DRAFT REPORT OF THE FISCAL COUNCIL ON THE PROPOSED ORGANIC AMNESTY LAW FOR INSTITUTIONAL, POLITICAL AND SOCIAL NORMALISATION IN CATALONIA

I. BACKGROUND AND COMPETENCE OF THE PROSECUTORIAL COUNCIL

By means of a communication from the President of the Spanish Senate dated +++++, the text of the "Proposición de Ley Orgánica de amnistía para la normalización institucional, política y social en Cataluña" (hereinafter, PLOA) was sent to the Attorney General's Office for a report.

It can be deduced from the content of the PLOA that it is a legislative initiative that has a significant impact on the functional scope of the Public Prosecutor's Office, as defined, among others, in Art. 3, sections 4 and 5 EOMF. The application of a measure of pardon has a radical influence on certain criminal proceedings, already concluded by final judgement or in process, in which the Public Prosecutor's Office intervenes as a necessary party (art. 105 LECrim), and on which it will have to rule in relation to the corresponding criminal and civil liabilities (art. 9.1 PLOA).

Nor can the unique position of the Public Prosecutor's Office in the field of constitutional jurisdiction be ignored (art. 3, sections 11 and 12 EOMF), derived from its status as the body charged with acting in defence of legality and citizens' rights (art. 124.1 of the Spanish Constitution -hereinafter, EC-), which gives it a relevant role in the possible raising and resolution of questions of unconstitutionality (arts. 35 to 37 of Organic Law 2/1979, of 3 October, of the Constitutional Court -hereinafter, LOTC-).

Similarly, the PLOA has a bearing on matters pertaining to the accounting jurisdiction before the Court of Audit (hereinafter, TCu), or on possible administrative liabilities subject to the contentious-administrative jurisdiction, over which the Public Prosecutor's Office has been assigned certain functions (art. 3, section 14 EOMF), in accordance with the provisions of the corresponding sectorial and procedural regulations (in particular, Organic Law 2/1982, of 12 May, of the Court of Audit; and Law 29/1998, of 13 July, regulating contentious-administrative jurisdiction).

This Council considers that art. 10 EOMF constitutes a solid legal authorisation to issue this report. In accordance with this precept, there is a general duty for the Public Prosecutor's Office to collaborate with the Cortes Generales, at the

request of the latter and provided there is no legal obstacle. In this sense, the fact that the EOMF does not expressly provide that the Public Prosecutor's Council has the power to issue reports on proposed legislation cannot be considered a legal obstacle, nor is there any ruling by the Constitutional Court that prevents the drafting of this report.

Indeed, Art. 14.4.j) EOMF attributes to the Fiscal Council the function of issuing a report on "draft laws". However, this mention cannot be interpreted in a literal sense. In fact, Article 3, section o) of Royal Decree 437/1983, of 9 February, on the constitution and functioning of the Public Prosecutor's Council, expressly includes as a function of this body that of reporting on "draft bills" affecting the structure, organisation and functions of the Public Prosecutor's Office. What is relevant, therefore, is not the specific form adopted by the legislative proposal, but the need for the institution to be able to issue a report on a pre-normative text that significantly affects its functional sphere. In any case, art. 14.4.j) EOMF must be interpreted jointly and systematically with the provisions of art. 10 EOMF. It is usual for the Fiscal Council to issue reports on draft bills, but this does not prevent it from issuing a report on a bill, if so requested by one of the legislative chambers that make up the Cortes Generales, with which there is a duty to collaborate.

SSTC 19/2023, of 22 March and 94/2023, of 12 September, do not undermine our position, but rather confirm it. These are two rulings which resolve appeals of unconstitutionality brought against certain precepts of Organic Law 3/2021, of 24 March, on the regulation of euthanasia. These rulings allude to the different treatment that draft laws and bills deserve in relation to the consultative functions of certain bodies, but their doctrine does not preclude the issuing of this report.

In STC 19/2023 [FJ 7.b)] admits the possible "institutional standing that may correspond to the Public Prosecutor's Office to bring, in particular, the contentious-administrative appeal in the procedure for the protection of the fundamental rights of the individual, today regulated in Chapter I of Title V of the same Law 29/1998, procedure referred to in the fifth additional provision of the LORE (in this respect, in general terms, Judgment of the Administrative

Chamber of the Supreme Court of 28 November 1990, appeal 2915-1990)", apart from the references contained in the separate opinions signed by Judges Arnaldo Alcubilla and Arnaldo Alcubilla and Arnaldo Alcubilla and Arnaldo Alcubilla, respectively. Arnaldo Alcubilla and Ms. Espejel Jorquera. All these mentions apparently contrast with what was stated in STC 94/2023 [FJ 2.B.b)], that the euthanasia law "in no way affects the structure, organisation and functions of the Public Prosecutor's Office", but, in any case, STC 19/2023 does not specifically address the now controversial issue of the competence of the Public Prosecutor's Council. STC 94/2023 does.

Indeed, STC 94/2023 [FJ 2.B.b)] rejects the grounds of challenge based on "not having sought a report from the Council of State, the General Council of the Judiciary, the Public Prosecutor's Council and the Spanish Bioethics Committee during the parliamentary procedure". On this point, STC 94/2023 refers to STC 19/2023 [FJ 3.B.b)], in which the same allegation was rejected, but regarding the Bioethics Committee and the General Council of the Judiciary, not the Public Prosecutor's Council. In any case, what STC 19/2023 points out is that, indeed, "bills of parliamentary origin do not require, neither in their presentation nor in their subsequent processing, the issuing of prior reports of any kind [STC 215/2016, of 15 December, FJ 5 c)], whether or not the same were required for the Government before submitting a specific bill to Congress (art. 88 CE)". But it adds [FJ 3.B.c)], "[t]his is without prejudice to the fact that the Cortes Generales may consider it appropriate to request a report from the General Council of the Judiciary [i.e. the Public Prosecutor's Council] on any question or matter within its institutional remit (...). The chambers did not consider it appropriate in this case, and there is nothing to object to in legal-constitutional terms". In short, the Constitutional Court states that bills do not require the issuing of prior reports and that, therefore, their absence does not invalidate the parliamentary procedure in constitutional terms, but there is nothing to prevent the Cortes Generales from requesting these reports, which is precisely what has happened in this case.

Moreover, STC 36/2013 of 14 February is not applicable to the Public Prosecutor's Office either, since it refers specifically to the Council of State which, as is well known, is configured as the "supreme consultative body of the

Government" (art. 107 EC), a quality that obviously does not apply to the Public Prosecutor's Office.

In short, and by virtue of all of the above, it is considered that there is no obstacle, quite the contrary, for the Public Prosecutor's Council to issue this report. The general duty to collaborate with the Courts applies to the Public Prosecutor's Office as an institution, not to the State Attorney General (as is the case with relations with the Government, according to Articles 8 and 9 of the EOMF). And, within the Public Prosecutor's Office, the Public Prosecutor's Council is the body responsible for reporting on legislative proposals affecting the structure, organisation and functioning of the Public Prosecutor's Office, as provided for in art. 14.4 j) EOMF. We are dealing with a pre-normative text which significantly affects its functional scope and which, due to its legal, material and historical relevance, deserves to be informed by the consultative bodies which usually issue their opinion, as an instrument at the service of legislative quality but, above all, of free and well-founded parliamentary debate and, in short, of the Rule of Law. And, all of this, within a general framework in which the institutional loyalty inherent to the fact that the Public Prosecutor's Office is integrated, with functional autonomy, in a State power such as the Judiciary (art. 2.1 EOMF and Title VI CE) must preside.

This text expresses the opinion of the Fiscal Council on the aforementioned PLOA, and complies with the reporting procedure required by the Spanish Senate.

II. STRUCTURE AND CONTENT OF THE PLOA.

Section VI of the Preamble of the PLOA contains a sufficiently detailed description of the structure and content of the legislative proposal, to which we expressly refer. However, in order to provide a general overview of the text, the following main points can be highlighted:

Title I delimits the objective scope of the amnesty in two ways. On the one hand, by describing the acts covered and the time frame it covers; and, on the other, by identifying the conducts which, in any case, will not be amnestied.

Title II regulates the effects of the amnesty in the criminal, administrative and accounting fields.

Title III identifies the bodies competent to apply amnesty in each specific case and jurisdiction, the procedure to be followed, the statute of limitations for applying for amnesty and the system of appeals.

The PLOA also contains a First Final Provision which modifies Article 39 of Organic Law 2/1982, of 12 May, on the Court of Auditors; a Second Final Provision which modifies Article 130 of the Criminal Code to expressly include amnesty as a case of extinction of criminal responsibility; and a Third Final Provision which determines its entry into force on the day of its possible publication in the Official State Gazette.

III. CRITICAL ANALYSIS OF THE CONSTITUTIONALITY OF AN AMNESTY

1. General considerations: the necessary contextualisation of this legislative proposal.

The circumstances surrounding the drafting and presentation of this initiative undoubtedly contribute to its necessary contextualisation and, in this sense, offer some hermeneutical guidelines that may serve for the proper understanding of some of its contents. As is well known, rules are to be interpreted "according to the proper meaning of their words, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, paying attention fundamentally to their spirit and purpose" (art. 3.1 of the Civil Code, hereinafter CC).

Without prejudice to the fact that some of these ideas will be insisted upon later on, the majority social and political consensus that existed until 23 July 2023 on the unconstitutionality of the amnesty has been replaced by a sudden change of opinion. This radical change of opinion, coinciding with the results of the last general elections held on the aforementioned date, has not been justified as the product of legal-political reflection. What was relevant was the need to reach an

agreement between various political parties in order to obtain favourable support for the investiture of the candidate for the presidency of the Government of the political party that, on 13 November 2023, presented this bill in the register of the Congress of Deputies. These are public and notorious facts, admitted by their protagonists in numerous and repeated statements, which are well known, and to which we refer. A proposal that was considered as a guarantee of the fulfilment of the agreements signed. In fact, the presentation of this text took place before the investiture and, therefore, before the Government was formed. This meant that a preliminary bill was not drafted, with the consequent omission of the reports from the corresponding consultative bodies (art. 22 of Law 50/1997, of 27 November, of the Government), among others, the Fiscal Council. This procedure is now being supplemented at the request of the Senate, not the Government or the Congress of Deputies.

Regardless of the assessment that, from a democratic point of view, the fact that the essential change of position on an issue of extraordinary political and social relevance for Spain has been removed from the opinion of a good number of voters may merit, this fact cannot go unnoticed or fail to be taken into consideration for a legal assessment, not only - and from a dogmatic point of view - whether or not any law approving an amnesty is in accordance with the Constitution, but also - and going down to the detail of the specific case of the organic bill presented - whether or not this law, based on the argument expressed, could, if approved at the time, be constitutional or not.

2. Grounds for the unconstitutionality of an amnesty

2.1 The omission of the reference to the amnesty as a legal-political significance of its unconstitutionality. The necessary respect for constitutional legality and political pluralism

The absence of an express prohibition in the constitutional text or, also and by default of the above, the omission of any reference to amnesty in the EC of 1978, has led some authors to argue that this figure, as an aspect or manifestation of the right to pardon, constitutes a special prerogative that the EC implicitly recognises to the Legislative Power, which enables it to issue a

regulation with the rank of an organic law approving its concession in certain exceptional circumstances. They argue, in this respect, that if national sovereignty resides in the Spanish people, from whom all the powers of the State emanate (art. 1.2 CE), and the Cortes Generales represent the Spanish people (art. 66.1 CE), the democratic principle, which inspires the Parliament's mandate, allows that, if a broad majority of this representation of the Spanish people, in this case an absolute majority of the Congress of Deputies in the final vote, unites its will to approve the granting of an amnesty, this will have the democratic legitimacy of the support of the majority of society, represented by its Deputies and Senators constituted in parliamentary seat.

However, this approach must be combined in any system of parliamentary democracy with two basic principles: that of observance and due compliance with legality, in this case, constitutional legality; and that of respect for political pluralism and, therefore, for parliamentary minorities, as superior values and principles of our legal system, as stipulated in articles 1.1 and 9.1 EC.

Starting with the second principle, we will now analyse the necessary validity of the principle of political pluralism and the limitations that this principle has in parliamentary democracies.

The Constitutional Court (hereinafter, TC), on all occasions *"has highlighted the need to ensure the proper exercise of the function of political representation of parliamentary minorities in the opposition, since respect for the position and rights of minorities acts as a constituent element of the system itself, which legitimises its own functioning. Without respect for the rights of political minorities, there is no way to preserve the pluralism inherent to the democratic State (STC 226/2016, 22 December, FJ 5), advocated by art. 1.1 CE as one of the highest values of our legal system (STC 115/2019, FJ 3, citing SSTC 86/1982, of 23 December; 99/1987, of 11 June; 20/1990, of 15 February; 119/1990, of 21 June; 217/1992, of 1 December; 27/2018, of 5 March, and 25/2019, of 25 February)"* (ATC 177/2022, of 19 December, FJ 6*).*

The European Court of Human Rights (hereafter ECHR) has also stressed that *"pluralism, tolerance and openness characterise a 'democratic society'. Even if*

the interests of individuals must sometimes be subordinated to those of a group, democracy is not about the constant supremacy of the opinion of a majority, but requires a balance which ensures that minority individuals are treated fairly and avoids any abuse of a dominant position" [(ECHR of 26 April 2016 (*Izzettin Doğan and Others v. Turkey), § 100; similarly, the judgments of* 26 April 2016 (*Izzettin Doğan and Others v. Turkey), § 100; the* ECHR of 26 April 2016 (*Izzettin Doğan and Others v. Turkey), § 100. Turkey*), § 100; in the same vein the judgments of 29 June 2007 (*Folgerø and Others v. Norway*), § 84 and 13 August 1981 (*Young, James and Webster v. United Kingdom*), § 63].

This doctrine, formulated to ensure respect for minorities of all kinds, can be applied to guarantee the position of political minorities within parliamentary chambers. And, as the TC has declared (STC 115/2019, of 16 October, FJ 3) *"respect for this balance requires respect for the procedures laid down for the adoption of certain types of decisions. Thus, political pluralism, without the adjustment to limits or channels that ensure respect for the positions of minorities, at least respect for their dialectical positions, is not a sufficient value to ensure, by itself, the survival of the democratic State. Plural public debate, in parliament or outside it, on any political project (...)"*, requires due observance of the procedures established as *"the channel through which to channel the pluralistic expression of the various political options, in the knowledge that these procedures act, among other things, as a safeguard of the right of political minorities to have their voices heard in decision-making*".

Further on, the aforementioned judgement points out that, in any case, *"procedures are not an end in themselves, but a means to ensure the participation of both the majority and the opposition, i.e. parliamentary minorities, in decision-making and, therefore, the connection between respect for procedures and the guarantee of political pluralism is fully identified with respect for the position of democratic opposition minorities"* (Ibidem, FJ 3).

In short, the principle of political pluralism implies listening to minorities and respecting the procedural channels through which they express themselves, before submitting any parliamentary action to decision. Even more so if it is a legislative initiative arising from Parliament itself, by means of a bill, which must

allow the parliamentary groups that have not presented it to obtain the necessary prior information to take an opinion on its existence and content, and thus give rise to a serious and well-founded parliamentary debate that precedes the decision, first on the consideration of the legislative proposal, followed later by its legal-political analysis and proposal of amendments, until culminating in the final debate and vote on the text.

Together with the previous principle, the principle of legality and loyalty to the Constitution of the Powers and other Institutions constituted under its protection takes on special relevance, even greater if possible.

The TC has categorically proclaimed that, "*[i]n the social and democratic Rule of Law configured by the 1978 Constitution, democratic legitimacy and constitutional legality cannot be set against each other to the detriment of the latter: the legitimacy of an action or policy of public power consists basically in its conformity with the Constitution and the legal system. Without conformity with the Constitution, no legitimacy can be predicated. In a democratic conception of power, there is no legitimacy other than that based on the Constitution"* (STC 259/2015, of 2 December, FJ 5).

The High Court continues to emphasise that *"the democratic principle, which constitutes a superior value of our legal system reflected in art. 1.1 CE (STC 204/2011, 15 December, FJ 8) and which has various constitutional manifestations [STC 42/2014, FJ 4 a)], cannot be conceived, as a constitutional principle, in isolation and detached from the constitutional system as a whole and its processes. (...) [T]he unconditional primacy of the Constitution is a guarantee of democracy both because of its source of legitimisation and its content and because of the very provision of procedures for its reform"* (*Ibidem, FJ 5).*

The EC is the legitimising expression derived from the constituent power. The Court adds: *"The sovereign people, conceived as the ideal unit of imputation of constituent power, ratified in referendum the text previously agreed by their political representatives. The unconditional primacy of the Constitution also protects the democratic principle, 'since the guarantee of the integrity of the*

Constitution must be seen, in turn, as preserving the respect due to the popular will, in its garb of constituent power, the source of all legal-political legitimacy' [STC42/2014, FJ 4 c)]. Therefore, it is the mission of this Court to ensure that the unconditional primacy of the Constitution is maintained, which is nothing more than another form of submission to the will of the people, expressed this time as constituent power" (Ibidem, FJ 3). It is worth recalling at this point that, on 6 December 1978, the Spanish citizens ratified the draft Constitution with an overwhelming majority (87.78% of voters and a turnout of 67.11% of the electorate), which was subsequently sanctioned and promulgated by King Juan Carlos I on 27 December 1978.

Therefore, the powers and other public institutions are subject to the EC, as expressly established in Article 9.1, which is the source of legitimisation of their existence and the powers with which they are endowed. It is alleged by some doctrinal sectors that the silence in the EC of any express mention of amnesty would allow the deduction that this institute, insofar as it has not been expressly prohibited by the constituent assembly, can be permitted by the EC, in such a way that the constitutionality of amnesty as an aspect of the right to pardon must be accepted, given that the constitutional text only refers to the express prohibition of general pardons [Article 62 i) EC], but not of individual pardons and amnesty. However, this thesis is in direct contradiction with the concept of the EC, as a source legitimising the existence and powers of the public authorities. Two arguments may suffice to reject this approach:

a) On the one hand, the constituent process reflected the will to exclude any reference to amnesty in the constitutional text finally approved. In this sense, two amendments were presented to the text of the report:

(i) The first of these, Amendment No. 504 to the then Article 58.1 of the Draft, tabled by the Mixed Parliamentary Group and, on its behalf, by the deputy Mr. Raúl Morodo Leoncio, its spokesman, which proposed replacing the initial text of this section, which would become section 2, and providing, with respect to section 1, the following text: *"The Cortes Generales, which shall represent the Spanish people, exercise legislative power, without prejudice to the provisions of Title VIII, grant amnesties, control the action of the Government and have the*

other powers attributed to them by the Constitution". In the Final Report of the Constitutional Committee (Official Gazette of the Cortes no. 82, 17 April 1978), the initial Article 58 later became Article 61.1, under Title IV (On the Cortes Generales), Chapter I, and the text proposed by amendment no. 504 was adopted, although all reference to amnesty was deleted. The final text of the Report of the Ponencia was as follows: *"The Cortes Generales represent the Spanish people and are made up of the Congress of Deputies and the Senate"* [this text is included in the current Article 66.1 of the EC]. For its part, section 2 of that Article 61 was drafted in the Report of the Ponencia with the following text: *"The Cortes Generales exercise the legislative power of the State, approve its Budget, control the action of the Government and have the other powers attributed to them by the Constitution"* [this text corresponds to the current Article 66.2 of the EC]. The prohibition of general pardons was included in the new art. 57. i) of the Report of the Ponencia, among the prerogatives of the King [current art. 62 i) CE].

(ii) The second of the amendments was number 744 presented by Mr. César Llorens Bargés, representing the Parliamentary Group of Unión de Centro Democrático (UCD) and which, within the Title corresponding to the Administration of Justice (Title VIII of the Draft), proposed a new wording of Article 109 of the Draft: *"General pardons are prohibited. Individual pardons shall be granted by the King, following a report by the Supreme Court and the Public Prosecutor of the Kingdom, in the cases and by the procedure established by law. Amnesties may only be granted by Parliament".*

It thus provided for the possibility of Parliament granting amnesties, although it justified the introduction of the amendment with the aim of counteracting the alleged proliferation of pardons that had been granted during Franco's dictatorship, and it was therefore necessary to establish limits so that they would not constitute *"a breakdown in the Administration of Justice with unforeseeable consequences for exemplarity, legal security, affected interests and the feelings of the condemned within Spanish society"*.

The Report of the Report accepted to include the prohibition of general pardons, but to do so in art. 57. i) of the Draft, within the prerogatives of the King [current

art. 62 i) CE], by *"regulating this matter together with the right of pardon".* In this respect, it offered the following wording corresponding to Art. 109: *"Justice shall be free when so provided by law and, in any case, in respect of those who can prove insufficient resources to litigate".* The Report of the Rapporteur decided to exclude the reference to amnesty without providing any reasoning.

Finally, the Minutes of the sessions of the Constitutional Commission include the following text in the minutes of the session of 3 November 1978, in section 4: *"4°. With regard to the matter of amnesty, it is agreed not to constitutionalise this issue".* This decision explains why the EC made no mention of amnesty in the constitutional text.

b) On the other hand, and in view of the above, it is necessary to consider how this intentional constitutional omission of any express reference to amnesty should be interpreted.

In the opinion of this Council, as opposed to the thesis that if it is not prohibited it would be permitted, it must be understood that the deliberate omission of the reference to amnesty in the constitutional text cannot lead to this conclusion, which seems to us to be too simple and without a solid legal basis.

In the field of Constitutional Law, unlike relations between private individuals, *"the general principle of freedom enshrined in the Constitution (Article 1.1) authorises citizens to carry out all those activities which the Law does not prohibit, or whose exercise is not subject to specific requirements or conditions (...) the principle of legality (Articles 9.3 and 103.1)* [on the other hand] *prevents the Administration from issuing regulations without sufficient legal authorisation"* (STC 83/1984, 24 July, FJ 3).

It is true that, in the case of an amnesty approved by an organic law emanating from the legislative branch, we would not be talking about the principle of subjection of the administration to the law, which is typical of administrative law and, therefore, subject to judicial control.

