/2015, which regulated the said registry. In particular, it was established that the aforementioned articles violate the constitutional order of powers by attributing to the registry executive powers that injure the competences of the Autonomous Communities.

The Constitutional Court (hereinafter referred to as CC) recognizes that consumers under the modalities of self-consumption have the obligation to register in the registry, although the competence to regulate the procedure of registration in the said registry of the facilities located in the respective territories will be of the Autonomous Communities.

In relation to the issue of "shared self-consumption", the CC declared art. 4.3 of the RD Self-consumption unconstitutional and null.

The third section of the aforementioned art. 4, which specified the classification of self-consumption modalities, prohibited connecting a generator to the internal network of several consumers. The prohibition, contained in the phrase "[i]n no case can a generator be connected to the internal network of several consumers" was considered a very controversial issue of the Royal Decree under debate, since it created a problem

[605] Recourse number 1908/2014

[606] The arts. 20, 21 and 22 regulate the obligation of consumers under the electric power modalities to request registration in the state register of self-consumption of electric power, the registration procedure in this register and the modification and cancellation of the inscriptions.

in the implementation of self-consumption facilities in communities of owners or shared properties, prohibiting the creation of an «internal network» of several consumers.

In relation to article 4.3 of the RD Self-consumption, on one hand, the Government of Catalonia argued that the prohibition established in the said article entailed an absolute prohibition that did not leave it any possibility of developing in the exercise of its shared competence in promoting the implementation of self-consumption facilities in communities of owners or shared properties. The State Attorney argued that the provision contained in RD Self-consumption was a simple technical specification of Article 39.3 LSE, which states

"All facilities intended for more than one consumer shall be considered as a distribution network and shall be assigned to the distribution company in the area, which will be responsible for the security and quality of the supply. This infrastructure will be open to the use of third parties."

The CC does not share the argument of the State Attorney and considers that these internal networks of several consumers correspond to what are technically called "liaison facilities ", that is, facilities that through the connection link the distribution network with the interior facilities or receivers of each of the users that are in the same urbanization or building, and that always run through places of common use but remain the property of the users, who are responsible for their conservation and maintenance.

Consequently, the CC establishes that the prohibition contained in article 4.3 of Royal Decree 900/2015 "affects the scope of the powers assumed by the Government of Catalonia [..] in terms of the 'promotion and management of renewable energies and energy efficiency' in its territorial scope, and makes it difficult to achieve energy efficiency and environmental objectives in line with those established by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, concerning promoting the use of energy from renewable sources; Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings; and Directive 2012/27/EU of the European Parliament and of the Council, of 25 October 2012, relating to energy efficiency."

Another relevant aspect of the ruling is the statement made by the CC in relation to discharges to the electricity grid for consumers that implement savings and efficiency systems.[607] The CC considers that the provision is constitutional if it is interpreted in the sense that the granting of these authorizations corresponds only to the State "when its use affects another Autonomous Community or the transport of energy out of its territorial scope".[608]

Therefore, it will be the competent body in energy matters of the Autonomous Community which can authorize consumers of electrical energy connected in a high voltage to carry out an activity whose secondary product is the generation of electricity and which, due to the implementation of a system of energy savings and efficiency that is not a means of generating electricity, or battery, or energy storage system, has at certain times electricity that cannot be consumed in their own installation to provide the said energy to the network.

Self-consumption in the jurisprudence of the Supreme Court: the Sun tax or a contribution to system costs?

The RD Self-consumption, during the reference period, has also been challenged in front of the Supreme Court (hereinafter SC) which, in a ruling worth highlighting, has addressed a very controversial issue in the sector of the regulation of electricity.

Articles 17 and 18 of the RD Self-consumption, among others,[609] were in the spotlight in relation to the charges imposed on consumers under the self-consumption modalities, which have been called the "Sun tax". These articles, according to the appellant company, violated article 9.3 LSE, which establishes that self-consumers have to pay

[607]First section of the Second Additional Provision of the Self-Consumption RD.
[608]That is, in the cases in which Article 149.1.22 EC attributes to the State powers to authorize electrical installations.
[609]In addition to the articles cited, the appellant requested the nullity of article 25 of RD 900/2015 in sections 1 and 2.b), 2.c) and 3.b), relating to the sanctioning system; the third transitory provision on the adaptation of the self-consumption facilities in operation to the requirements of RD 900/2015 and the nullity of the entire RD 900/2015 due to its inadequacy to the European Directives on energy matters 2009/72/EC, 2009/28/EC and 2012/27/EU.

> *"the same access tolls to the networks, charges associated with the costs of the system and costs for the provision of backup services of the system that correspond to a consumer not subject to any of the self-consumption modalities."*

With the ruling no. 1542/2017 of October 13, the Supreme Court, dismissing the appeal, has denied the existence of the so-called "Sun tax".

In detail, the Supreme Court has considered that it is a

> "*contribution to the costs of the system when a self-consumer, in addition to consuming the energy generated by themselves, has the support of the electrical system to consume electricity from the system at any time they need it, and, in their case - as is usual - they effectively consume it*."

According to these considerations, the Supreme Court emphasizes that the self-consumer who depends exclusively on the energy that they generate and who is not connected to the electrical system does not pay anything.