However, this general principle of submission to the legal system does not only bind the Administration, insofar as the Executive Branch acts, but also binds all the powers of the State, insofar as they are constituted powers, which have their democratic legitimacy in the EC itself, which is what enables and authorises the exercise of all the powers and functions that the constituent assembly wanted those powers to have. It is the EC and the rest of the legal system that design the framework within which citizens and public authorities must operate, and to whose prescriptions they are subject (art. 9.1 EC). In this respect, the TC said that "*the Cortes Generales, as holders "of the legislative power of the State" (art. 66.2 of the Constitution), can in principle legislate on any matter without the need to possess a specific title for this, but this power has its limits, derived from the Constitution itself, and, in any case, what the Cortes cannot do is place themselves on the same level as the constituent power by carrying out acts proper to it, except in the case in which the Constitution itself attributes some constituent function to them. The distinction between constituent power and constituted powers does not operate only at the moment of establishing the Constitution; the will and rationality of the constituent power objectified in the Constitution not only found at its origin, but permanently found the legal and state order, and suppose a limit to the power of the legislator. The Constitutional Court, in its function as supreme interpreter of the Constitution (art. 1 of the LOTC), is responsible for safeguarding the permanent distinction between the objectification of the constituent power and the actions of the constituted powers, which may never exceed the limits and competences established by the former*" (STC 76/1983, 25 August, FJ 4).

The Legislative Power, like any other Power constituted under the protection of constitutional legitimacy, is therefore subject to the EC in the exercise of the powers and functions authorised by it. It is, therefore, subject to the constitutional norm itself, in such a way that it cannot exercise its genuine function, legislative, as the public power that it is, when it does not have the consequent constitutional authorisation to approve laws or regulations with the rank of law that lack that authorisation for the specific issue on which it intends to legislate.

The rule "*quae non sunt permissa prohibita intelliguntur*" (what is *not* permitted is understood to be prohibited), which reflects the principle of positive binding which governs relations between public power and the law in our legal system, does not allow any of the powers of the State, including the legislature, to extend to those areas for which it does not have constitutional authorisation. And this, in relation to amnesty, is not presumed to be implicit, nor has it been authorised by the EC. We have seen that the constituent assembly, on two occasions, rejected amendments proposing the inclusion of amnesty as a power attributed to Parliament.

When the Report of the Constitutional Committee declared itself in favour of *"not constitutionalising the amnesty",* as is reflected in the Minutes of the session of 3 November 1978 - already cited - it was because it was excluded from the constitutional authorisation. If it had been decided that amnesty, as an exceptional power of Parliament, had been included in the constitutional text, it would have been sufficient to accept either or both of the two proposed amendments. If it did not do so and the amendments were not accepted and were expressly excluded from the text of the constitutional proposal and, finally, from the approved Constitution, it is because it was intentionally intended that the amnesty should be excluded from any possibility of constitutional empowerment.

It should be borne in mind that amnesty, like pardon, are manifestations of the right to pardon, although they have a very different nature, content and legal effects, as do the powers of the State which, where applicable, may be attributed to them. What they do have in common is their exceptional nature in relation to the principles of equality before the law for all citizens and the separation of powers, given that they both affect the power to judge and enforce what has been judged, which, in a State governed by the rule of law, corresponds exclusively to the Judges and Courts, as our Constitution, in both cases, recognises and provides (Articles 14 and 117.3 EC). Therefore, if these are exceptional prerogatives, their exercise and application can only derive from the existence of a normative provision, in both cases of a constitutional nature, as are also the rights and prerogatives recognised in the aforementioned Articles 14 and 117.3 EC. For this reason, it can be concluded that the EC does

not protect the approval of an amnesty, but it does protect the granting of a pardon since, by simple logical deduction, it can be affirmed that if general pardons are prohibited by the EC [art. 62 i) EC], *a sensu contrario,* individual pardons have constitutional authorisation, the exercise and application of which must be done in accordance with a Law, in this case the Pardon Law.

To all this reasoning and to the conclusion we have just reached, one could object to the thesis that the aforementioned art. 62. i) EC provides that it corresponds to the King to *"[e]xercise the right of pardon in accordance with the law", in* such a way that if a law, organic in this case, is that which allows this exercise, the EC would not prevent the possibility of the amnesty being approved by means of a specific organic law. There would therefore be the constitutional authorisation required in previous paragraphs. It would be a generic authorisation which, as on so many other occasions, would allow the legislator to configure the right of pardon and, therefore, the double aspect of this right to regulate and develop it. In short, it could be argued that the right of pardon would have a legal configuration, leaving, therefore, in the hands of the legislative power the possibility of establishing, by law, the establishment of both amnesty and pardon.

For this Council, such an interpretation is in direct contravention of the constituent intention when regulating the right of pardon. On the one hand, the reality of the parliamentary work prior to the approval of the EC, as described above and which we now reiterate, clashes head-on with that reasoning. But, furthermore, as we will see later, if we are to understand that amnesty, as an aspect of the right to pardon, constitutes an exception to the principles of equality before the law for all citizens and also affects the work of another State power, the judiciary, it is the EC, as a rule which legitimises the creation, functioning and attributions of the powers and other State institutions in the Rule of Law, which alone can authorise this exceptionality. The Legislator, by approving an amnesty law, will be delimiting the subjective and objective scope of criminal prosecution or any other type of prosecution in certain cases, and will prevent judges and courts from applying the criminal or punitive law previously established for all to the beneficiaries, and this can only be done, we must insist, if it has the necessary constitutional coverage to carry it out. If an

amnesty law, if approved by Parliament, encroaches on the powers of another branch of government, in this case the judiciary, it must be based on the enabling conditions recognised by the EC.

This possibility of a constituted power encroaching on the exclusive power to judge and enforce judgments, which corresponds to another State power, constitutes a particularly relevant and decisive exception to the principle of separation of powers. For this reason, only the EC, in a clear, express and specific manner, can authorise such an exception, because the EC is the only guarantor of the rule of law and the separation of powers in a democratic system. The constituent assembly of 1978 rejected the amendments proposing its express inclusion and, furthermore, stated that it did not wish to constitutionalise it. Therefore, any initiative of the legislative power aimed at its provision and regulation is in direct contravention of the EC, because it lacks express regulatory support for its approval.

This is the great difference between the framework offered by the EC of 1978 and those that other Constitutions of our Historical Law (such as the Constitutions of 1869 or 1931) or foreign Constitutions within the EU, which are invoked as a criterion of science to affirm their recognition, even if implicit, in the Spanish legal system. Although in other sections of this report a more detailed reference will be made to the enormous differences that can be seen between the two systems, it is necessary to point out that the reference to constitutional systems, whether historical Spanish or those of other EU member states, cannot be used as a determining criterion for taking a position in favour or against the constitutionality of the amnesty, because the social, political, cultural and, above all, legal realities in whose framework those constitutional texts were approved at the time, are very different from those surrounding the constitutional text of 1978.

2.2 An amnesty is a breach of the principle of the separation of powers as a structural element of the rule of law

a) The principle of separation of powers is a fundamental pillar of the rule of law. This has been understood by the TC, which has made it clear that *"the*

separation of powers is an essential principle of our constitutionalism. The idea that public power must be divided into various functions, entrusted to different authorities and separated from each other, is at the root of modern constitutionalism and at the origin of our constitutional tradition" (STC 70/2022, 2 June, FJ 5). The Court goes on to point out that *"the principle of division and separation of powers is inherent to the social and democratic State governed by the rule of law that we Spaniards have formed through the 1978 Constitution (art. 1.1 CE), as it is a political and legal principle that permeates the structure of all democratic States" (ibidem, FJ 5)*.

And although the 1978 EC does not expressly state this principle, it does delimit the sphere of attributions of each of them. Thus, with regard to the Judiciary, Article 117.3 of the EC clearly states that *"the exercise of jurisdictional power in all types of proceedings, judging and enforcing what has been judged, corresponds exclusively to the Courts and Tribunals determined by law".* And Art. 118 imposes the general obligation to "*comply with the judgments and other final decisions of the judges and courts*".

In its work of interpreting the EC, the High Court has also declared that Title VI, under the same heading *"Judicial Power" (*arts. 117 to 127) *"regulates a power of the State which it identifies with the exercise of jurisdictional power or function, conceived in the strict sense as that State activity aimed at pronouncing law irrevocably and whose exercise corresponds solely to the judicial bodies. Judicial Power is exercised by the courts and tribunals in their activity of judging and enforcing what is judged and, for this reason, from an organic perspective, that Power is conceptualised as the set of bodies endowed with jurisdiction (art. 117 CE)"* (STC 85/2018, of 19 July, FJ 5).

Furthermore, the aforementioned judgment goes on to emphasise that this *"power, and the consequent constitutional reserve, is always defined and exercised in accordance with the aims proper to each jurisdictional order, which, as far as criminal matters are concerned, is none other than the exercise of the State's ius puniendi, when appropriate, through the institution of the trial and with respect, of course, for all constitutional rights and guarantees (especially those established in Articles 24 and 25 EC). The judicial bodies that form part of*

the criminal jurisdiction are constitutionally determined bodies to hear criminal offences and exercise the punitive power of the State. In this sense, the courts and tribunals of the criminal jurisdiction are responsible for hearing criminal cases and trials, with the exception of those corresponding to military jurisdiction (Articles 9.3 and 23 of the Organic Law of the Judiciary), which reflects the exclusive competence of this jurisdictional order to hear acts constituting a criminal offence. This jurisdiction extends over time from the preliminary investigation of the first proceedings (arts. 12 et seq. of the Criminal Procedure Act (LECrim)) to the execution phase of the sentence (arts. 983 to 999 LECrim). In the case of criminal offences, the capacity to investigate them from the moment that there are indications that a criminal act has taken place therefore corresponds to the judicial authority and, where appropriate, to the Public Prosecutor's Office (art. 124 EC), assisted by the judicial police in their functions of investigating the crime under the authority of judges, courts and the Public Prosecutor's Office (art. 126 EC)".

From this extensive statement of constitutional doctrine, a series of basic criteria on the constitutional configuration of the judiciary in our legal system can be extracted, in brief synthesis:

i) The Judiciary, made up of judges and magistrates who are independent, irremovable, responsible and subject only to the rule of law (art. 117.1 CE), has the exclusive power to judge and enforce what is judged, interpreting and applying the law, without any other power or institution being able to interfere or influence it or the actions it carries out in any way.

ii) This judicial exclusivity extends to all jurisdictions, including, logically, criminal law.

iii) This power ranges from the power to initiate proceedings to the enforcement of final decisions handed down by the Courts and Tribunals, which must be complied with by all (art. 118 EC).

b) In keeping with the constitutional principle of the separation of powers and thus delimiting the exclusive sphere of attributions of the Judiciary, the approval

by law of an amnesty entails an intrusion by the Legislative Branch into that branch's own sphere.

Amnesty is a legal operation aimed at eliminating all the legal consequences derived from the application of previous legislation, essentially criminal and administrative sanctions, although it can be extended to other branches of the legal system, pre-existing but approved under the protection of the current EC of 1978 and endowed with the attributes of legitimacy conferred by its approval by a democratic Cortes Generales.

The application of amnesty, therefore, and in terms coined by the TC itself, *"will entail what has been called by the doctrine 'retroactive repeal of norms', making the restrictions suffered by the right or freedom affected disappear completely, with all its consequences, so that it can be said that the right is revived retroactively"* (STC 147/1986, 25 November, FJ 2). In other words, amnesty means that a pre-existing and democratic law ceases to be applied to certain persons, participants or presumed participants in certain criminal or punitive acts, when the factors, elements or circumstances provided for in the law itself approving this exceptional benefit concur and, furthermore, retroactively.

But it also entails the elimination, equally retroactively, of all those consequences prejudicial to the rights and freedoms of the amnestied persons, when final judgments or judicial resolutions have so declared, and therefore any penalties or sanctions that may have been imposed, where applicable, are no longer enforced. However, the criminal or punitive law which, at the time, has been or could be applied by the Courts, remains in force for all other persons who do not understand themselves to be included or benefited by that identifying factor, element or circumstance which, in this sense, become discriminatory, so that the latter cannot benefit from the effects of the former, as we shall see later on.

c) The amnesty, therefore, constitutes an instrument of interference by the Legislative Power in the proper and exclusive action of the Judicial Power. If the EC is the source of legitimisation of the three branches of government and which, furthermore, delimits the sphere of attributions of each of them, any

interference by the other two branches in the genuine and exclusive work of the judiciary, of judging and enforcing what has been judged, must be expressly recognised by the EC. A Power, in this case the Legislative, cannot make use of its power of legislative initiative, provided for in Art. 66.2 EC, to introduce a factor of exceptionality in the application of the laws it has previously approved, if the EC itself has not expressly recognised it.

For the reasons given above, the EC not only does not expressly recognise the figure of amnesty, neither as a manifestation of the right to pardon, nor as a power specifically attributed to the Cortes Generales, so that the mere approval of a legislative text of this nature by Parliament, outside of any constitutional provision which recognises this power, would be manifestly unconstitutional. Moreover, the diagnosis of the unconstitutionality of a legislative initiative of this nature and relevance is even more accentuated if the decision to grant amnesty to certain people does not obey an ideal of *"Justice"*, but rather a reason of confessed circumstantial necessity to make a governmental investiture a reality.

It should be added that the factor of the lack of democratic legitimacy of the dictatorship's laws, which justified the approval of the pre-constitutional amnesty of 1977, does not apply here either. The same criminal and punitive laws by which the people who can benefit from the amnesty have been incriminated have continued, continue and will continue to be applied after the amnesty to other people who cannot be covered by the protective umbrella of the factors, elements or circumstances required by the legislative initiative to see their responsibilities eliminated.

In these circumstances, the amnesty implies an illegitimate and unconstitutional intrusion by the Legislative Power into the Judicial Power's own and exclusive set of powers. It therefore contravenes art. 117.3 CE and, therefore, the principle of the division of powers, the cornerstone of the entire constitutional architecture of the Rule of Law.

2.3 Amnesty violates the principle/right to equality before the law

The asserted denial that amnesty has a direct basis in the EC of 1978 and that, furthermore, the thesis that the constitutional regulation of the right to pardon [art. 62 i) EC] has a legal configuration, for the reasons set out above, leaves any legislative initiative that seeks, through amnesty, not only to establish an exception to the principle of separation of powers, but also, and especially, to the constitutional principle of equality before the law for all citizens, which is one of the basic pillars, along with others, of the Rule of Law, without any support.

a) In general terms, the principle of equality before the law recognised in Article 14 EC imposes on the legislature the duty to treat equally those in equal legal situations, prohibiting any inequality which, from the point of view of the purpose of the rule in question, lacks objective and reasonable justification or is disproportionate in relation to that justification.

Furthermore, this general clause of equality before the law also requires the reasonableness of the applicable difference in treatment. This general principle of equality has been configured by reiterated constitutional doctrine [for example, STC 91/2019, of 3 July, FJ 4 a)] as "*a subjective right of citizens to obtain equal treatment, which obliges and limits the public authorities to respect it and which requires that equal cases of fact be treated identically in their legal consequences and that, in order to introduce differences between them, there must be sufficient justification for such a difference, which at the same time appears to be well-founded and reasonable, in accordance with generally accepted criteria and value judgements, and whose consequences are not, in any case, disproportionate*".

An amnesty law, which primarily affects the field of criminal law and administrative sanctioning law, but also everything that involves incurring obligations and liabilities to the state and to private citizens (accounting or civil liability), is conceptually configured as an exceptional regime to the principle of equality before the law. By provision of the law, certain citizens are exempted from all kinds of burdens or responsibilities towards the State and other citizens, simply because of the concurrence in them of a certain factor, element or circumstance that allows them to escape from harmful legal consequences which, in the absence of that factor, element or circumstance, would make them

liable (in criminal, civil, administrative or accounting proceedings) to the State and other citizens, for their participation in certain acts classified as crimes or offences of any other nature. In this case, moreover, this differentiating factor is identified with an ideological motive for the conduct, as we shall see later. Thus, the future application of the rule will affect a fundamental freedom recognised in art. 16 EC, which recognises not only ideological freedom (art. 16.1 EC) but also the right not to declare one's ideology (art. 16.2 EC). The PLOA is therefore configured as an essentially discriminatory instrument, because it classifies citizens between those protected by a fundamental right when acting for a political motivation and those who have another way of thinking which, on the other hand, they do not have to reveal.

For all these reasons, and regardless of whether or not the institute of amnesty has constitutional authorisation, this legal regime must find a basis of justice that rationally justifies the exceptional treatment that this beneficial and privileged regulation entails.

b) Even when reference is made below to the hypothetical doctrinal treatment that the TC has given to the institute of amnesty, it is good to advance certain reflections which, *obiter dicta,* were highlighted by the Court itself in some of its resolutions, always referring to pre-constitutional regulations which were approved during the transition from the dictatorial regime prior to the current democratic one.

The High Court, in reference to that pre-constitutional regulation (Law 46/1977, of 15 October), stated precisely that *"amnesty (...) is a legal operation which, based on an ideal of justice (STC 63/1983, of 20 July, FJ 2), aims to eliminate, in the present, the consequences of the application of a certain regulation - in a broad sense - which is rejected today as contrary to the principles inspiring a new political order. It is an exceptional operation, typical of the moment of consolidation of the new values it serves, whose unitary purpose does not mask the fact that it is put into practice by resorting to a plurality of legal techniques which are united precisely by the common purpose"* (STC 147/1986, 25 November, FJ 2).

Consequently, the Court came to highlight two determining factors of those exceptional benefits and privileges granted by the amnesty approved at that time in Spain's history:

(i) On the one hand, the *"ideal of justice"*, understood as the moral principle that leads to giving everyone what is their due or belongs to them. In short, according to this argument, the objective would be to restore the rights of persons who, unlawfully or unjustly, were deprived of those rights, in whole or in part. Justice, proclaimed as a superior value of our legal system (art. 1.1. CE), connected to equity, which implies individual treatment, differently adapted from the abstract norm to the circumstances that are appreciated to exist in the specific case, are the only two values that would give argumentative support to the exercise of the right to a pardon.

(ii) On the other hand, together with the value of justice and equity as criteria for its application, the TC also highlighted a second conditioning element for the granting of amnesty. In this sense, it pointed out that any operation leading to its approval must obey the emergence of *"principles inspiring a new legal order"*, in other words, a change in the legal system which entails the need to leave behind those illegitimate situations which have unjustly harmed many citizens and which, in accordance with the new system of values brought about by the new regime, must be repaired and their effects extinguished. In a modern society, which aspires to enshrine the values of the rule of law, freedom, justice, equality and political pluralism (art. 1.1. CE), can only be achieved in their full validity and effectiveness when the necessary legal instruments are generated to re-establish the freedom and equality of all citizens in their rights.

And this situation can only be reached when the transition from a dictatorial regime to a democratic one takes place, designing a set of regulatory measures that establish the values of the Rule of Law referred to above. Furthermore, the very political and legal situation of transitoriedad entails the need to approve other complementary measures that allow for the full restoration of equality among all citizens. One of these measures is precisely the amnesty which, approved in that transitional context, fulfils everyone's aspirations for justice and restores the rights of those who, unjustly and unlawfully, lost them. This was the

case in the Spanish transition, prior to the approval of the EC, and the TC recognised it as such.

c) On the basis of all these considerations, it is understood that a State with a democratic regime, in which the rule of law prevails, and whose Constitution expressly provides for the granting of amnesties, either as a special aspect of the right to pardon, or as a singular power attributed to the Legislative Power by its corresponding Constitution, will not be able to tolerate the approval and application of amnesties when these two determining elements, which we have just analysed, are not present, i.e., the need to realise and give effect to the value of justice and the existence of a context of justice, cannot tolerate the approval and application of amnesties when these two determining elements, which we have just analysed, do not concur, i.e. the need to realise and enforce the value of justice and the existence of a context of political and social transition, generating new principles, which justify the restoration of the rights of citizens unjustly deprived of their rights, in accordance with the previous system.

Any other situation in which these two elements are not present cannot justify the approval of an amnesty because, in doing so, it would be undermining the values of the rule of law, in particular, the equality and freedom of citizens. If the amnesty obeys a pure reason of necessity or political expediency which, in a conjunctural manner, may benefit certain citizens merely because a political agreement has been reached (in this case, for an investiture), the amnesty thus granted clearly contravenes the principle of equality before the law.

Furthermore, the second of the determining elements for granting amnesty requires a political-social context of transition from a dictatorial or autocratic regime to a democratic one, in which the rule of law prevails, not so much because the latter represents respect for the values of justice, equality, freedom and political pluralism, but also because the actions of the public powers and institutions are backed by the legitimacy provided by the democratic regime itself. The laws and other provisions of the legal system are backed by the democratic legitimacy provided by a legislative and executive powers whose source of legitimacy is, on the one hand, the Constitution, as the supreme law

voted by referendum by the citizens, and, on the other hand, because they are constituted on the basis of the democratic vote of the citizens. The first, by means of the parliamentarians elected in free electoral processes, and the second, by the confidence conferred on the candidate for President of the Government by the Parliament, in a regime of parliamentary democracy such as the Spanish one.

On the other hand, in an autocratic or dictatorial regime, the laws and other provisions passed within it lack the democratic legitimacy that characterises the rule of law because, although they have been passed in parliament, their members have not been selected by the will of the people in free and equal elections. It is precisely this lack of democratic legitimacy of the laws, especially criminal and punitive laws, which justifies the possible granting of a subsequent amnesty, because the erasure of all responsibility caused by the application of laws or rules which did not have that democratic legitimacy is what an amnesty seeks to restore and re-establish in their integrity, returning the validity and effectiveness of their rights and freedoms to the people who unjustly suffered them. The aim, therefore, is to repair the unjust application of non-legitimate rules and to restore the rights of those who were subjected to unjust administrative processes or proceedings.

Well, this second element is not present when the amnesty is intended to be granted in a political-legal context which is not undergoing the transition from a dictatorial or autocratic regime to a democratic one, but its temporal and spatial scope is the same as that which existed prior to the granting of the amnesty, and the rules that have been applied to the administrative processes or files affected by the granting of the amnesty are and remain the same, before and after it was granted, approved at the time by a Parliament that enjoyed the same democratic legitimacy as the one that later intends to adopt an initiative of the magnitude that is being sought. The amnesty will obey other reasons of political convenience and opportunity, but they will not be in line with the principles and values involved in the progression to a democratic regime and the legitimacy that this entails.

The legal-constitutional consequence of approving an amnesty which does not comply with the value of justice and which, furthermore, affects administrative proceedings or files in process or already completed, initiated in application of legal norms approved by the Cortes Generales during the democratic validity of the EC of 1978, will be that of being in contradiction with the principle of equality before the Law recognised in Art. 14 EC. The amnesty thus conceived, that is, one which produces the elimination of any vestige of criminal, administrative, accounting, patrimonial or civil liability, for the alleged or already declared commission of crimes or punishable offences provided for in criminal or administrative laws, will provide a privileged situation of unjust benefit in favour of certain persons who, whether already convicted or already convicted by a final judicial sentence, will be able to enjoy a privileged situation of unjust benefit in favour of certain persons, or already convicted by final judicial sentence, declared in this case as guilty of crimes or other types of sanctions, will grant them, without any basis of justice, a position of favourable discrimination with respect to the rest of citizens who, for the same commission of those crimes or infractions, will have to bear the corresponding liability, derived from the acts that they carry out.

The violation of the principle of equality before the law also entails the violation of one of the highest values of the Spanish Constitutional Order, specifically, the value of equality (art. 1.1. EC). It therefore undermines one of the basic pillars of the rule of law on which our democratic system is based.

2.4 An amnesty entails a breach of the principles of legal certainty and the prohibition of arbitrariness on the part of the public authorities.

(a) *Infringement of the principle of legal certainty*

The TC (for example, STC 168/2023, 22 November, FJ 6) has repeatedly proclaimed that this principle, enshrined in art. 9.3 CE, *"must be understood as 'certainty about the applicable legal regulation', (...) as well as 'the citizen's reasonably founded expectation as to what the actions of the authorities in the application of the Law should be' (...). These requirements (...) are inherent to the rule of law and [...] must therefore be scrupulously respected by the actions*

of the public authorities, including the legislator himself. Moreover, without legal certainty there is no rule of law worthy of the name. It is the reasonable foreseeing of the legal consequences of conduct, in accordance with the law and its application by the courts, which allows citizens to enjoy a peaceful coexistence and guarantees social peace and economic development".

Alongside this principle, but as its corollary, we must also refer to the *"principle of legitimate expectations"*, understood as the consideration of citizens who adjust their conduct to the legislation in force in the face of regulatory changes that are not reasonably foreseeable. In particular, those that have to do with the general area of the economy and, especially, with regard to taxation, which is what the TC has usually referred to, but which is also understood to be applicable to the amnesty in terms of its exceptional nature and, in the present case, its total unpredictability prior to its adoption, to its total unpredictability before the legislative initiative currently being processed was announced [see, in this respect, STC 42/2022, of 21 March, FJ 3 B) and the express reference made to any regulatory area, citing other rulings of the High Court].

The TC emphasises that *"the alleged harm to citizens' legal certainty is a question that can only be resolved on a case-by-case basis"* [for example, STC 51/2018, of 10 May, FJ 5 b)], and the specific circumstances of each case, such as the purpose of the measure, the degree of foreseeability, its quantitative and qualitative importance and other similar factors, must be weighed up.

STC 147/1986 (FJ 3) contains a reference to the principle of legal certainty (art. 9.3 CE) which, however, is not highlighted in the PLOA's MS. For the Court, "[a]*lthough it is not appropriate now to analyse the constitutional viability of amnesty in private relations, it is clear that an institution of this kind affects legal certainty, a principle enshrined in art. 9.3 of the Spanish Constitution. This happens because the amnesty that is granted alters situations that have been established by firm judicial sentences, which have the value of res judicata (art. 118 of the Spanish Constitution), and this alteration of the rules of succession of legal systems can evidently affect the aforementioned principle, understood as the confidence that citizens can have in the observance and respect of situations derived from the application of valid and valid norms* (...)". The Court

considers that, in order to resolve the specific case, it is necessary to weigh up the limits or, rather, the reasonableness of the limits that have been imposed on legal certainty in the interests of the prevalence of material justice (FJ 3). And, in this sense, it asserts that the declaration of imprescriptibility of actions that were already time-barred, thus consolidating legal situations, and whose admission could generate onerous effects for employers who limited themselves to applying the law in force at the time, could be understood as unreasonable (FJ 4). To conclude by pointing out that "[i]*f amnesty is always an exceptional institution, which in part disregards the usual rules of evolution of the legal system, the declaration as imprescriptible of those actions which arose from it and which had already prescribed is a new exception which is added to the previous one, further compressing the principle of legal certainty. As such, it must be assessed as producing exceptional effects when its consequences affect the sphere of freedom guaranteed to all citizens by the Constitution. If the amnesty could have been reasonable, and even desirable, and a period of time was granted for the interested parties to benefit from it, once that time had elapsed, the state of pendency, of provisionality of the original situation, ceased; by resuming the provisionality through Law 1/1984 and, with the total exception of its time limitation, it can be said that the exception has become the general rule, and that the principle of legal security -perpetually compressed- is now ignored*" (FJ 5). In this way, the Court starts from the premise that an amnesty always affects the principle of legal certainty recognised in art. 9.3 EC and, in this specific case, rejects the idea that this principle should be affected indefinitely, by means of a post-constitutional rule.

A thorough interpretation of these jurisprudential criteria leads to the understanding that the 1977 amnesty, although it was adopted for exceptional reasons and in a context of a change of political regime, based on the principle of Justice, cannot be applied in a discriminatory manner and, in any case, it represents a breach of the principle of legal certainty (art. 9.3 EC) which does not make sense to maintain (nor, therefore, to agree *ex novo as* is now being claimed) in a context of a social and democratic State governed by the Rule of Law.

The general doctrine on the principle of legal certainty cannot be referred to amnesty in the abstract without supporting it in a specific case in which this aspect of the right to pardon can materialise. As we have anticipated, the possible infringement of this principle *"can only be resolved on a case-by-case basis"*, in such a way that, regardless of whether, *in genere*, any form of amnesty should be considered to be contrary to the EC of 1978, for the reasons mentioned above, the analysis of its possible contradiction with the principle of legal certainty necessarily involves a study of the content of the PLOA.

In this sense, we will now limit our examination to the general aspects of what is contained in the text of the aforementioned proposal, leaving for later the specific analysis of its articles and even the possible impact on other principles and rights, such as the principle of taxation, integrated in the principle of criminal legality (art. 25.1 EC). A first result of this general study reveals certain elements that collide head-on with the principle of legal certainty and the aspects that have been outlined in the doctrine of our highest body for the protection of constitutional guarantees and rights:

i) Firstly, the TC has pointed out as a genuine characteristic of this principle *"the reasonable foreseeing of the legal consequences of conduct, in accordance with the legal system and its application by the Courts".* Of course, we must start from the idea that the legislative initiative under analysis is characterised by its absolute *"unpredictability".* This unpredictability can be predicted on two levels: on the one hand, in terms of time and, on the other hand, in terms of the possible delimitation of the objective scope of its application.

As far as the timeframe is concerned, an analysis of the social and political context in Spain in the last months of 2023 clearly reveals that such an approach was neither foreseen nor foreseeable. What is more, the repeated statements made by different electoral candidates, now members of the parliamentary group that has presented the bill, during the electoral campaign that preceded the vote on 23 July 2023 in the general elections, either did not express themselves on it or, if they did, it was to deny any possibility of making a legislative proposal of this nature a reality, as they considered it unconstitutional.

ii) In addition to the unpredictable timing of the fact that this initiative could see the light of day immediately after election day, legal certainty, from the perspective of its objective scope, is seriously compromised by the ambiguity and lack of specificity of the acts that are intended to be amnestied. The first two articles of the proposal, dedicated to the regulation of the *"objective scope"* of the acts eligible for amnesty and the *"exclusions"* from the application of the amnesty, are a true reflection of the indeterminacy, due to the breadth and ambiguity with which they are drafted. This unpredictability will not only affect those who may benefit from the amnesty, but also those whose legitimate expectations of benefiting from this measure of grace will be frustrated.

With regard to the *"objective scope", it is the* ideological factor, expressed in the "intention to demand, promote or procure the secession or independence of Catalonia" [art. 1.1.a) PLOA], which is an essential prerequisite for establishing the "objective" delimitation of the amnesty, provided that it is carried out in a specific framework or context, that of the Catalan independence process. It is a factor which, due to its individual and subjective nature, is not only difficult to prove, beyond the mere express manifestation of that intentionality by the persons involved, but also to assess by the judges and courts who have to determine whether that political intentionality exists and serves to constitute a cause-effect relationship between the former and the criminal result. What the Criminal Code punishes or excludes from criminalisation are not ideological aims or intentions, in which, unlike other legal systems such as Germany's, the principle of militant democracy does not apply (STC 48/2003, 12 March), but the acts classified as crimes committed by individuals, regardless of the political motive or intentionality that drives them to commit them. Moreover, these same offences will continue to exist and will be applicable to all those who do not prove and are not found to have political intentionality. Of course, the determining premise for the application of the amnesty in a context such as the current one, the indeterminacy of its content and the difficulty for the judge to appreciate this intentionality, act as factors of notorious legal insecurity in the interpretation and application of the rule, unless, as we have anticipated, the mere allegation by the judge is enough to justify the amnesty, the mere allegation by the person under investigation, accused or convicted, depending

on when the amnesty is applicable, is sufficient to include the case within this objective scope, which is still largely discriminatory - almost random - both in the application of this exceptional pardon and in its exclusion.

Indeed, in the chapter on *"exclusions", there is* also a clear ambiguity in some of the cases described in Art. 2 PLOA. For example, the acts listed in paragraph b), which are classified as crimes of torture or inhuman and degrading treatment *"in accordance with* Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, with the exception of treatment which does not exceed a minimum threshold of severity because it is not likely to humiliate or degrade a person or show a diminution of human dignity, or to cause fear, distress or inferiority in a manner likely to break his or her moral and physical resistance". From the point of view of legal certainty, this paragraph offers two factors of clear indeterminacy: on the one hand, the text of this paragraph refers, for the assessment of torture, to the terms of Art. 3 of the ECHR and, consequently, to the case law of the ECtHR on torture, when our own legal-penal system, as a consequence of having ratified the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (instrument of ratification published in the BOE no. 159, of 5 July 1989), is not yet in conformity with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (instrument of ratification published in the BOE no. 159, of 5 July 1989), and the European Court of Human Rights (ECHR). 159, of 5 July 1989) has typified different manifestations of this aberrant and despicable crime (Title VII of Book II; arts. 173 to 177 CP), punishable by prison sentences. And, on the other hand, the need to interpret numerous indeterminate legal concepts which make it difficult to establish objective criteria for exclusion from the application of the rule which, furthermore, do not fully correspond to those established by the doctrine of the ECtHR on the matter. We will return to this later.

Another of the exclusion assumptions that is striking due to its ambiguity is that of paragraph e), which excludes from the application of the amnesty "crimes that affect the financial interests of the European Union". It is not clear whether it refers exclusively to the criminal offences incorporated by Organic Law 1/2019, of 20 February, which, among others, transposed into our criminal law

Directive 2017/1371, of the European Parliament and of the Council, of 5 July 2017, on the fight against fraud affecting the financial interests of the EU through criminal law [known as the PIF Directive], and whose competence in our country for its investigation and prosecution is attributed to the Delegated Prosecutors of the European Public Prosecutor's Office (art. 4 of O.L. 9/2021, of 1 July). Or, on the contrary, whether it can also be extended to all corrupt conduct in the handling of public funds that does not come directly from EU funds. This last question arises in view of the fact that, as we shall see later, the European Union is particularly interested not only in the fight against crime that directly affects European funds, but also in ensuring that the Member States make proper use of their budgets and expenditure forecasts, with criteria of efficiency in the management of public funds. This interest also extends to the eradication of all manifestations of corruption in the use of public funds by public authorities and civil servants in any of its Member States.

Of course, these notes would suffice to argue that the principle of legal certainty is compromised by the legislative initiative that is to be adopted. But it is not the only one, as will be explained below.

b) *On the prohibition of arbitrariness of public authorities.*

The TC has emphasised that *"when a reproach of arbitrariness is made against the legislator, extreme care must be taken in our judgement, since political pluralism and the freedom of the author of the law to shape it are also constitutional assets that we must protect. For this reason, we have generally required two conditions in order for an objection of unconstitutionality to be successful in these cases: on the one hand, that the person raising the objection must give detailed reasons for it, offering a justification in principle convincing enough to destroy the presumption of constitutionality of the contested law; and, on the other hand, from a material point of view, that the arbitrariness denounced is the result either of regulatory discrimination or of the absolute lack of a rational explanation of the measure adopted, without it being relevant to carry out an in-depth analysis of all the possible motivations for the rule and all its possible consequences"* [STC 159/2021, of 16 September, FJ 5 B) and the SSTCs cited therein. Likewise, on the requirement of prudence when

invoking the legislator's infringement of this principle, STC 74/2022, 14 June, FJ 3 D)]. FJ 3 D)].

In order to analyse the possible existence of arbitrary action by the public authorities, leaving aside the abstract consideration of the unconstitutionality of the amnesty, for the reasons mentioned above, it is necessary to study the context and circumstances in which this draft Organic Law was presented. To this end, it is necessary to focus on identifying the authorship of this legislative initiative and who carried it out, as well as to determine how it was presented, who and for what crimes amnesty is sought, and what are the reasons and arguments which have led to the proposal of this legislative initiative. In any case, the analysis will be based on the mere observation of public and notorious facts, without entering, under any circumstances, into political-partisan assessments.

In order to answer the question of the identification of the perpetrators and possible beneficiaries of the amnesty, it is necessary to give a chronology of the events that preceded the formal presentation of the legislative initiative in the Register of the Congress of Deputies.

The first relevant date is 9 November 2023, when an agreement was signed in Brussels (Belgium) between representatives of two political parties with the backing of as many parliamentary groups in the Congress of Deputies. One of the points of this agreement literally states, in what is now of interest, the following: ″The Amnesty Law to procure full political, institutional and social normality as an essential requirement to address the challenges of the immediate future. This law must include both those responsible and the citizens who, before and after the 2014 referendum and the 2017 referendum, have been subject to judicial decisions or proceedings linked to these events″. In another following point, the following agreement is highlighted: ″The investiture of Pedro Sánchez, with the vote in favour of all the deputies of Junts″.

The next important date is 13 November 2023, on which the Socialist Parliamentary Group, which gives a presence in the Chamber to one of the two signatory parties of the previous agreement, presented the "proposal for an

organic amnesty law for institutional, political and social normalisation in Catalonia". *On the* same day, the President of the Congress of Deputies, following a meeting of the Bureau of the House, announced the convening of the plenary session for the investiture session of the candidate proposed by HM the King for the Presidency of the Government, who at that time was the candidate for the Presidency of the Government for the Socialist Parliamentary Group.

Finally, in the plenary session of 15 and 16 November 2023, the previously designated candidate was elected in the first vote by an absolute majority of the Lower House (179 Members). The Parliamentary Group of Junts per Catalunya in the aforementioned Chamber, in compliance with the agreement of 9 November 2023, signed by the representative of the political party of the same name, voted in favour of the investiture of the previously nominated candidate.

The sequence of events described above reveals that the initiative to present the PLOA was part of an investiture agreement signed between two political parties with parliamentary representation in the Congress of Deputies and assumed by the two corresponding parliamentary groups.

The next question, regarding the determination of those who intend to benefit from the aforementioned PLOA, in view of the chronological sequence of the events described, can only be answered by connecting the decision to register the aforementioned bill in the Congress of Deputies with the agreement previously signed by the two political formations referred to above.

From the aforementioned connection, it is possible to reasonably deduce that the beneficiaries of the presentation of the aforementioned draft organic law would be, on the one hand, the candidate appointed by H.M. the King to the Presidency of the Government, belonging to the Socialist Parliamentary Group, who obtained the backing of the absolute majority of the Congress of Deputies to be invested, having obtained, among the favourable votes of other Parliamentary Groups in the House, that of the seven Deputies of the Junts per Catalunya Group, in accordance with what had been previously agreed in the agreement of 9 November 2023; and, on the other hand, art. 1 PLOA, dedicated

to delimiting the objective scope of the amnesty, makes it possible to include as possible beneficiaries of the amnesty, among others, certain leaders, militants and sympathisers of the political group Junts Per Catalunya, some of whom have already been sentenced by final judgement and others, including some of its most prominent militants, who are the subject of various arrest warrants issued by the Criminal Division of the Supreme Court, for alleged crimes, among others, of embezzlement of public funds. All of these people could benefit from the proposed amnesty, regardless of whether or not other parliamentary groups in the Spanish Parliament have been or could subsequently support this legislative initiative.

On this basis, the PLOA appears to be vitiated by arbitrariness from the point and time at which it is not aimed at satisfying a principle of justice or equity, but is based on an agreement between two political formations that obtain a reciprocal benefit. Nor is it intended to re-establish the rights and freedoms that are said to have been unjustly violated of a part of the citizens residing in Catalonia, given that they are going to be exonerated from any criminal liability for acts which, in other parts of Spain and without the intentionality that is included in the PLOA, would determine liability for serious crimes against legal assets of extraordinary social and personal relevance such as those described in articles 1 and 2 of the PLOA.

2.5 An amnesty implies the denaturalisation of the law as a general rule: the PLOA does not meet the constitutional requirements to be valid as a singular rule.

Laws have traditionally been characterised by their generality and abstraction. Generality means that the application of the law does not refer to specific persons but to all citizens who may eventually be affected by it. By abstraction, it is understood that the rule is not linked to a specific event that has already occurred, but that it contemplates a current or future situation or assumption that, if it comes to fruition, will give rise to its application. The PLOA does not enjoy such characteristic features.

On the one hand, it refers to certain members of a population, those who have engaged in conduct associated with a specific purpose or ideology. It does not even refer to all persons who may have committed certain crimes or offences, but only to those who committed them for a specific purpose and who, although numerous, can be identified. The case is particularly striking if we observe, albeit very briefly in this section of the report, the description of the offences included in the objective scope of the legislative proposal, placed in relation to the excluded offences [art. 2, a) and c) PLOA]. It is striking that homicide is excluded, but not attempted homicide, which affects the same protected legal good. The same can be said of the exclusion of certain aggravated injuries provided for in articles 149 and 150 PC, but not of others which are also serious, such as those included in article 148 or in article 150 PC itself, as we will see later. The same applies to the exclusion of crimes of terrorism, which will only be amnestied if they have not "intentionally caused serious violations of human rights", ignoring the intrinsic seriousness of all forms of terrorism [this point will be stressed later]. It seems that the intention of the text is not only to extinguish the specific criminal responsibility for certain crimes committed in a given context, but also to avoid the criminal prosecution of certain individuals.

On the other hand, the text seems to refer to a past event, to a specific, clearly prefixed event. An event which, precisely because it is fixed in time, cannot occur again. However, the text itself (art. 1.3) allows its subsequent unlimited validity in the event that the "performance" of the conduct began before 13 November 2023 (the date of presentation of the bill), and even if its "execution" ended later. Apart from the apparent contradiction with the very nature of an amnesty - which aims to "forget" what has happened, not what is about to happen - and the more than debatable differentiation - in terms of criminal dogmatics - between "carrying out" and "execution", the fact is that this provision can pose unquestionable practical problems of accreditation, for example, in the case of preparatory acts such as conspiracy or proposition (art. 17 CP), included in the scope of application of the PLOA (art. 1.2). In short, it seems that the intention is to regulate extraordinarily specific situations and, at the same time, deliberately ambiguous in order to include as many people as possible, provided that they have committed or intend to commit criminal acts on the basis of their ideology.

In the opinion of this Council, we are dealing with a unique law, which contains a retroactive suppression of the unlawfulness of certain behaviours which were unlawful at the time they were committed (and which, in fact, continue to be unlawful for other persons, as we have already seen).

According to STC 129/2013, of 4 June (FJ 4), "singular laws are *those enacted in response to a specific and singular event, which exhaust their content and effectiveness in the adoption and execution of the measure taken by the legislator in the face of that event, isolated in the singular law and not communicable with any other".* STC 148/2020, of 22 October (FJ 5), for its part, categorises singular laws by reference to STC 203/2013, of 5 December, which, in its FJ 3, distinguishes between the following types: *"(i) a first type of singular law is the self-applying law, a term that alludes to laws that contain a typically executive activity, of application of the rule to the specific case, as was the case analysed in STC 129/2013, of 4 June; (ii) secondly, a law can also be classified as a singular structure, in view of the addressees to whom it is addressed, as in the case of the rule examined in STC 166/1986, of 19 December; and iii) finally, those enacted in response to a specific and singular event, which exhaust their content and effectiveness in the adoption and execution of the measure taken by the legislator in the face of that event, isolated in the singular law and not communicable to any other, a category in which, for example, the case of STC 203/2013, of 5 December, falls into".*

More recently, the doctrine on singular laws has been systematised in STC 159/2021, of 16 September (FJ 3), distinguishing between singular, non-self-applicable laws which, in turn, can be subclassified into *"those with a single addressee or singular structure in view of the addressees to whom they are addressed; and those dictated in view of a specific event, that is, a singular or exceptional situation".* And, on the other hand, self-executing laws, which are those *"which contain a typically executive activity of applying the rule to the specific case"*.

In the present case, and as the Preamble of this Organic Law Proposition highlights, we would be dealing with a law passed to deal with "a singular or

exceptional situation", also known as "single-case laws", in the terminology used by STC 166/1986, of 19 December, (FJ 10), and which are not reduced to those whose material content, in whole or in part, is an executive or administrative activity.

The TC stresses that *"[t]he canon of constitutionality applicable to this type of law is that elaborated in STC 129/2013 (FJ 4), and systematised in STC 231/2015 (FJ 3). In these judgments we stated that 'special laws do not constitute a normal exercise of legislative power' and, consequently, 'they are subject to a series of limits contained in the Constitution itself', among which are the principle of equality; their restriction 'to those exceptional cases which, due to their extraordinary importance and complexity, cannot be remedied by the normal instruments available to the administration, which is constrained to act in accordance with the principle of legality, nor by ordinary regulatory instruments'; as well as 'the prohibition of conditioning the exercise of fundamental rights, a matter reserved for general laws'"* (STC 159/2021, 16 September, FJ 3).

It thus assumes the criteria already set out in STC 166/1986, of 19 December (FJ 11), later reiterated in STC 203/2013 of 5 December (FJ 4), which recalls that, for "*any singular law* (...) to *be considered constitutional*", "*it will have to pass*" the "*triple canon*" of "*reasonableness, proportionality and appropriateness*", which includes a legitimate aim.