Second, the Court evidences that the aforementioned articles 17 and 18 do not impose additional charges on those subject to the various forms of self-consumption with respect to ordinary users, as opposed to the arguments of the appellant. The SC once again maintains a very formalistic stance without going into the heart of the matter, declaring the conformity to the right to the formula used for setting the criteria, although the court itself observes that "it can certainly be the subject of a legitimate criticism."

The ruling of the Constitutional Court on the distribution of powers in the field of renewable energies.

In the field of electrical power, lastly, it should be noted the Constitutional Court ruling 36/2017, of 1 March 2017, on the appeal raised by the Government of Catalonia in relation to various precepts of Royal Decree 413/2014[610] of 6 June, which regulates

[610] A positive conflict of competence proposed by the Government of Catalonia, against arts. 8, sections 1 and 2, 30 and 35.1 a) i) and the first final provision of Royal Decree 413/2014 of 6 June, which regulates the activity of production of electrical energy from renewable energy sources, cogeneration and waste.

the activity of producing electricity from renewable energy sources, cogeneration and waste.

The challenged provisions oblige the owners of the facilities to send certain information directly to the Ministry of Industry, Energy and Tourism and attribute executive powers to the General State Administration, specifically the inspection and authorization of the electricity production facilities. First, the Government of Catalonia does not question that the State wants to obtain the information indicated in article 8 of Royal Decree 413/2014, but that it does not do so through the Government of Catalonia and that it is not the one that provides it to the General Administration of the State, given that it is an executive function that corresponds to the companies that produce electricity in Catalonia, over which the Government of Catalonia has authority for authorization and inspection.

The CC states that, without prejudice to the collaboration and coordination mechanisms between the State and the Government of Catalonia in relation to the reciprocal exchange of information, the receipt of information by the State cannot be conditioned in an absolute way by this information being transferred through the Government of Catalonia.
Regarding the State's power to inspect the production facilities (Article 30 RD 413/2017), the CC considers that the control that the State must exercise over the specific remuneration regime and the competitive allocation of these facilities is sufficient cause to adduce its executive inspection function, circumscribed to the aforementioned purposes.

3. The absence of relevant developments in the environmental regulations approved by the State during 2017.

The environmental regulations adopted in the period under analysis have been of very low importance because no statutory regulations of particular relevance have been approved, but rather only regulatory standards in very specific sectorial areas, focused on the modification of existing standards and the transposition of Directives of the European Union.

Among these regulations, it is interesting to note those related to the improvement of air quality and limiting emissions to the atmosphere; those related to the development of the Nagoya Protocol, through access to genetic resources and the sustainable use of Plant Genetic Resources for agriculture and food[611]; and those related to the safety of storing chemical products.[612]

In detail, the national legislator has given particular attention to the issue of improving air quality and the emissions of certain pollutants. We can highlight, in this area, the following rulings:

- **Royal Decree 39/2017 of 27 January, which modifies Royal Decree 102/2011 of 28 January, related to the improvement of air quality,** which develops aspects of Law 34/2007 of 15 November of air quality and protection of the atmosphere. The main modifications included in the aforementioned RD refer to the data quality objectives in relation to benzo (a) pyrene, arsenic, cadmium and nickel, polycyclic aromatic hydrocarbons (PAH), other than benzo (a) pyrene, total gaseous mercury and total deposits.
- **Royal Decree 1042/2017 of 22 December, on the limitation of emissions to the atmosphere of certain pollutants from medium-sized combustion facilities and by which Annex IV of Law 34/2007 of 15 November of air quality and protection of the atmosphere has been updated.** This RD contains specific provisions for the control of atmospheric emissions of sulphur dioxide (SO2), nitrogen oxides (NOx), carbon monoxide (CO) and particles from medium-sized combustion facilities in order to reduce atmospheric emissions and the risks of these emissions for the environment and health. In addition, it updates the catalogue of potentially polluting activities in the atmosphere, which affects medium-sized combustion facilities.
- **Royal Decree 115/2017 of 17 February, which regulates the marketing and handling of fluorinated gases and equipment based on them, as well as**

[611]Highlighting Royal Decree 124/2017, dated 24 February, regarding access to genetic resources from wild taxa and control of use, and Royal Decree 199/2017 of 3 March, approving the Regulation of the National Programme for the Conservation and Sustainable Use of Plant Genetic Resources for Agriculture and Food.

[612]Royal Decree 656/2017 of 23 June, by which the Regulation of the Storage of Chemical Products and its Complementary Technical Instructions MIE APQ 0 to 10 are approved.

the certification of the professionals who use them and by which the technical requirements are established for the facilities that carry out activities that emit fluorinated gases.

- **Royal Decree 617/2017 of 16 June, which regulates the direct granting of aid for the purchase of alternative energy vehicles and for the implementation of electric vehicle charging points in 2017** (MOVEA 2017 Plan).
- **Royal Decree 773/2017 of 28 July, by which various royal decrees were modified in terms of products and industrial emissions.**

Finally, it is important to highlight Royal Decree 363/2017 of 8 April, which establishes a framework for the management of maritime space. This Royal Decree transposes the Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014, with the purpose of establishing a framework for the management of maritime space to promote the sustainable growth of maritime economies, the sustainable development of marine spaces and the sustainable use of marine resources.