Section V of the Preamble attempts to justify the unique nature of the PLOA and its compliance with the constitutional canon by means of a series of arguments which, however, fail to meet the filter required by the High Court.

To begin with, it is mentioned that "its object and scope is addressed to a specific group of addressees (...) for a singular event", when the reference is then added to the "set of acts linked, in different ways, to the aforementioned independence process, which are materially and temporally delimited". We have already anticipated something on this issue, which will be analysed in more detail later, but the fact is that the very description of "a singular event" as a "set of acts linked (...) to (...) the (...) process of independence" is already sufficiently expressive of a certain generality, not of a singularity.

The principle of equality is then invoked which, in the terms set out in the Preamble of the PLOA, must be understood as referring to equality in the application of the Law (there shall be no "discrimination between persons who are included in the qualifying assumption"), but not, as we have already pointed out, to equality before the Law, which is notoriously infringed in the opinion of this Council. Constitutional jurisprudence requires that the difference in treatment inherent in the concept of a special law must respond to an "*objectively reasonable justification*" [STC 166/1986, 19 December 1986, FJ 11.a)]. In this way, the "*special law will only be compatible with the principle of equality* [before the law] *when the uniqueness of the situation results immediately from the facts, in such a way that the assumption of the rule is given by them and it is only possible for the legislator to establish the legal consequences necessary to achieve the proposed aim. The control of constitutionality thus operates on a double level, to exclude the arbitrary creation of factual assumptions, which would only be unique because of that arbitrariness, and to ensure the reasonableness, in terms of the proposed end, of the measures adopted*" [STC 166/1986, 19 December, FJ 11 a)].

Well, even though this is a unique law, the principle of equality before the law is certainly not preserved in these circumstances. First of all, it is necessary to highlight the lack of any reference to the right to effective judicial protection of the victims of all the criminal acts committed by some of the people already convicted and beneficiaries of this amnesty, As well as those who may also presumably have incurred responsibility for very serious criminal acts which are still pending trial and which will also benefit from the amnesty, without leaving aside society as a whole which, in various ways, could claim justice by acting as the accusing party in criminal or other proceedings.

Therefore, the Preamble of the PLOA attempts to make a judgement of reasonableness, proportionality and appropriateness that already lacks, *ab initio*, technical-legal rigour from the point and time at which it disregards the weighing of the suitability, necessity and proportionality of the measure, of a fundamental right as relevant and important as the aforementioned right to effective judicial protection of the victims and injured parties. Furthermore, it

constitutes a criminal and other treatment that clearly violates the principle of equality before the law, by granting beneficial treatment, without any objective justification and without reasons of justice and equity, to the participants in those acts.

The aforementioned judgments of reasonableness, proportionality and appropriateness are articulated around the need to "overcome" the situation of "high political tension experienced by Catalan society in a particularly intense way since the end of 2011", without explaining in any way the choice of this date. Further on, the Preamble stresses that this organic bill seeks to "improve coexistence by advancing towards the full normalisation of a plural society that addresses the main debates on its future through dialogue, negotiation and democratic agreements".

In reality, the MS uses terms that do not correspond to the real situation in Catalonia and the rest of Spain. All of them constitute a set of expressions that seek to euphemistically highlight the episodes of violence that took place, repeatedly, in different towns in Catalonia, particularly during the months of September and October 2017, as well as in the month of October 2019, and the criminal acts carried out by the highest authorities of the constituted powers in that Autonomous Community, some of whom were convicted and the rest prosecuted and awaiting trial as fugitives from justice and with search and arrest warrants, for the commission or alleged commission of various extremely serious crimes.

It was not only a problem of "tension" or political "conflict" that occurred in Catalonia on the dates indicated in the Preamble, but of crimes or alleged crimes of extreme gravity, committed by persons who at that time held the political representation of the citizens of Catalonia and other persons, encouraged by them, to commit the violent acts that are now to be amnestied.

If the issue had been limited to a mere situation of tension or political conflict, it is clear that there would have been no need for the intervention of the Courts of Justice, especially those of the Criminal Jurisdiction, which would have had to

act to impart justice and repress those criminal conducts, as is proper in a State governed by the rule of law.

In short, the singularity of the law does not stem from the facts that make it indisputably necessary, which, as we have already mentioned, are diffusely described, but from the need to reach an agreement for an investiture. The generic invocations of "general interest", "pacification" or "coexistence" in Catalonia, contained in the aforementioned Preamble, can easily be dismissed by the reality of the facts. It is not a question of responding to events that took place years ago or which may even take place in the future, but to current political needs. In reality, as we will see later, the whole argument is impregnated with an idea that is unacceptable in a State governed by the rule of law, namely that coexistence was altered by the actions of the powers of the State and, in particular, the judiciary.

The same applies to the criteria of proportionality and appropriateness. Proportionality is based on the alleged absence of a "generic and imprecise reference" to its scope of application, when the rule is plagued by notorious vagueness. And the adequacy is "connected (...) with the purpose for which the rule is intended". The PLOA refrains from justifying that there is no other less burdensome way of resolving the particular issue raised, which is the material content of the principles of proportionality and adequacy, and that there is no other less burdensome way of resolving the legal interests concerned or more effective way of resolving the particular issue raised. The PLOA is incapable of arguing the concurrence of these weighting elements to justify a measure such as amnesty. When the legislator considers that certain conduct should not be punished, it proceeds to decriminalise it, with general effects. Similarly, if the aim is to condone the legal consequences of the crime for certain people, the figure of pardon is available. These are the two ordinary ways provided for in the Spanish constitutional system and, in fact, they have already been used for what is understood to be the need to solve the problem described in the Preamble to the PLOA. When it was believed that the crime of sedition was disproportionate, *Organic Law 14/2022, of 22 December, on the transposition of European directives and other provisions for the adaptation of criminal legislation to European Union law, and reform of crimes against moral integrity,*

public disorder and smuggling of dual-use weapons, was passed. And when it was understood that the sentences imposed should not be enforced, Royal Decree 460/2021 of 22 June was issued, citing one of them as an example, pardoning Oriol Junqueras i Vies.

In short, amnesty is not necessary to achieve the desired legal effect, which can be obtained by reforming the Penal Code or by pardon. The real intended objective, that is, to reach an investiture agreement, does not arise from the factual situation described in the explanatory memorandum but from the electoral result produced on 23 July 2023, which implies the omission of any criterion of legal reasonableness in this legislative proposal. A minimally reasonable and objective analysis leads to the conclusion that the amnesty implies a disproportionate sacrifice of fundamental pillars of the rule of law, in order to obtain a supposed benefit of dubious achievement such as "coexistence" or "pacification". It is difficult to understand why the application of the democratically approved law could have generated conflict or altered coexistence or social peace, as opposed to the commission of the criminal conduct itself.

For all of the above reasons, it is considered that the PLOA does not meet the requirements of reasonableness, proportionality and adequacy demanded by the TC to grant constitutional validity to certain forms of special law.

IV. ON COMPATIBILITY WITH INTERNATIONAL AND EUROPEAN UNION LAW

1. Introduction. General considerations.

This section of the report analyses the international repercussions of the PLOA. To this end, the different commitments assumed by Spain will be differentiated according to the subject matter and the international organisations of which it is a member, in relation to the content of the Preamble or Explanatory Memorandum (hereinafter, MS) and some of the precepts of the legislative proposal submitted for our consideration.

Without prejudice to what will be explained below, it should be noted at this point that the MS seems to imply that the amnesty complies with international law and, specifically, with European Union law, when this is not the case, but quite the opposite. On the one hand, certain particularly serious forms of crime will benefit from the proposed amnesty, in clear contravention of the international commitments assumed by Spain, as a sovereign state or as a member of the European Union, which oblige its effective prosecution. On the other hand, the review of certain pronouncements of the Court of Justice of the European Union (hereinafter, CJEU) and the European Court of Human Rights (hereinafter, ECHR), in addition to not dealing with cases similar to those that are the object of the PLOA, cannot serve as a guarantee to affirm the compatibility of this proposal with European Union law, given that these jurisdictional precedents grant an indisputable preponderance to judicial action against the attempts of the political power in power to forget multi-criminal offences.

In any case, a preliminary general analysis, without prejudice to a more specific analysis in the following sections, shows that the PLOA contravenes numerous rules of European law. Its regulation would entail a breach of the separation of powers, contrary to the EU rule of law clause (Articles 2 and 19.1.2 of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU)) and the level of protection of fundamental rights before the courts (Article 53 CFREU). Some of the amnestiable crimes under the amnesty bill (such as embezzlement, i.e. corruption or terrorism) are covered by art. 83 of the Treaty on the Functioning of the European Union (TFEU), as they are subject to common minimum standards in the EU (to continue with the examples, by Directives 2017/1371 and 2017/541, which will be analysed in more detail later). Therefore, the Cortes Generales, by legislating on these matters, is acting on shared competences [arts. 2 and 4.2.j) TFEU], but, as we will see later, against the common objectives of the uniform EU standard, thereby infringing the principle of subsidiarity and proportionality of EU law (art. 5 TEU) and going against the objective of effective protection of the EU's interests.

In this connection, it should be recalled that Article 83 TFEU provides that: "The European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of *particularly serious crime* with a *cross-border dimension* resulting from the nature or impact of such offences or from a special need to *combat them on a common basis*. These areas of crime are: *terrorism*, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, *corruption*, counterfeiting of means of payment, computer crime and organised crime" [emphasis added].

In short, a legislative initiative such as the PLOA, which ignores the obligation to respect the minimum standards relating to the definition and punishment of particularly serious crimes such as terrorism or corruption, established in Article 83.1 of the Treaty on the Functioning of the European Union (TFEU), represents a breach of the commitments assumed by Spain in defence of a common area of freedom, security and justice (Articles 67 et seq. TFEU) and judicial cooperation in criminal matters (Articles 82 et seq. TFEU).

2. The PLOA is contrary to European Union law.

The inclusion of embezzlement and terrorism offences makes the PLOA a legislative instrument contrary to EU law.

2.1 The PLOA is contrary to Spain's international commitments in the fight against corruption. The crime of embezzlement cannot be the subject of an amnesty.

Articles 1(1)(a) and (b) and 8(1) and (2) PLOA consider crimes of misappropriation of public funds and conduct involving civil and accounting liability, including those which are the subject of proceedings before the Court of Auditors, to be amnestible, with the lifting of precautionary measures aimed at securing them.

As we shall see, these provisions not only clash with the ethical principles of the exercise of power, but also represent a breach of the international obligations assumed by Spain, in accordance with the provisions of Articles 93 and 96.1 EC.

One of the fundamental indicators of human development and the political quality of states is the incidence of corruption. All international organisations, both at the global and regional levels, have normative instruments and institutions that monitor the degree of compliance with international obligations in this area. The fight against corruption is seen as a necessity based on guaranteeing citizens of all nations a democratic and just society. The norms establish principles, preventive measures and the requirement of effective prosecution of corruption, obliging states to establish normative and penal measures, in the latter case, in particular, because of the configuration of penal norms as a form of negative constitution, an impenetrable closure of the functioning of states and the basis of an effective democracy. States' compliance with corruption standards and the effective prosecution and enforcement of sanctions condition not only the attractiveness for investment, but also the international credibility of states' national institutions and the general prestige of societies.

(a) Commitments undertaken at the United Nations level

In the sphere of the United Nations, the United Nations Convention against Corruption of 2003 should be highlighted. The convention was ratified by Spain on 19 June 2006 and by the European Union on 12 November 2008. The latter will be analysed below, but is of significant importance because it is not only part of the Spanish legal system, but also forms part of the European Union legal system.

The convention contains preventive and repressive measures against corruption regulated in eight chapters with provisions that imply, in some cases, the need to legislate in a certain sense; in others, those that open up the possibility of regulating a certain matter; and, finally, those that include some recommendations. As far as repression is concerned, certain mandatory

offences are established (Articles 15, 16.1, 17, 23 and 25) and there is a power to criminalise in a certain sense (Articles 16.2, 18, 19, 20, 21, 22 and 24).

In addition to the normative amendments, the text establishes the need to adopt active public policies within the framework of the domestic legal system and with respect for their fundamental rights (arts. 5, 8, 9, 10, 11, 12, 13, 38, 39, 53, 60 and 62) and other rules of direct application in the framework of criminal proceedings (arts. 30.3, 30.4, 30.5, 31.1, 50.1, 50.3). The addressee of these rules in each State is, depending on the circumstances, the bodies responsible for investigating or applying the law in the specific case, taking into account the regulatory framework in force.

At this point, we would like to draw attention to three aspects in which the need to legislate in a certain sense is established on a mandatory basis.

Articles 19 to 22 require the punishment of active and passive bribery of authorities and officials, embezzlement and abuse of functions. Article 17 is precise in stating that "each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official, for his or her own benefit or for the benefit of others or other entities, of property, public or private funds or securities or any other thing of value entrusted to the official by virtue of his or her position". This is an unavoidable obligation addressed to the legislator insofar as the verb used is formulated with the imperative "shall adopt". It is important to note that the definition requires the intentional commission and misappropriation of funds entrusted to the persons responsible for their administration, so that any restrictive clause is in clear conflict with the Convention. Therefore, the legal concept of corruption is normatively integrated by the catalogue of offences whose incorporation is obligatory for states in accordance with the 2003 Convention against Corruption, incorporated into the Spanish legal system, and which necessarily includes the embezzlement of public funds.

Similarly mandatory, Art. 31 obliges States Parties to adopt "to the greatest extent possible under their domestic legal system, such measures as may be

necessary to authorise the confiscation of: (a) proceeds of offences established in accordance with this Convention or property the value of which corresponds to such proceeds; (b) property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention". The provision is complemented by Art. 57, which requires restitution to the holders of the diverted funds.

Thus, the convention obliges the establishment of repressive measures that determine the criminal prosecution of those responsible and the deprivation of assets for restitution for the benefit of the society that suffers from acts of corruption including the misappropriation of assets.

Prevention, punishment and the restitution of assets derived from crime are articulated through an essential principle, effectiveness. The most repeated noun in the text of the Convention is "effectiveness" and the most frequently written adjective is "efficient".

Article 30(3) sets out a provision that merits specific analysis in regulating the basis and practical operation of criminal proceedings. According to its wording, "each State Party shall ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximise the effectiveness of law enforcement measures in respect of those offences, with due regard to the need to prevent such offences". What is relevant about this precept is that it establishes that the properly political powers, the executive and the legislature, must ensure that the authorities responsible for prosecuting the offences exercise their functions effectively and that, unlike the above-mentioned articles, the precept does not establish the basis for the State's normative activity, but rather its application. In other words, there is a duty to guarantee the investigation of the crime as the basis for the prosecution of the offences regulated in the convention as crimes of corruption, including embezzlement. Indirectly, it establishes the duty of the authorities in charge of prosecuting the crime to investigate it until the material truth is reached, constituted as a citizen's right in the face of a multi-criminal offence.

Given these premises, there is nothing more contrary to the effectiveness of the fight against corruption than its oblivion, whatever the criminal form in which it manifests itself. Furthermore, Article 65 establishes a closing clause that obliges states to adopt, in accordance with the fundamental principles of their domestic law, such measures, including legislative and administrative measures, as may be necessary to ensure compliance with their obligations under the convention, and authorises them to adopt more stringent or severe measures than those provided for in the same text in order to prevent and combat corruption, but not to reduce them.

The operation of the convention is delegated to the Conference of States Parties within the framework of the United Nations Organisation on Drugs and Crime (UNODC), which is used to analysing cases that normally refer to states outside the European Union and which sometimes face situations of difficulty in applying the standards of the rule of law, and which has equipped itself with a tool that analyses the legislation of states in this area and establishes guidelines for their effective incorporation of the norms of the convention[1] . We draw attention to this text because it includes a chapter 6 (*Tool* 34, pp. 415 ff.) dedicated to analysing cases of amnesty for corruption offences linked to reconciliation processes. Assuming the obvious risks of undermining the principles that guarantee the prevalence of the rule of law in cases of amnesty in conflict situations, the text points out that amnesty might be admissible under very restrictive conditions, in particular when "the government creates a newly organised anti-corruption structure; corruption has been, or remains, systemic and the large number of cases is likely to paralyse the anti-corruption structures and many of the public servants, due to their low salaries, were forced to use corrupt practices to survive". None of this can be deduced from the text submitted to this Prosecutorial Council for analysis.

In this situation, those who apply and advocate the application of the law will come up against three rules: the classification of the crime of embezzlement in Articles 432 to 435 of the Criminal Code, the Amnesty Law in the event that it enters into force with the wording we are analysing, and Article 30.3 of the Convention against Corruption, which is contradictory to the Amnesty Law. It

[1] https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_chap6.pdf

should be remembered that Article 11 PLOA states that the consequence is not the cessation of the investigation but the free dismissal of the case, at the request of the Public Prosecutor's Office or a party, or even ex officio.

This contradiction of norms, the one that obliges to effectively prosecute corruption and the one that obliges to forget the crime, must be interpreted together within the framework of the EC, whose articles 94 et seq. regulate the value of international treaties. Law 25/2014 of 27 November on Treaties and other International Agreements is perfectly clear regarding the effectiveness and prevalence of international treaties in case of collision with other rules of domestic law. The principles governing this relationship are as follows:

i) Effectiveness of treaties. According to Article 28.1: "The provisions of international treaties validly concluded may only be derogated from, modified or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law". In this sense, the suppression of the international obligation assumed by Spain is carried out through a channel completely alien to this procedure, provided for in Articles 69 and 70 of the international text.

ii) Observance of treaties. According to Article 29: "All public authorities, organs and bodies of the State shall respect the obligations of the international treaties in force to which Spain is a party and ensure the proper fulfilment of those treaties". It should be noted that the obligation is not limited to legislative bodies, but extends to all public authorities and State bodies.

(iii) Direct application. Art. 30 provides: "International treaties shall be self-executing unless it appears from their text that such application is conditional upon the adoption of the relevant laws or regulations.

(iv) Prevalence. Article 31 adds that the legal norms contained in international treaties, validly concluded and officially published, shall prevail over any other norm of domestic law in the event of conflict with them, with the exception of norms of constitutional rank.

As we have indicated, Article 30 of the Convention establishes a duty that reaches not only the bodies that must incorporate the wording of the treaty into domestic law, but also includes a duty of effectiveness in the prosecution of the crime for all the authorities responsible for investigating and punishing it, and therefore, the contradiction cannot be resolved in favour of the national norm when it contravenes an international convention that establishes a specific obligation, as is the case here.

b) Corruption at the Council of Europe level

Within the framework of the Council of Europe, mention can be made, first and for information purposes only, of a text to which neither Spain nor the European Union is a party: the 1999 Convention 173 on Corruption. Articles 2 to 14 oblige states to punish bribery of all kinds of officials, influence peddling and conduct aimed at diverting funds by means of false or incomplete entries or declarations. Art. 14 obliges states parties to adopt "such legislative and other measures as may be necessary to establish as an offence punishable by criminal or other penalties under their domestic law, when committed intentionally, the following acts or omissions intended to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent that the Party has not made a reservation or declaration: (a) drawing up or using an invoice or any other document or accounting entry containing false or incomplete information; (b) unlawfully omitting to account for a payment." Art. 19 requires effective, proportionate and dissuasive sanctions and measures, as well as measures to confiscate or deprive the property of the offence for restitution to the society harmed by the corruption.

In addition, the Committee of Ministers of the Council of Europe issued Resolution (97)24 of 6 November 1997 on the twenty guiding principles for the fight against corruption, in which it agreed on the need to adopt effective measures for the prevention and repression of national and international corruption (principle 1), with effective measures guaranteeing the independence and autonomy of the actions of those who make up the institutions designed to make the fight against corruption effective, and protecting them in the exercise

of their functions (principle 3). It also establishes the duty to take appropriate measures to deprive the proceeds of crime[2] (principle 4).

Finally, within the Council of Europe, the Group of States against Corruption (GRECO), created in 1999 with the aim of improving the capacity of its member states in the fight against corruption and ensuring compliance with international commitments in this area, should be highlighted[3] . It has several reports and follow-ups on similar situations in which the capacity to act against corruption or the division of powers is curtailed[4] .

(c) EU requirements on corruption, including embezzlement

In the framework of the European Union, the aforementioned EU Directive 2017/1371 on the fight against fraud affecting the financial interests of the European Union through criminal law should be noted. Its articles detail the types of conduct that affect the misappropriation of funds from European budgets and delegate to the Criminal Code of each country the form and requirements that fraud must take. Specifically, Article 4(3) states that "Member States shall take the necessary measures to ensure that embezzlement, when committed intentionally, constitutes a criminal offence". And the preamble of Organic Law 1/2019, of 20 February, which amends Organic Law 10/1995, of 23 November, of the Criminal Code to transpose European Union Directives in the financial and terrorism fields and to address international issues, which transposed the aforementioned PIF Directive into Spanish law and was subsequently amended in this area by Organic Law 14/2022 of 22 December, states that the Directive "entails the harmonised regulation of these frauds, as well as the criminalisation of other conducts closely linked to them: money laundering, bribery and embezzlement", and in relation to their commission by legal persons, it points out that the Directive "requires that any of the offences provided for therein, including the offence of embezzlement, be punishable". In short, regardless of whether or not, in the cases covered by the PLOA, a diversion of funds of strictly European origin is actually established, the PFI

[2] The standards clearly include the sanctioning of embezzlement and effective confiscation: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc17c
[3] https://www.coe.int/en/web/greco
[4] https://www.coe.int/en/web/greco/ad-hoc-procedure-rule-34-

Directive is configured as an instrument that serves to determine the European standard in this area[5] . Moreover, according to the CJEU of 16 June 2005 (Case C-105/03 *Maria Pupino*), a national court "*is required to take account of all the rules of national law and to interpret them, as far as possible, in the light of the letter and the purpose*" of the European rules (paragraph 61).

The European Union has had an anti-fraud strategy in place since 2011. The European Union's legal system is full of rules that facilitate the prosecution of all forms of corruption by the criminal authorities of the individual member states, and seeks measures to prevent its existence. The Union's agreements with third states, especially in accession processes, are conditional on strict monitoring of corrupt practices. In its report on the rule of law, the European Commission considers that the fight against corruption should be strengthened, not relaxed .[6]

It should also be noted that in 2008 the European Union acceded to the 2003 Convention against Corruption, once the text had been ratified by all member states. This is not a symbolic gesture, but rather the Union assumes the obligations established in the Convention and incorporates the text into its acquis as its own law under art. 216 TFEU, according to which "the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives set out in the Treaties, or is provided for in a legally binding Union act, or is likely to affect common rules or alter their scope. Agreements concluded by the Union shall bind the institutions of the Union and the Member States". In other words, the stated contradictions of the PLOA with the anti-corruption commitments not only contravene Spain's international obligations under the UNODC, but are also contrary to EU law.

In this regard, in accordance with Art. 216 TFEU, the CJEU (Grand Chamber) of 21 December 2011 (Case ATAA C-366/10), in paragraphs 50 and 51, regulates the position of ratified treaties under EU law below primary law and above

[5] https://www.boe.es/doue/2017/198/L00029-00041.pdf
[6] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52020DC0580

secondary law with these words: "*Under Article 216(2) TFEU, when the Union concludes international agreements, the institutions of the Union are bound by those agreements and, consequently, those agreements take precedence over acts of the Union. It follows that the validity of an act of the European Union may be affected by its incompatibility with such rules of international law. Where such incompatibility is raised before a national court, the Court must ascertain whether certain conditions are met in the case before it in order to determine whether the validity of the act of European Union law in question can be assessed, pursuant to Article 267 TFEU, by reference to the rules of international law relied on.* The European Union must in the first place be bound by those rules. Furthermore, the Court may examine the validity of an act of European Union law in relation to an international treaty only if the nature and scheme of that treaty do not preclude it. Finally, where the nature and system of the treaty in question allow the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty relied on in order to examine the validity of the act of European Union law are, in terms of their content, unconditional and sufficiently precise, which is the case in the fight against the misappropriation of public funds, as has already been explained.

On the other hand, it is clearly in the Union's interest that the Member States make proper use of their budgets, non-compliance with which can generate problems of budgetary balance which, in a context of monetary union and shared fiscal rules, can be particularly relevant.

In any case, it should also be recalled that freezing and confiscation orders must be enforced in the Member States in accordance with the principle of mutual recognition in criminal matters provided for in Article 82 TFEU, in accordance with Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018, and include corruption offences of any nature, [as well as terrorist offences]. Article 3(1)(7) prescribes that confiscation orders are executed without verification of the dual criminality requirement for certain offences, including corruption. In other words, it is assumed that all EU states make it their own way of fighting crime to confiscate the proceeds of crime in certain criminal cases, including corruption.

Consequently, the failure to require effective punishment for the offence of embezzlement and the return of the misappropriated assets means that the content of the PLOA contravenes European Union law.

d) Analysis of the jurisprudence of the CJEU and the intervention of other international bodies

The consequences of including corruption offences in the framework of the amnesty go beyond the criminalisation itself and require an analysis of the case law of the CJEU and the intervention of other supranational bodies when dealing with certain acts of the states in which there is analogy. Without prejudice to a more detailed jurisprudential study to be carried out later on, it is worth noting the following at this point:

First of all, it is worth highlighting a recent precedent. In January 2019, an amnesty process benefiting a number of political decision-makers led to political intervention by the President of the European Commission and the issuing of reports by the European Union's Cooperation and Verification Mechanism in 2021[7] and 2022[8] .

Secondly, GRECO has monitored the negative impact on the division of powers, a situation shared by Bulgaria and Hungary.

Thirdly, proceedings have been brought before the CJEU in this matter, specifically for contravening the *ne bis in idem* principle or prohibition of double jeopardy, which implies the right of individuals not to be subject to criminal proceedings or punished more than once for the same acts, expressly recognised as a fundamental right in Art. 50 CDFUE and in Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR). In the established case law of the CJEU, this rule can only apply when the public prosecutor as the judicial authority in the specific case files the case in accordance with the specific facts. More

[7] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52021DC0370
[8] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52022DC0664

specifically, the CJEU of 16 December 2021 (Case *AB and others*, *revocation of amnesty* C-203/20, paragraph 61) expressly ruled in relation to Slovakia that the principle of *non bis in idem*, as set out in Art. 50 CFEU does not preclude the issuing of a European arrest warrant under Framework Decision 2002/584/JHA if the criminal proceedings were initially closed by a final decision based on an amnesty - without the criminal liability of the persons charged having been examined - and the effects of the decision to close the proceedings had subsequently ceased to have effect because the amnesty had been revoked[9] .

In contrast to the striking affirmation contained in the PLOA MS that the jurisprudence of the CJEU authorises amnesty, the aforementioned ruling gives clear priority to judicial action when the amnesty is initially granted and then revoked by more or less general rules, without there being an express pronouncement issued by a judicial authority or the Public Prosecutor's Office when analysing in detail the concurrent elements in the specific case.

Fourthly, the doctrine of the CJEU (C-203/20) has been confirmed by the most recent CJEU of 25 January 2024 (Case *NR and Craiova High Court, Romania* C-58/22, paragraphs 54, 56, 57, 75), which, in accordance with the Advocate General's report[10] , concludes that "*a person cannot be considered to have been acquitted, within the meaning of Article 50 CDFU, as a result of the adoption by a Public Prosecutor of a decision not to prosecute where that person's legal position has not been examined as to whether he is criminally responsible for the acts constituting the offence under investigation". 50 CFREU, as a result of the adoption by a prosecutor of a decision not to prosecute where that person's legal position as the person criminally responsible for the acts constituting the offence under investigation has not been examined*".

Fifthly, it is striking that the PLOA MS refers to the CJEU of 29 April 2021 (Case C-665/20 PPU), which establishes a different consequence to the one stated in

[9]https://curia.europa.eu/juris/document/document.jsf?text=&docid=243106&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=685031
[10]https://curia.europa.eu/juris/document/document.jsf?text=&docid=243106&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=685031

the MS[11] . In this judgment, the CJEU specifically points out that it is for the executing judicial authority, within the margin of discretion available to it, to weigh the prevention of impunity and the fight against crime against the guarantee of legal certainty for the person concerned. Consequently, as opposed to the automatic application of a supposed amnesty, the CJEU considers that there is a judicial power of balancing when one of the grounds for opposing the EIO provided for in Article 4 of Framework Decision 2002/584 is present, which allows for a restrictive interpretation of the exercise of the legal pardon.

Sixth, the case law of the CJEU has had occasion to pronounce on the capacity of the courts to act effectively against corruption and has analysed the supremacy of EU law in combating it, for example, the judgments of 21 December 2021 (*Euro Box Promotion and others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19), 18 May 2021 (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19) and 24 July 2023 (Case C-107/23, Lin). These decisions are unanimous in establishing principles that guarantee the prosecution of corruption, even in the case of a more favourable criminal law, as in the case of the calculation of limitation periods.

Precisely, the CJEU of 21 December 2021 (*Euro Box Promotion* and others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19), has applied the principles of primacy and effectiveness (Art 325 TFEU) of European Union law, in relation to national legislation that may generate a systemic risk of impunity for acts constituting serious offences of fraud affecting the Union's financial interests, or corruption in general (paragraphs 192, 212, 213 and conclusions 2) and 4).And also, from a cross-cutting approach to fraud, in its judgment of 25 February 2021 (*John Dalli v. European Commission*, C-615/19 P), the CJEU considered that the European Anti-Fraud Office (OLAF) has competence beyond the protection of the financial interests of the European Union.

In summary, and with these considerations in mind, the international normative framework establishes a binding minimum floor for all states by setting the following minimum standards in the fight against corruption:

[11] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:62020CA0665&from=ES

i) Internal rules should establish and effectively prosecute misappropriation of public funds.
i) Sanctions must be effective and dissuasive.
ii) The proceeds of crime should be confiscated from the perpetrators for adjudication and use by the aggrieved society.
iii) Public authorities must act effectively to combat it.
iv) Impunity is not admissible except in exceptional circumstances and under very restrictive conditions.

Amnesty, both for crimes sanctioned by final sentences and for cases pending trial, is a lowering of the minimum international standards of democratic quality, human development and the ethical basis for the exercise of public functions. There is no valid international and European precedent for an amnesty for this kind of conduct. Integrity in the exercise of public functions under parameters of strict legality constitutes a higher interest of any democratic legal system, and is therefore incompatible with impunity for corruption, which includes embezzlement.

2.2 The PLOA is contrary to Spain's international commitments in the fight against terrorism. Terrorist crimes cannot be the subject of an amnesty.

As we will see later, art. 2.c) PLOA excludes the possibility of granting amnesty in relation to "acts which by their purpose can be qualified as terrorism, according to Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, and which in turn have intentionally caused serious violations of human rights, in particular those covered by Articles 2 and 3 of the" ECHR (right to life and prohibition of torture or inhuman or degrading treatment) "and international humanitarian law".

In the same way that we have explained in relation to corruption, all international organisations establish the obligation to prosecute terrorist crimes and, especially since 2001, their financing. The inclusion of these conducts in the scope of application of the amnesty, excluding only those that have

intentionally caused serious human rights violations, is in contravention of Spain's international commitments in this area.

(a) United Nations

Within the framework of the UN, sanctions are established in certain areas such as the use of explosives and attacks on maritime and air navigation[12] . Among them, Article 1.1.d) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971 and ratified by Spain, requires criminalisation and prosecution of acts consisting of destroying or damaging air navigation facilities or services or disrupting their operation, if such acts by their nature constitute a danger to the safety of aircraft in flight. Moreover, Art. 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism[13] requires certain forms of participation to be punishable.

To facilitate the implementation of the relevant conventions, the UNODC published in 2021 a "Handbook on the Appropriate Use of Non-custodial Measures for Terrorist Offences" in which it restrictively analyses the application of amnesty in relation to geographically and culturally distant nations in situations of high-intensity conflict that expose the proper functioning of the rule of law[14] . In those exceptional circumstances and in order for amnesties to be effective instruments of peace, reconciliation and reintegration, they must be very carefully designed, conditional on the need for the potential beneficiary to provide truth, reparation, amends or a combination of all of these in return, conditions which must be prior to the concrete application of the measure of grace and have subsequent monitoring measures. None of this is apparent in the text submitted by the Senate for report.

b) Council of Europe

[12] https://www.unodc.org/documents/terrorism/Publications/Legislative_Guide_Universal_Legal_Regime/Spanish.pdf . The list of conventions at https://www.unodc.org/unodc/en/treaties/index.html?ref=menuside
[13] https://www.boe.es/buscar/doc.php?id=BOE-A-2002-9850
[14] https://www.unodc.org/pdf/terrorism/UNODC_Technical_Assistance_Handbook_-_Electronic_ENG.pdf

On the other hand, Art. 5 of the 2005 Warsaw Convention against Terrorism and its Protocol, to which the European Union is a party, requires the criminalisation of certain offences in accordance with Art. 1, according to which, for the purposes of the Convention, "terrorist offence" means any of the offences included in the scope of application and defined in one of the treaties listed in its annex, including the aforementioned Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971. In addition, it incorporates the punishment of forms of public provocation to incite terrorism and Art. 15 establishes an essential duty to prosecute[15] .

(c) European Union

The European Union ratified the Council of Europe's Warsaw Convention on 26 June 2018. Therefore, as mentioned above, it has incorporated into its own legal system the text of the Convention and, by extension, the requirement of criminalisation of a set of conducts, including those established in the UNODC framework, which not only do not require the absence of certain results to be considered "terrorist acts", but also extend to preparatory forms such as promotion, encouragement and financing.

In particular, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA[16] describes terrorist acts as "one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, and the enjoyment of human rights and fundamental freedoms, on which the Union is founded. They also represent one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the Union is founded" (Recital 2).

Article 3 of this Directive criminalises terrorist offences by compiling those set out in the international conventions that precede it. According to its wording,

[15] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:22018A0622(01)&from=EN
[16] https://www.boe.es/doue/2017/088/L00006-00021.pdf

"Member States shall take the necessary measures to ensure that the following intentional acts, established as criminal offences under national law, which, by their nature or context, may seriously damage a country or an international organisation, are established as terrorist offences", including: "(a) attacks upon the life of a person which may result in death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) mass destruction of State or public installations, transport systems, infrastructure, including computer systems, fixed platforms located on the continental shelf, public places or private property, which may endanger human life or cause major economic loss" or "(f) the manufacture, possession, acquisition, transport, supply or use of explosives (...)"; provided that they are committed by the State or an international organisation, which, by their nature or context, may cause serious harm to a country or to an international organisation, are criminalised as terrorist offences.)"; provided that they are committed for one of the purposes described in paragraph 2 of the same Article 3. 3(2), which include acts such as "(a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to do or abstain from doing any act"; or "(c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". Conduct described as terrorism includes provocation (Art. 5), recruitment (Art. 6), training (Art. 7), travel for the purpose of terrorism or its organisation or facilitation (Art. 9 and 10), as well as its financing (Art. 11) and aiding, abetting, soliciting or attempting (Art. 14).

As can be seen, the EU definition of terrorism does not always and in any case require a particularly serious human rights outcome, because it is in itself one of the most serious human rights violations. What the EU does require is that states take the necessary measures to ensure that the offences listed in Articles 3 to 12 and 14 are punishable by effective, proportionate and dissuasive criminal penalties, and that the terrorist offences listed in Article 3 and those listed in Article 14, insofar as they are related to terrorist offences, are punishable by penalties which are higher than those imposed by national law for such offences where the special intent required by Article 3 is not present. In addition, Article 16 provides for the possibility and conditions under which

penalties may be reduced, but in no case does it provide for extinction of liability.

The same Directive provides that "Member States shall take the necessary measures to ensure that their competent authorities seize or confiscate, as appropriate, in accordance with Directive 2014/42/EU of the European Parliament and of the Council proceeds derived from or instrumentalities used or intended for use in the commission of or contributing to the commission of any of the offences referred to in this Directive" (Art. 20.2).

European Union law is therefore precise as regards the definition of certain conducts and their punishment, in order to effectively prosecute this serious criminal phenomenon and to provide for the deprivation of the effects of the offence.

The PLOA cannot merely refer to a Directive for interpretative purposes. Directives are not directly applicable criminal rules [on the direct effect of Directives and their possible useful effect, for the benefit of the citizen, when they have not been transposed, see STC 13/2017 of 30 January and the SSTJUE of 4 December 1974 (*Van Duyn* case), 5 April 1979 (*Ratti* case) and 19 January 1982 (*Becker* case)]. Moreover, in this case, Directive (EU) 2017/541 has already been transposed into our criminal legal system through LO 1/2019, of 20 February. Consequently, there can be no contradiction between the Spanish Criminal Code and the EU Directive. Therefore, neither can a new definition of terrorism be established that differs from that contained in the CP, nor can Spain's national and international obligation to effectively and dissuasively prosecute terrorist crimes be eliminated, regardless of the type of result produced, thus seeking to introduce a kind of lenient terrorism that can be amnestied. We will insist on all of this later on.

By attempting to force the Spanish judge to interpret restrictively the existing EU anti-terrorism rules, Articles 83(1) and 19(1) TEU are also violated.

In short, the international normative framework, and with it that of the European Union, establishes a series of minimum standards that must be adapted in the

criminal legislation of the states, and which do not take into account distinctions regarding a specific ideological or political purpose apparently justifying such conduct.

The Spanish Penal Code is probably one of the most exhaustive in this area and covers a significant number of conducts, the result of its own historical experience. However, the terms of the PLOA imply failing to prosecute any form of terrorism that is not particularly serious or not enforcing the penalties already imposed, for a purely ideological reason, thereby failing to comply with Spain's international commitments and, in particular, with European Union law in a matter aimed at guaranteeing the minimum essential rules of public security that enable the survival of the rule of law and the peaceful coexistence of society as a whole.

2.3 The PLOA is contrary to the European principles and values enshrined in Article 2 of the Treaty on European Union and to the rights recognised in the Charter of Fundamental Rights of the European Union.

a) The PLOA is contrary to the European principles and values enshrined in Art. 2 TEU.

Article 2 TEU states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

These are principles and values which are the cornerstone on which the whole EU is built, and which the Member States are committed to promoting, so that EU law is based on the fundamental premise that each state shares with all the others, and recognises that they share with it, these values and principles.

A proposal such as the PLOA, which affects the judicial function in general (by annulling its decisions or preventing it from continuing to act), means that the

principle of the separation of powers inherent to the rule of law is not duly guaranteed. National judges, who are also European judges, must have every guarantee of independence and impartiality in the exercise of their functions, without being constrained in their judicial work. The national remedies and procedures applied by national judges are a tool of EU law, when they serve the realisation of the effective protection of these interests.

This is illustrated by the CJEU (GS) of 19 November 2019 (Case C-585/18, C-624/18 and C-625/18 *AK and Others v AK and Others*) which, in paragraphs 120 and 124, states that '*the independence of the courts, which is inherent in the judicial function* (...) is of paramount importance as the guarantor of the protection of all the rights conferred by Union law on individuals and the safeguarding of the values common to the Member States as proclaimed in the Charter of Fundamental Rights of the European Union.) *is of paramount importance as a guarantor of the protection of all the rights conferred on individuals by Union law and of the safeguarding of the values common to the Member States proclaimed in Article 2 TEU, in particular the value of the rule of law (judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paragraph 58 and case-law cited]*' and that '*the principle of the separation of powers* (...) *characterises the functioning of a State governed by the rule of law*'.

As will be seen in more detail in the analysis of the articles of the PLOA, this legislative proposal establishes special and exceptional rules, different from the ordinary rules of domestic law, in matters such as precautionary measures, criminal, administrative and accounting prosecution and enforcement, and time limits for prosecution, depriving Spanish judges of their capacity to act and eliminating the effective remedies established in national law for the protection of EU interests (not only in matters of terrorism or the protection of the EU's financial interests, but also in the administration of justice).

In particular, the PLOA seeks to limit the scope, purpose and effects of some typically European regulatory and cooperation instruments such as the

preliminary ruling before the CJEU (art. 267 TFEU)[17] and the European arrest warrant (regulated by Council Framework Decision 2002/584/JHA of 13 June 2002, currently transposed into Spanish law by Law 23/2014, of 20 November)[18] . This constitutes a severe restriction or limitation of the right to effective judicial protection recognised in art. 47 CFEU which, in accordance with the provisions of the aforementioned art. 52.1 CFEU, is only justified when "they are necessary and effectively meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others", which is not the case with the PLOA, for the reasons already set out in previous sections of this report.

In effect, the provisions of Art. 4, in its paragraphs a), b), c) and d) PLOA, impose on the national judge to lift the precautionary measures adopted, which undermines the procedure established in the Spanish and Community legal order, given that it does not allow him to protect the Community goods and interests that could be affected, as is the case with the fight against fraud, terrorism or judicial cooperation. This abrogation of European law is not saved by the mere inclusion, at the beginning of Article 4 of the PLOA, of the formula "without prejudice to the provisions (...) of Article 267 TFEU", since the effectiveness of the judicial protection of EU law is eliminated through the imperative mandate to judges to apply, in any case, peremptorily and irrevocably, impunity, even if they question the lifting of the precautionary measures on a preliminary basis.

Undoubtedly, the most striking case of violation of European law is Article 4.b) of the PLOA when it provides that the "judicial body hearing the case shall proceed to cancel (...) European (...) arrest warrants (...)" (EAWs). The regulation of the EAW is an EU matter that aims to eliminate impunity and whose competence is exclusive to the judge, as indicated in the CJEU of 8 December 2022 (*CJ* case, C-492/22 PPU) and 31 January 2023 (*Puig Gordi et al.* case, C-158/21). Therefore, the requirement to lift the measure and close the proceedings laid down in the PLOA is contrary to the judicial remedy

[17] As defined and interpreted in the CJEU of 4 June 2015 (Case C-5/14 *Kernkraftwerke Lippe-Ems,* paragraph 37), 11 September 2014 (Case *A v B and others* C-112/13, paragraph 37), and 22 June 2010 (Cases C-188/10 *Aziz Melki and Sélim Abdeli* and C-189/10 *Aziz Melki and Sélim Abdeli,* paragraphs 38 and 41).

[18] As defined and interpreted in the CSTJs of 24 November 2020 (*Openbaar Ministerie* case C-510/19, paragraph 42), 27 May 2019 (*OG and PI* case C-508/18 and C-82/19, paragraphs 53 and 55) and 28 April 2022 (*C and CD* case C-804/21, paragraph 65)

established by EU law, preventing the effective application of a European instrument.

If a Spanish judge decides to ask a preliminary ruling (Art. 267 TFEU) and is not allowed to maintain or grant provisional or precautionary measures until the decision of the CJEU, the useful effect of the preliminary ruling would be completely eliminated, which would be contrary to the doctrine of the CJEU in its judgments of 19 June 1990 (*Factortame* case C-213/89, paragraph 21) and 11 September 2014 (*A v. B and others* C-112/13, paragraph 37). The regulation of the PLOA is an impediment to the effectiveness that the decision of the CJEU could have.

The same applies to the appeals system, according to the CJEU of 26 September 2018 (Case *X and Y* C-180/17, paragraph 29), or the effective enforcement of judgments, according to the CJEU of 30 June 2016 (Case *DGRPF Brasov v Toma* C-205/15).

b) The PLOA implies a lack of protection of the European Union's financial interests.

The EU legal system (in particular Directive 2017/1371, mentioned above) clearly envisages fraud prevention by including effective and dissuasive sanctions for offences affecting the EU's financial interests (including embezzlement), which is completely undermined by considering amnesties to be amnestiable, This is completely undermined by considering a series of corrupt conducts to be amnestied, in a broad and unspecified manner in the PLOA, which would deprive fraudulent conducts affecting the EU's financial interests of effective sanctions, thus creating a panorama of impunity. The PLOA does not respect the minimum standards provided for in EU legislation, and also blatantly contradicts the recent doctrine of the CJEU in the judgment of 21 December 2021 (*Eurobox* case C-357/19), in the order of 7 November 2022 (*FX* case C-859/19), and in the SSTJUE of 24 July 2023 (*Lin* case C-107/23) and 22 February 2022 (*RS* case C-430/21), which sanctioned the Romanian domestic legislation (including its constitutional jurisprudence) as contrary to EU law for failing to protect the EU's financial interests and to combat corruption.

The introduction in Articles 1.1 and 1.4 of the possible immunity for embezzlement without the intention of enrichment, as opposed to embezzlement with enrichment that would not be amnestiable, in addition to introducing unjustified discrimination from the perspective of the protected legal interest (the proper use of public funds), continues to be detrimental to the protection of the EU's financial interests through effective and dissuasive prosecution, thus contravening the commitments assumed by Spain in this area, as has already been explained.

c) The PLOA is contrary to the principle of legal certainty (Art. 47 and 49 CDFUE).

The indeterminacy of the cases included and excluded from the scope of the amnesty, as will be seen later, is particularly evident. It is not limited to identifying certain individuals, nor a period of commission of crimes, nor specific events, nor certain types of crime, nor a degree of participation and execution of the acts, but rather establishes a general clause that affects all criminal acts committed with a certain ideological purpose, although they are not directly related to the consultations carried out in 2014 and 2017.

This open-ended regulation is contrary to the requirement of *lex certa* and legal certainty as laid down in Articles 47 and 49 CFREU. According to the settled case law of the CJEU, the principle of legal certainty requires rules to be clear and precise (see, to this effect, CJEU of 16 February 2022 (Case C-156/21 *Hungary v. Parliament and Council*, paragraph 223).

d) The PLOA is contrary to the principle of equality (arts. 20 and 21 CDFUE).

The principle of equal treatment is a general principle of EU law laid down in Articles 20 and 21 CFREU. This has been established repeatedly by the CJEU (see, in this regard, CJEU of 14 September 2010 (*Azko Nobel* case C-550/07)), which requires an explicit, objective and reasonable justification for establishing a difference in treatment by the national rule, which is absent in the PLOA MS. It is public and notorious that its raison d'être is not "the re-establishment of

social and institutional coexistence" but the need to comply with an investiture agreement. The PLOA (art. 1, 3, 4, 5 and 8) ends up incurring in a favourable, unjustified discrimination on the grounds of a specific ideology, while the punishability of the same offences, carried out for other purposes, in the same time and space, is maintained for the rest of the citizens. This discrimination can also be seen in the distinction between embezzlement with or without personal enrichment.

Furthermore, in paragraph eleven of section V of the MS, a proviso clause has been introduced with regard to the preliminary rulings of Article 267 TFEU, which establishes an unequal application of these in Spanish territory due to the amnesty, as will be seen later on.

e) The application of a State rule contrary to European Union law violates the right to effective judicial protection (art. 24.1 EC), from the perspective of an unreasonable and arbitrary selection of the rule [see, in this regard, STC 232/2015, of 5 November, FJ 5.c), citing STC 145/2012, of 2 July, FFJJ 5 and 6].

f) Non-compliance with European standards on the rule of law (Art. 2 TEU) could trigger the mechanisms provided for in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general system of conditionality for the protection of the Union budget. A Regulation which, according to its preamble (paragraph 7), is based on "respect for the rule of law" as an "essential condition to comply with the principle of sound financial management laid down in Article 317" TFEU, given that (paragraph 13), there is "a clear link between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principle of sound financial management". A Regulation that has been validated by the SSTJUE of 16 February 2022 (*Hungary and Poland v. European Parliament and Council of the European Union* C-156/21 and 157/21, respectively).

3. The CJEU and the ECtHR do not endorse the compatibility of the PLOA with EU law.

As already anticipated, the European jurisprudential and normative reviews contained in Section I of the PLOA MS do not allow to endorse the compatibility of this legislative proposal with EU law.

a) Analysis of the judgments of the CJEU.

(i) CJEU of 29 April 2021 (Case *X* C-665/20).

According to the MS, this judgment recognises the possibility of the existence of amnesties and states that amnesties "are intended to remove the criminal nature of the acts to which they apply, so that the offence can no longer give rise to criminal proceedings and, where a sentence has already been imposed, to put an end to its enforcement, thus implying, in principle, that the sanction imposed can no longer be enforced".

However, this judgment is not applicable to the case at hand, as it responds to the interpretation of European law on the *non bis in idem* principle. More specifically, on the interpretation of art. 4.5 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (as amended by Council Framework Decision 2009/299/JHA of 26 February 2009). The facts were that on 19 September 2019, the *Amtsgericht Tiergarten* (Berlin-Tiergarten Civil and Criminal *Court*) issued a European Arrest Warrant against X requesting his surrender for criminal proceedings for certain acts he allegedly committed in Berlin, Germany, on 30 October 2012. [X allegedly tied up Y, his partner at the time, and Y's ten-year-old daughter Z by threatening them with a knife. He then raped Y before mutilating her. Before leaving Y's home, he locked the doors of the respective rooms in which Y and Z were tied up in order to kill them]. X was tried in Iran for the above offences, with the exception of the unlawful detention of Y, which, in its material elements, was subsumed under the attempted voluntary manslaughter of the latter. At the end of the proceedings in Iran, X was convicted by a final judgment for the assault and battery of Y and for the attempted murder of Y and Z. He was acquitted by a final judgment. In contrast, he was acquitted by final judgment of the charges of rape of Y and unlawful detention of Z. Under Iranian law, X only had to serve the most severe of the

custodial sentences imposed on him in that State for the acts of which he was convicted by final judgment, namely a custodial sentence of seven years and six months. X had already served most of that sentence. He was granted remission of the remaining sentence as part of a general amnesty measure proclaimed by the country's Supreme Leader on the occasion of the 40th anniversary of the Iranian Revolution.

The citation of this judgment in defence of amnesty as an instrument of the right of pardon recognised at EU level lacks, to put it mildly, technical-legal rigour: (i) firstly, because the judgment itself does not rule on the application of the amnesty approved by a Member State, but by a third state, Iran, which is not part of the common European area and therefore not subject to the principle of mutual trust; (ii) secondly, because the stay of execution of the European enforcement order is not automatic in this case, but, as paragraph 103 of the judgment states, "*in exercising the discretion available to it, the executing judicial authority must weigh, on the one hand, the prevention of impunity and the fight against crime and, on the other hand, the guarantee of legal certainty for the person concerned, in pursuit of the objective assigned to the Union of constituting an area of freedom, security and justice, in accordance with Article 67(1) and (3) TFEU*". What the Court is pointing out in this case is that the executing judicial authority must weigh up the circumstances in which the amnesty is granted, in order to prevent impunity for the offences committed and to guarantee the legal certainty of the person convicted in a third country for the same offences for which he was prosecuted in Germany, although it has the margin of discretion afforded to it in the case of an amnesty granted by a State outside the EU; (iii) finally, it should be added that this CJEU has been handed down in the very specific context of the impact of the amnesty granted in a third State to the perpetrator of a series of offences for which he was convicted in that State, which may be accepted, within the EU, by two Member States, the issuing State (in this case, Germany) and the executing State (the Netherlands). In other words, it does not even offer a general approach to the scope and effectiveness of this extraordinary pardon within the EU.

In short, the CJEU specifically states that it is up to the executing judicial authority, within its margin of discretion, to weigh the prevention of impunity and

the fight against crime against the guarantee of legal certainty (prohibition of procedural *bis in idem*) of the person concerned. Consequently, as opposed to the automatic application of a supposed amnesty, the CJEU considers that there is a judicial power of balancing which allows the exercise of legal pardon to be interpreted restrictively.

In any case, it is particularly striking that this case is used, bearing in mind the nature of the facts and the fact that the amnesty had not been granted by a European Union state, but by the authorities of a political regime far removed from European standards in the protection of fundamental rights.

In spite of all this, Art. 4, b) PLOA eliminates any possibility of judicial appreciation in cases of European Arrest Warrants, by imposing that they be without effect.

(ii) CJEU of 16 December 2021 (case *AB and others* C-203/20)

According to the PLOA MS, the Court established the "possibility of closing criminal proceedings and terminating sentences on the basis of judicial decisions under an amnesty resulting from a legislative procedure". In fact, the substantive dispute was the possibility of issuing a European arrest warrant against a person who had been the subject of criminal proceedings which were initially closed because of a final judicial decision taken under an amnesty granted by the President of the Slovakian government in 1998, and which were resumed following the adoption of a 2017 law revoking that amnesty and annulling that judicial decision (paragraph 34), a revocation which was upheld by the Slovakian Constitutional Court. The CJEU upholds the issuance of an order in those circumstances. In fact, the CJEU ruling could even be understood as incompatible with the PLOA promoters' approach.

Paragraph 61 of the judgment states that '*the issuing of a European arrest warrant against a person who has been the subject of criminal proceedings which were initially closed because of a final judicial decision taken under an amnesty and which were resumed after the adoption of a law repealing that amnesty and annulling that judicial decision, where the latter was adopted prior*

to any assessment of the criminal liability of the person concerned, does not preclude the issuing of a European arrest warrant'. In other words, a subsequent legislative provision of an EU Member State which, by virtue of that provision, repealed the previously adopted amnesty law and thus authorised the reopening of criminal proceedings against persons involved in criminal cases which had been closed without final judgment as a result of the application of an amnesty adopted by the repealed law, thereby allowing the issuing of European arrest warrants against those persons, would not be contrary to EU law.

It is clear that the citation of this judgment in the preamble to the Law is, to say the least, unfortunate, given that the objective scope of the amnesty provided for in Art. 1 PLOA does not appear to be compatible with this CJEU doctrine. According to this doctrine, the closure of criminal proceedings that have not yet been concluded and are pending a final judicial decision, in application of an amnesty law, would not prevent the subsequent issuing of a European arrest warrant and, consequently, the prior reopening of those proceedings, if a subsequent national amnesty law repeals the previous one. In other words, the procedural *non bis in idem* principle only applies when the case has been examined on the merits. This examination does not seem feasible in view of what is proposed in Art. 11 PLOA, which imposes a free dismissal of the proceedings, without any possibility of examining the merits of the case from the perspective of the guilt or otherwise of the accused person.

b) Analysis of the ECtHR judgements

According to the MS, the ECtHR has recognised the "validity and political expediency of the amnesty, setting as a limit the serious violations of human rights", citing as an example the ECHR of 27 May 2014 (*Marguš v. Croatia*). In this particular case, the applicant was a Croatian citizen who in 2007 was convicted in Croatia, as a former commander of the Croatian army, of war crimes against the civilian population. It was alleged that his right to be tried by an impartial tribunal and to defend himself in person had been violated, and that the criminal offences for which he had been convicted were the same as those for which proceedings against him had been terminated in 1997 pursuant to the General Amnesty Law adopted in Croatia after the war (Art. 6 ECHR and Art. 4

of Protocol 7 ECHR). The ECtHR declared the non-violation of Article 6 (right to a fair trial) and the non-applicability of Article 4 of Protocol 7 (*non bis in idem*). The ECtHR noted the existence of a growing tendency in international law to consider unacceptable the granting of amnesties in respect of serious human rights violations (paragraph 139); and that this possibility could be limited by the Treaties to which the State is a party (paragraph 132). However, the ECtHR concludes that "*even if one were to accept that amnesties are possible where there are some particular circumstances, such as a process of reconciliation and a form of compensation to the victims*", the amnesty granted in that case "*is still not acceptable as there is nothing to indicate that such circumstances have been met*" (paragraph 139).

Nor does this jurisprudential precedent serve to give international coverage to a domestic legislative initiative of a member state of the Council of Europe, not only because the factual assumption referred to by the ECtHR was of an unusual gravity, not comparable to the facts to which the amnesty in Spain seeks to be applied, but also because the Court limited itself to judging this specific factual assumption. This is a judgement which deals with a radically different matter to those which constitute the scope of application of the PLOA and, in any case, the fact that international treaties can limit the granting of an amnesty in cases of serious human rights violations does not imply, in any way, that it is necessarily permitted in all other cases.

From all that has been said so far in relation to the case law emanating from the European Courts cited in the MS, it is not possible to draw any conclusion that could support the adequacy of the PLOA to the EC of 1978. This aspect of the right of pardon, like that of pardon, are matters in which the conventional EU norms and their interpretation by the corresponding Courts start from the same and unique presupposition, which is the recognition of the sovereignty of the Member States of the EU or of the Council of Europe to establish their own internal systems and the Courts and legal instruments necessary to examine their adequacy with the corresponding constitutional texts.

In the case of the CJEU, it only enters into a review of the domestic rules of a Member State, by way of a preliminary ruling question submitted by the national

courts, when they contradict the provisions of EU rules and provisions, in order to demonstrate the validity of the principle of the primacy of the EU over the provisions of the domestic law of the State concerned, but in no case does it extend its ruling beyond the strict limits of whether or not the national rules that are submitted to it for review are in accordance with EU law.

The ECtHR, for its part, does not even judge the content of the domestic law of the member states of the Council of Europe, but limits itself to applying the ECHR and its Protocols to the individual cases that are submitted to it in order to determine whether or not, in the application of the domestic rules of the member state, the rights of the ECHR have been violated.

Therefore, citing this European jurisprudence does nothing to strengthen the argument that the amnesty to be approved in Spain is in accordance with the EU Treaties or with the ECHR and its Additional Protocols.

V. THE VENICE COMMISSION DOES NOT ENDORSE THE COMPATIBILITY OF THE PLOA WITH THE SPANISH CONSTITUTION OR WITH EUROPEAN UNION LAW

1. General considerations

The so-called "Venice Commission" (hereinafter VC), whose official name is the "European Commission for Democracy through Law", is a consultative body of the Council of Europe. Its mission is to support and assist member states, in particular those wishing to align their institutional and legal structures with European standards and international experience in the field of democracy, human rights and the rule of law. Established in 1990, it currently has 61 member states, including the 46 member states of the Council of Europe, plus four observer countries and two other countries with which special cooperation is maintained. The VC works in three main areas: democratic institutions and fundamental rights; ordinary and constitutional judicial systems; and electoral systems, referendums and political parties. The statutes of the VC were approved, in their current version, by Resolution (2002)3 of 21 February 2002, adopted by the representatives of the Committee of Ministers of the member

states, while its rules of procedure are set out in CDL-AD (2018) 018-e, adopted at its plenary meeting in October 2018.

Due to its nature and legal system, and its status as a body composed of countries with very different legal cultures, the opinions of the VC cannot pronounce on the constitutionality or otherwise of a rule such as the PLOA or on its compatibility with European Union law. This would imply the assumption of the functions of the Constitutional Court or the Court of Justice of the European Union.

However, the general doctrine emanating from this Commission, as well as the Opinions issued on specific amnesty projects, including the PLOA, make it possible to rule out the possibility that the VC could endorse the content of this bill, from the perspective of its compliance with European standards on the rule of law, as will be explained below.

2. T he Venice Commission's doctrine and Opinions on the rule of law and amnesty laws

The Venice Commission has developed a solid doctrine on the requirements that a state based on the rule of law must meet, as set out, among other instruments, in the so-called "Rule of Law Checklist". These requirements, in turn, have been transferred to the Commission's Opinions, which have analysed two specific amnesty projects, one of them the PLOA itself, from the perspective of their compatibility with European standards in this area. The content of these reports and opinions will be briefly outlined below for further assessment.

2.1 The so-called Rule of Law Checklist.

This text was adopted at the 106th plenary meeting in March 2016 (CDL-AD (2016) 007 of 18 March 2016) and is based on the Rule of Law Report adopted at the 86th plenary meeting in March 2011 (CDL-AD (2011) 003 rev of 4 April 2011). According to the contents of this *checklist*, a state based on the rule of law must respect, inter alia, the following criteria:

-A.5: The legislative process must be transparent, inclusive, accountable and democratic. This means that it must be open to input from different sectors of society and to analysis of its impact.

-II.B.3.i: Legal certainty. The rule must be drafted in such a way that its interpretation and application is reasonably foreseeable.

-B.7: Application of the principles *nullum crimen sine lege* and *nulla poena sine lege*. All criminal law must be drafted clearly and precisely, as a prerequisite for its interpretation and application.

-Paragraph II.D.3.iii: Equality before the law. Rules may not introduce differences of treatment that are not justified or based on specific or individual, not general, criteria.

2.2 The Venice Commission's Opinion of 11 March 2013.

The new wording of paragraphs V and VI of the Preamble of the PLOA, introduced by compromise amendments approved by the Congressional Justice Committee at its meeting of 7 March 2024, contains several references to the Venice Commission and, in particular, to the Opinion adopted at its 94th plenary session held in March 2013. This is, as far as is relevant here, the Opinion on the provisions on political prisoners in the Georgian Amnesty Law (CDL-AD (2013) 009 of 11 March). The PLOA MS notes that the aforementioned VC Opinion "emphasised the importance of maintaining a clear distinction between the legislative and judicial branches in the implementation of the amnesty, ensuring respect for judicial autonomy and democratic principles". Thus, "it is for the legislature to establish the criteria for eligibility for amnesty and for the judiciary to identify the specific persons falling within the scope of application established by the legislature".

As can be deduced from its text (paragraph 13), the subject matter of that Opinion was limited exclusively to the analysis of Article 22 of a Georgian Amnesty Law, adopted on 22 December 2012, insofar as it referred to a resolution of the Georgian Parliament adopted three days earlier, which

included a list of persons considered to be political prisoners, who would be subject to the amnesty. For the SC, by choosing to list the names of the persons to whom the rule would apply, the Parliament substituted itself for the judiciary, which should in principle have been entrusted with deciding whether the persons met the criteria that the Parliament had determined (paragraph 43).

2.3 The Venice Commission's Opinion on the PLOA

On 15 March 2024, at its 138th plenary session, the Venice Commission adopted its Opinion on the PLOA [CDL (2024)011].

The first thing to note is that this report is based on the text of the PLOA as it was originally drafted, i.e. when it was submitted to the register of the Congress of Deputies (13 November 2023), although it takes into account some of the amendments introduced during the parliamentary procedure before that legislative chamber.

Secondly, the SC itself states in paragraph 10, i.e. practically from the outset of its opinion, that it is not for it to judge the compatibility of the PLOA with the EC or with EU law, on the understanding that such controls correspond to the Constitutional Court and the CJEU, respectively.

In terms of content, the Opinion begins with a description of the legislative procedure followed, followed by a comparative analysis of the existing amnesty provisions in the Commission's Member States. This is followed by a description of the requirements which, according to the SC, must be met by any draft amnesty legislation from the perspective of the rule of law. The Opinion then analyses the PLOA and its compatibility with European standards on the rule of law and, in particular, on amnesty for terrorist, embezzlement and corruption offences, and on the procedural powers of judges and courts. In this way, the VC responds to the specific questions included in the request for a report formulated by the President of the Spanish Senate, through the President of the Parliamentary Assembly of the Council of Europe.

As could not be otherwise, the Venice Commission reiterates its criteria on the standards that an amnesty law should follow, from the perspective of compliance with the rules of the rule of law, which had already been established in its previous Reports and Opinions which, in substance, have already been reviewed.

The conclusions and recommendations of the Venice Commission on PLOA can be summarised as follows:

(a) The Commission considers that the material and temporal scope of application of the amnesty should be more precisely defined in order to make the effects of the law more predictable. In this respect, the recent extension of the temporal scope by two months, without justification, is a matter of concern. Furthermore, it recommends establishing a closer causal link between the consultations, their preparation and consequences, and the crimes of embezzlement and corruption, so as to serve as a principle of interpretation for the application of the amnesty. Regarding the exclusion of terrorist crimes, the principle is that amnesties are only compatible with international standards if they do not include serious human rights violations (paragraph 114).

b) According to the Commission, the PLOA does not raise problems of separation of powers in the light of the provision for the lifting of search warrants, detention and precautionary measures, although, as already stated, the Commission does not contain any analysis of constitutionality. What it does state is that the PLOA must be interpreted in such a way that it does not deprive judges of the power to review the practical effects of the Law itself (paragraph 115).

c) Finally, the Venice Commission appreciates that the PLOA has been presented as a draft law, which is a procedure without public consultation, neither to the actors nor to other state institutions, and that it has been processed through the urgency procedure. Moreover, the PLOA has widened the deep and strong division of the political class, institutions, judiciary, academia and society in Spain. The VC therefore encourages the Spanish authorities and political parties to take the necessary steps, and in a timely

manner, to establish a meaningful dialogue, in the spirit of loyal co-operation with state institutions and with the majority of the opposition, in order to achieve political and social reconciliation and to explore possible restorative justice procedures. With regard to the considerations on the need for a broad qualified majority for the approval of amnesties, the Commission recommends the authorities to reach a broader qualified majority than the mere absolute majority required for organic laws (paragraph 117).

3. Assessment and conclusions

As already anticipated, and as will also be discussed below, the PLOA does not meet some of the European standards on the rule of law set out in the Venice Commission's Opinions.

Firstly, it is incomprehensible that the Preamble has used an Opinion of the Venice Commission as an argument to legitimise this draft legislation, which in reality does nothing more than highlight its notorious shortcomings. The Georgian Amnesty Law can be considered a unique draft law, to the extent that it provided a list of persons eligible for amnesty. Even the PLOA has not gone that far, although successive negotiations and parliamentary procedures might suggest a certain willingness to do so. However, the aforementioned Venice Commission Opinion says a few more things.

To begin with, it notes that amnesty laws must respect the principles of legality of the rule of law, the prohibition of arbitrariness, non-discrimination and equality before the law (paragraph 34). It also notes that the criteria for selecting the cases [to which the rule would apply] were not disclosed to the public, so that the procedure lacks the necessary element of transparency (paragraph 39) and therefore appears to be arbitrary (paragraph 49). Moreover, the rule did not specify which offences are covered and for what period (paragraph 48).

These are deficiencies that, in reality, could be perfectly predictable of the PLOA. The same is true of this Commission's Opinion on the PLOA itself, which, as has already been explained, does not allow its compatibility with European standards or with the EC to be endorsed.

Its parliamentary processing by means of a bill has prevented it from obtaining reports from the corresponding consultative bodies (the Council of State, the General Council of the Judiciary and the Public Prosecutor's Council, significantly). Its urgent processing has made it impossible to carry out a calm study of the impact of the law on the achievement of the aims it is said to be intended to achieve. Despite the argumentative efforts contained in section VI of the Preamble of the PLOA, the notorious indeterminacy of the subjective and objective spheres, as well as its temporal delimitation of application, introduce factors of unpredictability contrary to the most elementary principles of certainty predictable of a rule of a criminal nature. And the same is true of the absence of objective criteria that reasonably justify the conducts included and excluded, which does not allow this legislative proposal to be assessed as anything other than arbitrary and contrary to the principle of equality before the law. All of this will be insisted on below.

VI. ANALYSIS OF THE PREAMBLE OF THE PLOA

General considerations

The PLOA presents, from the outset, an unusual preamble, given its considerable length in relation to the content of the regulatory text that follows. Likewise, also as a preliminary consideration, the repeated eagerness of the explanatory memorandum to provide a numerous list of arguments aimed at justifying, on the one hand, the reasons for its convenience for the general interests of our country "such as the need to overcome and channel deep-rooted political and social conflicts", as well as for the normal development of coexistence in Spanish society, which was altered by the events that took place in Catalonia in October 2017 and two years later, in 2919 when, on the occasion of the sentence of 14 October of that year by the Criminal Chamber of the Supreme Court, which convicted many of the people who had directed the criminal acts related to the so-called *"procés",* serious disturbances took place in various cities and important infrastructures in Catalonia. On the other hand, the preamble reflects the particular interest in justifying the constitutional goodness of the law, establishing different parameters and terms of comparison

which, we must anticipate, do not undermine the unconstitutionality of a law which aims to approve an amnesty, regardless of the considerations which, in general, we have already warned about in previous sections, regarding the possible unconstitutionality of any legislative initiative which tends to approve the granting of the same.

A detailed analysis of the text of the Preamble leads us, as a preliminary consideration, to realise that it contains a series of arguments that must be refuted from a strictly legal perspective, assessing their sufficiency and reasonableness in order to justify this legislative initiative. To this end, it is first necessary to address the normative value of the initiative, in order to then analyse some of the lines of argument with which it is intended to validate this initiative, and which singularly affect the correct understanding of the justice system in a social and democratic State governed by the rule of law, as well as elementary legal principles.

As already stated in STC 31/2010, of 28 June (FJ 7), citing STC 36/1981, of 12 November (FJ 2), a "*preamble has no normative value* (...). *However, lack of normative value is not the same as lack of legal value*". More specifically, preambles or explanatory statements "*have a legally qualified value as a guideline for the interpretation of* [the] *rules*" and, therefore, are not "*inaccessible to a pronouncement of* [the] [constitutional] *jurisdiction as a possible accessory object of a process referring principally to a normative provision*".

In the case of the PLOA, the lack of express constitutional authorisation for such a measure makes the explanatory memorandum an integral part of the body of law itself. In such a measure, the "what" is as important as the "why". In fact, the "what" can only be defined by the "why", i.e. the articles are dependent on the reasons which justify the text, and which define the basic parameters on which it is developed. Only that which merits amnesty can be amnestied. Therefore, the reasons that justify the amnesty are as or more important as the provisions that grant it. In any case, and beyond the consideration of its normative value, the MS must contain the reasons for which the amnesty is

granted, which must be appropriate to the constitutional principles and values that can justify an exemption from criminal responsibility.

2. The historical background of the amnesty in Spain cannot be used as a basis for the constitutionality of this amnesty.

One of the reasons put forward in section I of the MS to justify this legislative proposal is the use "on numerous occasions" of the figure of amnesty which, therefore, would not be a "new way" in "our legal-political tradition". Such an assertion, which tends to value this undoubtedly exceptional legislative initiative as normal, cannot be assumed uncritically or, at least, without an elementary clarification, such as the fact that previous amnesties were granted in social, political and, above all, legal contexts that were radically different from the current one.

Thus, to give some significant examples, art. 74.5 of the 1869 Constitution authorised the King, by means of a special law, to grant amnesties and general pardons. For its part, art. 102 of the 1931 Constitution conferred on Parliament (at that time unicameral, consisting of the Congress of Deputies), as an exclusive power, the granting of amnesties. This prerogative was used during the Second Republic (Law of 24 April 1943, or the Decree-Law of 21 February 1936; in addition to the Decree of 14 April 1931, which granted an amnesty on the same day as the proclamation of the Republic).

Special mention should be made of the numerous amnesties or general pardons granted during the Franco dictatorship, which exercised this power for the most varied reasons (political, religious events, etc.)[19] , with the consequent breakdown of the principle of legal certainty and the image of the Administration of Justice, in the words of constitutional amendment no. 744, mentioned above.

In any case, it does not seem reasonable to justify the amnesty proposal that is now being formulated on the basis of precedents protected by constitutional

[19] Among other examples: Decree of the Presidency of the Government of 31 October 1958 (BOE of 7 November 1958); Decree of the Presidency of the Government 1824/1961 of 11 October 1961 (BOE of 12 October 1961); Decree of the Presidency of the Government 1504/1963 of 24 June (BOE of 2 July 1963); Presidential Decree 2136/1965 of 22 July 1965 (BOE of 24 July 1965); Presidential Decree 3288/1969 of 18 December 1969 (BOE of 31 December 1969); or Presidential Decree 2326/1971 of 23 September 1971 (BOE of 1 October 1971).

texts that allowed them, or subject to a legal-political regime that has nothing to do with a social and democratic State under the rule of law established with the EC of 1978.

3. Comparative law precedents cannot support the constitutionality of this amnesty.

The same section I of the MS also alludes, as a weighty argument to justify this measure, to the recognition of amnesty "in the constitutional order of a good part of the countries of our geographical environment and legal influence", with express mention of Italy, France and Portugal. However, these precedents respond to a constitutional legal-political configuration which has nothing to do with the EC.

The Constitutions of the Republic of Italy in 1947 (art. 79), the Republic of France in 1958 (art. 34) and the Republic of Portugal in 1976 (art. 161) attribute to their legislative assemblies the power to approve amnesties or amnesty laws, which is not the case in Spain. This is particularly significant in the cases of Portugal and Italy, whose Constitutions expressly distinguish between general legislative powers and those of granting amnesties (art. 161, paragraphs c) and f) of the Portuguese Constitution; and arts. 70, 71 and 79 of the Italian Constitution).

In other EU countries such as Germany, also cited in the MS, the Bonn Basic Law [*Grundgesetz*] does not expressly provide for amnesty; a silence that was considered by the German Constitutional Court to be permissive of the *Gesetz über die Gewährung von Straffreiheit*, i.e. the Amnesty Law of 1949 (Judgment of 22 April 1953, BVerfGE 2, 213). However, the German constitution does not prohibit general pardons [as does Art. 62 (i) EC], nor did the 65 members of the *Parlamentarischer Rat who* drafted it discuss in 1949 whether amnesty should be included in it, nor did they expressly reject amendments which sought to introduce amnesty into the powers of the chambers representing the sovereignty of the people. Moreover, in German law, general pardons are recognised as having the same legal status as *amnesties*, to the extent that they are referred to as *amnesties*, as opposed to private *pardons*. In any case,

the amnesties granted in Germany (laws of 1949, 1954 and 2009, among others) had to do primarily with the serious consequences of all kinds caused by the Second World War, and with the persecution of people who had embraced Nazism during the years immediately before and during the Second World War, in a context, moreover, of global confrontation (Cold War) between two antagonistic blocs, with different conceptions of democratic and social life. Neither the scale nor the consequences of those amnesties had anything to do with those that constitute the de facto assumptions on which the PLOA is based.

As regards the other countries mentioned in the text of the Preamble, with express mention of the Kingdoms of Belgium and Sweden and the Republic of Ireland, it should be noted that none of their Constitutions (Belgium's 1831 Constitution, Sweden's 1974 Constitution and Ireland's 1937 Constitution) refers expressly to amnesty, Although it is true that amnesties have been granted in these countries, all of them, like those mentioned above, have referred to circumstances of serious crises of all kinds, particularly those related to the serious consequences of the Second World War. For example, the Republic of Ireland passed an Act in 2013, which granted amnesty to thousands of people who deserted during the Second World War and were court-martialled or tried before a tribunal. As can be seen, therefore, neither the temporal context, nor the circumstances, nor the subjective and objective scope of that amnesty bear any resemblance to that of the proposed Organic Law that is the subject of this report.

4. The TC has not declared the amnesty constitutional.

STC 147/1986, of 25 November 1986, cannot be used as a precedent to affirm that "[t]he constitutionality of the amnesty was declared by the Constitutional Court", as is maintained, in a very lax, not to say openly mendacious manner, in section IV of the MS of this legislative initiative.

In the first place, the purpose of this ruling was to resolve a question of unconstitutionality brought against certain precepts of Law 1/1984, of 9 January. Specifically, "*Law 1/1984 was questioned in its necessary connection with*

articles 5 and 8 of Law 46/1977, of 15 October, on Amnesty, which refer to the "active rights" of employees. Thus, the following analysis must be restricted to this specific point of the problem posed by Law 1/1984" [FJ 1.b)]. What the Court resolved were several questions of unconstitutionality that had been brought by different judicial bodies on the very specific issue of the imprescriptibility of actions for the recognition of the rights established in Law 46/1977. To this end, Law 1/1984 had added a precept, Article 11 bis to the previous Law 46/1977, which proclaimed the imprescriptibility of the actions in question, and an Additional Provision, which authorised the interested parties to request the application of the Amnesty Law, even when there had been a judicial decision declaring the proceedings inadmissible due to the statute of limitations of the action. In short, what was at issue was a rule of imprescriptibility of actions in the context of employment contracts, "*which clarifies some disputed aspects of the legal regime of the 1977* [Amnesty] *Law, in which the exercise of the power of pardon actually materialised*" (FFJJ 1 and 2). Therefore, it did not address the analysis of the 1977 Law, but rather a subsequent law, issued within the constitutional framework. In other words, STC 147/1986 had a much more limited scope than that stated in the Preamble to the PLOA.

In this judgment, the Court reproaches Law 1/1984 and, therefore, declares the unconstitutionality of the new precepts incorporated, that, having not established in the initial 1977 law any clause relating to the statute of limitations for actions and, therefore, to the possibility that the exercise of the actions to claim the rights recognised therein would lapse when the periods legally provided for in other rules of the legal system had elapsed, that statute of limitations was subsequently introduced, the possibility that the exercise of actions to claim the rights recognised in it would lapse when the periods legally provided for in other rules of the legal system had elapsed, was subsequently introduced, thereby producing a new exception to the already exceptional regime that the granting of the 1977 amnesty entailed. It therefore considered that this was a measure which "*compressed*" even further the principle of legal certainty (art. 9.3 CE) and, for this reason, declared the two precepts of Law 1/1984 unconstitutional.

Secondly, what this judgement does do is describe the basic characteristics of an amnesty law such as that of 1977, which have nothing to do with the proposal now being put forward. As has already been explained, and should now be recalled again, the Court states (FJ 2) that amnesty "*is a legal operation which, based on an ideal of justice (STC 63/1983), aims to eliminate, in the present, the consequences of the application of a certain regulation - in a broad sense - which is rejected today as contrary to the principles inspiring a new political order. It is an exceptional operation, typical of the moment of consolidation of the new values it serves* (...). *In some cases, normally for relations in which the state appears to be involved as a public power, the application of amnesty will involve what the doctrine has called "retroactive derogation of norms", making the restrictions suffered by the right or freedom affected disappear completely, with all its consequences, so that it can be said that the right is revived retroactively*". Therefore, the Court describes the 1977 Law as inspired by the principle of "*justice*", and which appears to be framed in a "*new political order*" which, exceptionally, must consolidate "*new values*", because it implies a "*critical judgment on a whole historical period*" (FJ 4). None of this is contemplated by the PLOA which, in various passages of sections II and III of the MS, refers to concepts such as "understanding", "dialogue", "coexistence", "respect", "negotiation", "general interest", "economic stability", or "cultural and social progress" which, clearly, cannot be understood as new values or principles different from those already included in our constitutional text. If we follow the literal meaning of the expressions used at the time by the Constitutional Court to refer to amnesty, any specific manifestation of this institute in which these two elements (justice and new political order) do not concur cannot justify the approval of an amnesty, because, if it does, it will be undermining the values of the Rule of Law, in particular the equality and freedom of citizens. If the amnesty is granted purely for reasons of necessity or political expediency, which may benefit certain citizens in the short term, the amnesty thus granted clearly contravenes the principle of equality before the law and profoundly affects the separation of powers and the exclusive powers of one branch of the State, the judiciary.

Furthering the partial and biased reading of the Constitutional Court's pronouncements, section V of the PLOA's MS refers to the "requirements" that

the Court has supposedly established to validate a "law of these characteristics", referring to the PLOA itself, which are specified in the "constitutional principles". To this end, it cites SSTC 28/1982 of 26 May 1982, 63/1983 of 20 July 1983 and 116/1987 of 7 July 1987, among others. However, the PLOA does not expressly refer to any of these principles which, as far as we are concerned, are specified in the principle of equality (art. 14 EC). This was determined by the purpose of the proceedings in which these rulings were handed down, which had nothing to do with the declaration or otherwise of the constitutionality of the 1977 Law. Thus, in STC 28/1982, the retroactive application of the Decrees of 26 August 1936 and 13 February 1937 on the recognition of rights as members of the Republican militias was invoked (FJ 2); STC 63/1983 dealt with the possible discrimination between certain military civil servants in relation to civil servants, as a consequence of the application of the 1977 Law (FJ 1), which the Court resolved by rejecting the claim that the contentious-administrative jurisdiction was competent to review the Government's omission to promote a legislative initiative aimed at recognising greater equality between the two types of civil servants (FJ 7); finally, in STC 116/1987, various precepts of Law 37/1984, of 22 October were analysed when defining the rights corresponding to the personnel of the Armed Forces of the Republic and, more specifically, whether the temporal criterion used in that law was the same as that of the Armed Forces of the Republic, whether or not the temporal criterion used in that law (the consolidation of definitive military employment before or after 18 July 1936) for the recognition or not of the rights derived from the amnesty was compatible with the principle of equality, and the Court concluded that, if no temporal reference was taken into account for civil servants, neither could there be any for military personnel.

Therefore, a comprehensive reading of the SSTCs reviewed in the PLOA MS makes it possible to rule out their use as an argument to affirm that the Court has "declared" the constitutionality of the figure or institution of amnesty.

In another order of things, and in the context addressed by STC 147/1986, the Court made some assertions, which are included in the MS now analysed, the scope of which should be qualified. Thus, the qualitative differences between pardon and amnesty are set out as *obiter dicta* arguments, after expressly

stating that the Court does not enter into the debate on the contravention of the amnesty with the provisions of Article 62.i) EC (FJ 2). In fact, the premise from which the Court starts to resolve the case is that "*Law 1/1984 does not even imply in itself a manifestation of the exercise of the right to pardon*", so that the "*problem lies in determining whether the legislator, who could specify this legal regime* [that of the 1977 amnesty], *as there is no direct constitutional restriction on this matter, has not violated other constitutional provisions with the content of the aforementioned law*". In other words, the expression that "there is no direct constitutional restriction on this matter" does not refer to the figure or institution of the amnesty, as the MS of the PLOA biasedly points out in the first paragraph of section IV, but to the clarification carried out by a law subsequent to the EC on the legal regime of an amnesty granted before the EC came into force.

5. On the considerations justifying this amnesty

Sections II, III and IV of the PLOA MS contain a series of general considerations that contextualise and justify this legislative initiative and which, in view of their content and their possible legal value as interpretation criteria for the application of the rule, need to be analysed and, if necessary, refuted.

5.1 On the contextualisation of this legislative initiative and the role of the justice system.

As set out in section II of the MS, the PLOA aims to grant amnesty for "acts that have been declared or were classified as crimes or as conduct determining administrative or accounting liability, linked to the consultation held in Catalonia on 9 November 2014 and the referendum of 1 October 2017", both declared unconstitutional, and carried out during a certain period of time.

The justification for this measure contains some general considerations that deserve at least some qualification and, in some cases, severe criticism.

a) The references to STC 31/2010, of 28 June, as having generated an "intense debate on the political future of Catalonia" which would have acted as a

"precedent" for the amnestiable acts seems to suggest the idea of a certain responsibility in the attribution of a so-called "political conflict" which, if it existed, would appear to be "sustained over time", that is, prior to that pronouncement. In any case, the ordinary functioning of the rule of law cannot give rise to any responsibility for the serious events that amnesty is sought for; responsibility that can never reside in a pronouncement by the highest body responsible for overseeing the constitutionality of any rule with legal rank and, therefore, for the regularity of the rules of the game which, precisely, are the basic prerequisite of any rule of law. The only people responsible for these events were the perpetrators.

b) The intervention of the judiciary was not provoked by "institutional tension", as stated in the MS, but by the alleged commission of criminal acts that it is the responsibility of the organs of the judiciary to investigate, by constitutional mandate (art. 117.3 EC).

c) The same is true of the references to the "disaffection of a substantial part of Catalan society" or to the "serious disruption (...) in social coexistence", which also seems to be attributed to judicial action when, in reality, it can only be attributed to those who, flying the flag of rights and freedoms, only sought to suppress the rights and freedoms that all Spanish citizens have given us through the Constitution and the laws. And, in particular, the Spanish citizens residing in Catalonia who, at a certain moment, when the Republic of Catalonia was fleetingly proclaimed by the then President of the Generalitat, were deprived of their Spanish nationality and their rights as citizens of an EU Member State, as well as of all their rights recognised by the EC and the Spanish legal system.

d) And the same applies to expressions such as "renunciation of the exercise of *ius puniendi* for reasons of social utility based on the pursuit of a higher interest: democratic coexistence"; or "the application of legality is necessary, but, on occasions, it is not sufficient to resolve a political conflict sustained over time"; or "the instruments available to the rule of law are not, nor should they be, immovable; given that it is the law that is at the service of society and not the

other way round, and that it should therefore have the capacity to update itself by adapting to the context of each moment".

In the rule of law instituted by the EC, the submission of all public authorities and citizens to the rule of law (art. 9.1 EC), particularly constitutional law, is a fundamental pillar of democratic society. Shortcuts are not possible, nor are utilitarian ideas or approaches, with the establishment of rules that contravene the principles of equality before the law for all citizens and the separation of powers, in order to achieve ends that do not necessarily coincide with those stated in the MS. In a State governed by the rule of law, political conflicts are resolved in the Parliamentary Chambers, but when those who hold certain constituted powers, in this case the Government of the Generalitat and the Parliament of Catalonia, whose democratic legitimacy is based on the EC itself, seek to be used to breach and infringe it by committing very serious criminal acts, in some cases already assessed and their perpetrators convicted by final judgement or, in others, still allegedly committed by persons subject to criminal proceedings in progress or necessarily suspended due to their alleged perpetrators being in absentia and fleeing from justice, there can be no question of political conflict, but only of criminal acts to which Justice, equally emanating from the sovereign people as those constituted powers, must respond.

Conflict has the character of "political" when, within the limits of the EC and the Law, and using the channels established by the Rule of Law, opposing approaches and initiatives are confronted, which have to be resolved in Parliament, with a majority vote in favour of one of the opposing positions, always adopted with respect for minorities. However, when what is seen is that a series of people, who hold high responsibilities within an Autonomous Community, use the powers conferred on them by the EC, by their Statute of Autonomy and by the rest of the legal system, to contravene their own constitutional legitimacy, infringing those rules, without using the previously established regulatory procedures, a political conflict is not generated. What is caused is the commission of crimes, for whose response in the form of prosecution and judgement only the Judiciary is empowered in a State governed by the rule of law.

Of course, it is not possible to contribute to "democratic coexistence" by using a law, without constitutional backing, which seeks to circumvent in favour of those persons the application of the constitutional law itself and the principles that inform it, that is, freedom, justice, equality, and political pluralism (art. 1.1. CE), in addition to the fact that the exercise of judging and enforcing what is judged corresponds exclusively to the Judiciary.

There can be no greater contradiction between what is expressed by the grammatical meaning of the words and terms used in the Preamble, cited above, and what is actually intended to be achieved, which has nothing to do either with democratic coexistence, or with the preservation of general interests, or, in short, with the Rule of Law. The alleged inadequacy of Justice to resolve alleged political conflicts, or the necessary adaptation of the regulatory framework to channel these conflicts, cannot necessarily imply the elimination of any judicial response to the commission of serious attacks on coexistence, such as the events that amnesty is now being sought for.

5.2 There can be no contradiction between the principle of legality and the principle of democracy.

Section III of the MS contains various references to an apparent contradiction between the principles of legality and those of democracy or democratic coexistence. It highlights, for example, that, according to the constitutional framework, "an amnesty law can only be based on the solidity of the democratic system, which thus demonstrates its capacity for conciliation through a sovereign act of the Cortes Generales" whose legitimacy, it states, is to be found in "the constitutionality of the measure" and "the need to address an exceptional situation in the general interest".

Regardless of the fact that the text of the PLOA, like any regulatory initiative, has the presumption of constitutionality and legality, as long as the Constitutional Court or the Ordinary Jurisdiction does not declare its unconstitutionality or respective illegality, it is true that the apodictic affirmation that this norm and the measure it intends to approve is constitutional is very striking.

However, leaving aside this initial critical consideration, the aforementioned thesis that the Legislative Power is sovereign to dictate as many rules as it deems appropriate, giving prevalence to the democratic principle and the popular will represented by the parliamentary majority over the Law, does raise greater concern and entails a greater risk for the Rule of Law. The Legislative Power, as a constituted power, can only approve those norms which are protected by an authorisation, in this case a constitutional one. We have already anticipated in more detail in previous sections of this report the absence of constitutional authorisation to approve a law of the nature and scope sought, so we will not insist on these considerations, referring to what has already been said.

However, we must reiterate that this alleged contrast represents a serious distortion of the essential values on which the whole constitutional order is based, that is to say, the most absolute and decisive breach of the elementary rules on which a social and democratic State governed by the rule of law such as Spain is based (art. 1 EC).

As stated in STC 259/2015, of 2 December (FJ 5), "*democratic legitimacy and constitutional legality cannot be contrasted to the detriment of the latter: the legitimacy of an action or policy of the public power consists basically in its conformity with the Constitution and the legal system. Without conformity with the Constitution, no legitimacy can be predicated. In a democratic conception of power, there is no legitimacy other than that based on the Constitution* (...) *For this reason, the legal system, with the Constitution at its apex, can in no case be considered as a limit to democracy, but as its very guarantee*". In short, there is no democracy without respect for the legal and constitutional order. There may be legality without democracy, but there is no true democracy without respect for legality.

On this point, although the MS seems to admit that "there is no democracy outside the rule of law", it states that "it is necessary to create the conditions for politics, dialogue and parliamentary channels to be the protagonists in the search for solutions to a political issue with a recurrent presence in our history".

From our point of view, and regardless of the considerations that, from a political-partisan point of view, this type of statement may give rise to, political dialogue cannot be incompatible with the actions of the judiciary, which, by means of this legislative initiative, is suppressed or eliminated without express constitutional authorisation.

In this context, the reference to STC 42/2014, of 25 March, is clearly biased. The convenience that problems that may arise in the constitutional order can be resolved through dialogue and cooperation between institutions does not exempt the judiciary from acting when these problems are transmuted into criminal conduct. What is relevant in this ruling is the consideration of the so-called "*right to decide*" as a "*political aspiration that can be defended within the framework of the Constitution*" (FJ 4), as long as it is channelled through the current legal system. An idea that was reiterated in the aforementioned STC 259/2015, stating that "*the proposal of conceptions that seek to modify the very basis of the constitutional order has a place in our legal system, provided that it is not prepared or defended through an activity that violates democratic principles, fundamental rights or the rest of the constitutional mandates, and the attempt to achieve it effectively is carried out within the framework of the procedures for reforming the Constitution. When, on the contrary, the intention is to unilaterally alter those contents and deliberately ignore the procedures expressly envisaged for this purpose in the Constitution, the only path that allows us to reach that point, that of the law, is abandoned*" (FJ 7).

5.3 The STS, Criminal Division, no. 101/2012, of 27 February cannot be used as a parameter for the constitutionality of the PLOA either.

The Preamble then refers to the STS, Criminal Chamber no. 101/2012, of 27 February, as an additional argument for the constitutionality of the amnesty as a manifestation of the right to pardon, since it emphasises the thesis that Law 46/1977 is in force and its possible repeal would correspond to Parliament, which is what is reflected textually in the MS.

Once again, the meaning and scope of an affirmation, in this case, of the Criminal Division of the Supreme Court, has been altered. From the outset, this

High Court does not, as could not be otherwise, judge the constitutional adequacy of the amnesty, neither in the abstract, nor in the specific expression of Law 46/1977. The Judgement fundamentally highlights the idea of reconciliation which, in the transition from an authoritarian regime to a democratic one, was at the heart of the decision to approve an amnesty that would break with the past and lead to a future of democratic coexistence. This judgment refers to this specific amnesty and this historical moment. In this sense, the judgement points out that "*the fundamental idea of the 'transition', so praised nationally and internationally, was to achieve peaceful reconciliation among Spaniards, and both the Amnesty Law and the Spanish Constitution were very important milestones in this historical development. It should be remembered that the Constitution, which expressly repealed several laws, in no way mentions the Amnesty Law among them, which is logical since it was an essential, irreplaceable and necessary pillar for overcoming Franco's regime and what it entailed. Achieving a peaceful 'transition' was no easy task, and there is no doubt that the Amnesty Law was also an important indicator for the different social sectors to accept certain steps that had to be taken to establish the new regime peacefully, avoiding a violent revolution and a return to confrontation. It is precisely because the 'transition' was the will of the Spanish people, articulated in a law, that no judge or court can in any way question the legitimacy of that process. It is a law in force whose eventual repeal would be the exclusive responsibility of Parliament*".

The Judgment therefore refers to a historical moment, that of the transition from dictatorship to democracy, and to a very specific political-social context propitiated by the movements that took place at that time, all of them prior to the constitutional text. The validity of the 1977 Law is therefore referred to in the judgement as the will of the Spanish people to achieve national reconciliation. Therefore, to try to abstract this approach to a question of general scope such as the defence of the constitutionality of the amnesty, to which this judgement makes no reference whatsoever, is to make the Supreme Court say what it has not said.

5.4 The constitutional prohibition of amnesty would not have implied the repeal of Royal Decree-Law 10/1976 of 30 July 1976, nor of Law 46/1977 of 15 October 1977.

The express prohibition of amnesty for the future would not have meant the repeal of previous amnesties (as stated in section IV of the MS). In this sense, as retroactively derogatory norms of previous ones which are considered unjust or illegitimate because they do not respond to the new principles and values (STC 147/1986), the amnesty appears to have the characteristics of a more favourable penal norm. Therefore, the prohibition of future amnesties would not necessarily affect previously consolidated favourable legal situations, the effects of which would remain unalterable, by application of the general principle of non-retroactivity of less favourable rules (Article 9.3 EC). In the same way that the maintenance of their effects does not enable the Cortes Generales to exercise a power that is not expressly attributed to them in the EC.

5.5 Criminalising or de-criminalising conduct does not give the courts the power to grant or withhold amnesties, nor can it be equated with this legal institution.

Crimes must be defined by the legislation in force at any given time (art. 25.1 EC), and the legislative power is expressly recognised by the Cortes (art. 66.2 EC). However, amnesty cannot be equated with a legislative power, given that it is configured as an exercise of a right of grace which, as such, can only be expressly recognised by the EC because, otherwise, it would imply interference in the sphere of another state power, such as the judiciary. As we have already seen, comparative law offers some clear examples of a constitutional distinction between the power to legislate and the power to grant amnesties.

Criminalising or decriminalising a conduct may be based on a change of paradigm regarding the general criteria of general and special prevention, as well as on the principle of minimum intervention that seeks to protect -exclusively- those legal assets that are considered worthy of criminal protection at each historical moment (STC 26/2018, of 5 March, FJ 6, citing other previous ones, such as STC 229/2003, of 18 December). Therefore, it is reasonable for there to be a social evolution in terms of the conducts to be criminalised or

decriminalised[20] . But this is not comparable with the proposed amnesty (section IV of the MS), since amnesty means exempting some people from criminal responsibility for acts which, for others, continue to be criminal. The legislator does not intend to repeal crimes as serious as embezzlement of public funds or terrorism, but to exempt certain persons from all criminal liability for specific acts committed for a specific purpose. An exemption which, in the past, will not affect more people and which, in the future, will not prevent the criminal prosecution of other people who do not fall within the personal scope of the LPOA and who commit the same offences.

In fact, as already mentioned, in a social and democratic State governed by the rule of law, with a real and effective separation of powers and true control of the actions of the public authorities, with full submission to constitutional principles and values, it is not possible to speak of amnestiable conduct. Crimes are defined by the bodies representing national sovereignty and, consequently, enjoy a presumption of legitimacy and of their compliance with constitutional values and principles, without prejudice to the control attributed to the Constitutional Court. Therefore, the modification of the social, political, legal and/or cultural criteria that may justify a decriminalisation of criminal conduct does not make it illegitimate and, therefore, in need of an amnesty. In other words, it is not possible to speak of the necessary repeal of "*certain legislation* (...) *which is rejected today as contrary to the principles inspiring a new political order*" (STC 147/1986, 25 November, FJ 2). In a democracy, it is as legitimate to criminalise conduct as it is to decriminalise it. It does not seem necessary to list the list of conducts which were decriminalised during the period of validity of the so-called "Penal Code of democracy", approved by Organic Law 10/1995, of 23 November, without these conducts having been the object of a correlative amnesty.

5.6 The national and regional legislation contained in the MS cannot be used as an element to be taken into account when weighing up the constitutionality of this legislative initiative.

[20] This is what happened in Spain, for example, when in 1978 art. 2.B.3º of the Law on Dangerousness and Social Rehabilitation, which punished homosexuality with a custodial sentence, was repealed.

National or regional legislation, statutory or regulatory, or referring to certain sectoral areas, cannot be used to justify the "implicit" constitutional recognition of amnesty (paragraph IV of the MS).

As is well known, constitutional jurisprudence has repeatedly indicated that, in order to assess the constitutionality of a rule with legal rank, account will be taken not only of the EC itself, but also of what is known as the "block of constitutionality", consisting of the laws passed by the State and the different Autonomous Communities to delimit their respective competences, or to regulate or harmonise their exercise (among many others, SSTC 10/1982, 23 March, FJ 2, 17/1991, 31 January, FJ 3, and 247/2007, 12 December, FJ 6).

Of course, the constitutionality of a rule cannot be determined by the provisions of national or regional legislation regulating such singular aspects as the organisation or disciplinary regime of certain civil service bodies. The case is particularly striking with the references contained in the MS to rules of even lower rank than the law. In this way, the constitutionality of the PLOA is intended to be determined by the exclusive will of the government of the day, in the exercise of its legitimate regulatory power (recognised in art. 97 EC) which, moreover, must be exercised in full compliance with the law and the law (art. 103.1 EC) and which can be controlled by the courts (art. 106 EC).

However, regardless of the fact that its application to specific cases can be questioned due to the non-existence of a post-constitutional law approving an amnesty up to the time of writing this report, there is an argument to the contrary which opposes the one offered with the citation of this list of norms. This is because none of these norms contemplates cases which are susceptible to amnesty, but only their consequences and effects, in the event that this extinction of responsibility could occur, which is not the case in practice, given that amnesty does not exist in our constitutional model. However, such a normative contribution does not allow us to deduce that amnesty, as such a manifestation of the right to pardon, has any place in our legal system.

Also striking is the reference to art. 666-4ª LECrim which, as the MS itself points out, was drafted in no less than 1882 (!), when amnesty was legal in Spain,

omitting that the current CP, approved after the 1978 EC, abolished amnesty as a cause for extinction of criminal responsibility (art. 130 CP), which is now intended to be introduced by the first additional provision of the PLOA.

The same can be said of the mention of Law 20/2022, of 19 October, on Democratic Memory, which does not have the status of an Organic Law, and whose purpose goes far beyond the mere confirmation of the validity of the 1977 amnesty law - a law on the constitutionality of which, as we have pointed out, the Constitutional Court has not ruled - and whose effects are precisely intended to be restricted or limited on the basis of a specific interpretation of international law.

5.7 The recognition of amnesty decreed in other countries, in accordance with their own constitutional and legal regime, does not imply the existence of a constitutional authorisation in Spain to grant or not to grant an amnesty.

The fact that Spain has signed international conventions or treaties which provide for the recognition of the exercise of the right of pardon through an amnesty granted by third countries, in accordance with its own internal regulations, cannot imply, in any case, as it seems to be deduced from the last paragraph of section IV of the MS, the attribution of a power not expressly provided for in our EC, nor a judgement on the constitutionality or otherwise of amnesty in our country.

Respect for the legislation of countries with which we maintain relations of cooperation and reciprocity cannot be binding on Spain. This is the case, for example, when judicial decisions of third countries are recognised that impose sentences that are notoriously superior or heterogeneous to those provided for in Spain, which, of course, do not oblige us to modify or harmonise our legislation with that in force in those states, nor do they presuppose any judgement on the constitutionality of an initiative such as the PLOA (see, in this sense, the factual cases dealt with in SSTC 81/2022, of 27 June and 104/2019, of 16 September, among others, in which the due adaptations derived from the provisions of the applicable international instruments themselves were applied - in these cases, Law 4/1985, of 21 March 1985, on passive extradition and the

Council of Europe Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983).

In the case of this Convention on the transfer of sentenced persons, Article 12 allows States Parties to "grant pardon, amnesty or commutation of sentence in accordance with their Constitution or other rules of law", which must be respected by the Member State receiving the sentenced persons who are to serve their sentences there. However, this does not mean that amnesty must necessarily be accepted as such a manifestation of the right to pardon in all the internal legal systems of the member states of the Council of Europe, but only in those whose Constitution or other legal norms expressly recognise it, which is not the case in Spain, as has been pointed out above.

MS also refers to Art. 3 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (OJEC No. 190 of 18 July 2002) which, verbatim, provides, in so far as it is relevant here, as follows: "Article 3: Grounds for non-compulsory execution of the European arrest warrant. The judicial authority of the executing Member State (hereinafter referred to as the "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:
(1) where the offence on which the European arrest warrant is based is covered by amnesty in the executing Member State if that State has jurisdiction to prosecute that offence under its own criminal law;'.

The first thing to remember is that this precept applies to cases in which the State executing the surrender refusal order has "jurisdiction to prosecute the offence in accordance with its own criminal law". Thus, a state should not surrender a person if it has granted amnesty for that crime under its domestic law, which does not mean, logically, that the amnesty is constitutional or not in Spain.

In any case, the citation of this EU Decision to justify the possibility of recognition of amnesty by the Spanish judicial authorities is unfounded because it is an instrument of judicial cooperation between EU Member States, which has replaced the 1957 Strasbourg European Convention on Extradition and

which is based on two essential principles: the principle of mutual trust between all the Member States and the principle of recognition and acceptance of the singularity that the criminal systems of each of the Member States may present in this matter (SSTC 26/2014, of 13 February, 132/2020, of 23 September, among others). The same applies to the Trade and Cooperation Agreement between the EU and the European Atomic Energy Community with the United Kingdom of Great Britain and the Republic of Ireland (OJEU of 31 December 2020), which also establishes a mechanism for judicial cooperation between EU bodies and the two States mentioned above and which is also based on the two principles set out above.

Amnesty, as a manifestation of the right to pardon, is recognised and applied in certain EU Member States, in the terms we have seen above, so that the two aforementioned principles cannot be ignored by the Spanish authorities when they use this instrument of judicial cooperation within the EU. The Spanish law itself, which has transposed this and other European rules that have been issued subsequently to assume those principles, expressly states that the granting of an amnesty in the State of issue of a European arrest warrant will oblige the Spanish Criminal Court to suspend the execution of the corresponding decision (art. 185 of Law 23/2014, of 20 November, on the mutual recognition of criminal decisions within the European Union). Furthermore, this law only contemplates as possible causes for extinction of criminal responsibility and consequent refusal of recognition or execution of the surrender those of criminal statute of limitations [art. 32.1.b)] and pardon [art. 48.1.a)]. Nothing is said about amnesty.

5.8 The criteria for weighing up the reasonableness, proportionality and appropriateness of this pardon measure cannot be met.

On the basis of the unconstitutionality of this legislative proposal, no comment is made on the references contained in section V of the MS to the principles of reasonableness, proportionality and adequacy of the PLOA, which are linked to the nature of a special law, as previously explained in section III.2.5 of this report, to which we expressly refer. In the opinion of this Council, it is not appropriate at this point to weigh up the aforementioned principles, given that

the most elementary enabling prerequisite, the constitutionality of the amnesty, is not present. It is not possible to weigh up what is fundamentally unconstitutional.

VII. ANALYSIS OF THE ARTICLES OF THE PLOA.

Apart from the general considerations set out above, an analysis of the articles of the PLOA confirms that certain precepts of this initiative could be contrary to the EC and EU law, as well as containing, in the opinion of this Council, certain deficiencies in legislative technique that will be highlighted in the following sections of this report.

1. Analysis of Title I. Objective scope and exclusions

1.1 The description of the PLOA's target scope.

Articles 1 and 2 PLOA regulate the objective and subjective scope of the amnesty, in accordance with a double technique: on the one hand, the conducts included in the measure of pardon are included; and, on the other, the conducts which, in any case, are excluded. Thus, the determination of the beneficiaries of the amnesty will have to be the result of a joint and systematic interpretation of both precepts, which, as we shall now see, will not be without some difficulty.

The objective scope of the amnesty is described in Art. 1 according to a complex legislative technique, marked by historical events ("the consultations held in Catalonia on 9 November 2014 and 1 October 2017"), together with a time span which, however, appears dissociated from those events without any justification ("between 1 November 2011 and 13 November 2023") and a description of "the actions carried out in Catalonia between 1 November 2011 and 13 November 2023", appears dissociated from those events without any justification ("between 1 November 2011 and 13 November 2023") and a description of "actions carried out in the context of the so-called Catalan independence process" (without further precision) which, paradoxically, do not require that "they are related to the aforementioned consultations" or, even, that they may have been "carried out after their respective celebration". Based on

this general outline, Art. 1.1, in its various sections, describes a series of general conducts, which are accompanied by an outline of possible amnestiable offences.

Thus, the first three sections define these acts, essentially, by their intention: (a) "to claim, promote or procure the secession or independence of Catalonia, as well as those that would have contributed to the achievement of such purposes"; (b) "to call, promote or procure the holding of consultations (....) by anyone lacking the power to do so or whose calling or holding has been declared unlawful, as well as those who have contributed to their achievement"; c) "with the purpose of allowing the holding of the popular consultations (...) or their consequences", or with the "purpose of allowing, favouring or contributing to the holding" of such consultations.

However, all of them end with an open clause: "as well as any other act criminalised for the same purpose" (letters a and b); "as well as any other act criminalised with the same intention" (letter c); which gives the enumeration of offences in each of these paragraphs the value of mere examples.

The following two paragraphs refer to the previous ones. Specifically: d) "purpose of showing support for the objectives and aims described (...) or for those accused or convicted for the execution" of those crimes; e) "police actions aimed at hindering or preventing the carrying out of the acts determining criminal or administrative liability covered by this article".

The description is complicated by the inclusion in subparagraph (f) not only of an extraordinarily open-ended conduct: "acts committed for the purpose of furthering, procuring or facilitating any of the actions giving rise to criminal, administrative or accounting liability referred to in the preceding paragraphs of this Article"); but a final clause which includes "any others which are materially related to such actions".

Art. 1.2 includes all forms of execution, covering preparatory acts as well as any form of perpetration or participation.

The objective scope of application of the rule appears to be riddled with legal and non-legal concepts of an indeterminate nature, if not with conduct that can hardly be criminalised or which is openly covered by the exercise of fundamental rights, not to mention some technical deficiencies. To cite a few examples:

i) The word "framework" seems to encompass the events between the consultations of 2014 and 2017. However, this outline is soon overtaken by the extraordinary expansive wave of the time span covered by the rule (between 2011 and 2023), through the use of other equally indeterminate terms such as "preparation" or its "consequences" (art. 1.1).

ii) The latest wording of paragraphs a) and b) of Art. 1.1, with regard to the offence of embezzlement, has introduced the distinction between the purpose or not of enrichment. In this way, further complicating the legislative technique, Art. 1 itself introduces, at the same time, conduct included and excluded from amnesty. Thus, only embezzlement aimed at financing, defraying or facilitating the carrying out of the conducts described in the first paragraph of Article 1.1 (whose notorious lack of definition has already been described) is amnestiable, "provided that there has been no intention to enrich". Consistently, a new paragraph 4 is added to Art. 1, defining enrichment as a "personal benefit of a patrimonial nature".

It seems that, once again, the parliamentary processing of the law seeks to circumvent the effects of certain judicial criteria, configuring the PLOA as a law that aims to resolve the situations of specific individuals. In this case, an attempt is being made to overcome the interpretation carried out by the Second Chamber of the Supreme Court in its order 20107/2023, of 13 February (FJ 4), which upheld the conviction for the crime of embezzlement provided for in art. 432 CP, imposed in STS 459/2019, of 14 October, following the reform of this crime carried out by Organic Law 14/2022, of 22 December. As is well known, for the highest interpreter of criminal legality, art. 432 of the CP "*includes in its typology both those who appropriate these funds and those who, in breach of their duty of loyalty in the administration, decide to give them an unequivocally illegal purpose.* (...) *the concept of profit motive cannot be obtained by*

identifying it with the purpose of enrichment. Suffice it to support this idea to cite STS 1514/2003, of 17 November, in which we underlined that '... case law has been holding, for more than half a century, that the purpose of enrichment is not the only one possible for the realisation of the type of appropriation offences. In particular the offence of embezzlement, it is clear that it cannot be otherwise, given that the criminal offence does not require the enrichment of the perpetrator, but rather, in any case, the illicit diminution of public funds or assets assimilated to these'. (...) *It would be contrary to the most elementary legal logic to understand that whoever makes public funds his own incurs a penalty of up to eight years' imprisonment and whoever uses them for a criminal or unlawful activity - in our case, the holding of a judicially prohibited referendum - can be punished with a fine.*

An alternative interpretative solution to the one we now adopt could be contrary not only to the axiological value that determines the criminal protection of public funds, but also to the strengthened commitment assumed by our country to protect the public funds of the European Union. This is expressed in Directive 2017/1371, 5 July 2017, on the fight against fraud affecting the financial interests of the Union through criminal law, which in its art. 7 proclaims the duty to adopt the necessary measures to ensure that the offence of embezzlement affecting such Community funds is punishable, in some cases, with a maximum penalty of at least 4 years' imprisonment and, generally, '... with effective, proportionate and dissuasive criminal penalties'."

It seems that the new wording of this precept insists on the idea of identifying the profit motive with the aim of personal enrichment, when this enrichment has never been necessary for the consummation of the offence of embezzlement of public funds.

In any case, the granting of an amnesty for crimes of embezzlement of public funds is contrary to the criteria set out by the European Parliament in the session held on 28 February 2024, in which it adopted the proposal of the Committee on Justice and Home Affairs to incorporate the prohibition on

granting pardons or amnesties for this type of crime in the new anti-corruption Directive - currently being processed -[21] .

iii) There is no evidence that the mere fact of carrying out conducts such as "disseminating the pro-independence project", "acquiring knowledge about similar experiences", "advice" [art. 1.1.a)]; "approval (...) of laws" or acts of "criticism" [art. 1.1.c)]; have been subject to criminal, administrative or accounting sanctions, so that it would not make sense to grant amnesty for such conducts.

iv) The rule lacks any objective criterion of connection, alluding in the MS to a "deep connection" (section II), and then mentioning a material connection [art. 1.1.f)], ignoring the fact that connection is a typically procedural concept (art. 17 LECrim).

v) Finally, as already mentioned, Article 1.3 significantly broadens the temporal scope of the conducts eligible for amnesty, by using concepts such as "commission", "execution" or "completion" which are difficult to specify from the perspective of criminal dogmatics. According to the PLOA, acts "the performance" of which began before 1 November 2011 or 13 November 2023 may also be amnestied if their "performance" is "completed" after those dates. Completion" can be understood as synonymous with "execution", so it would not make sense to establish the difference indicated in that provision.

1.2 The description of excluded conduct

Art. 2 PLOA describes the acts that "in any case" would not benefit from the amnesty. This list also contains a profusion of indeterminate concepts, as well as an apparently arbitrary selection of offences. Specifically:

i) Art. 2, a) PLOA excludes acts that have resulted in the "loss or uselessness of an organ or limb" or "a sense", as well as "impotence, sterility or serious deformity". There does not seem to be any objective reason why non-severe

[21] https://www.europapress.es/nacional/noticia-eurocamara-defendera-prohibir-amnistias-indultos-malversacion-reforma-contra-corrupcion-ue-20240228151700.html; https://www.elespanol.com/espana/politica/20240229/eurocamara-aprueba-directiva-prohibe-amnistiar-puigdemont-delito-malversacion/836166563_0.html

deformity (covered by Art. 150 PC) should be covered by the amnesty, while the loss of a "non-major" organ or limb, which is also covered by Art. 150 PC, is not.

On this point, we also refer to what was stated in section III.2.5 of this report, on the paradoxical exclusion from amnesty of the crime of murder, but not of attempted murder, or on the inexplicable selection and exclusion of certain serious injuries to the detriment of others.

ii) Art. 2, b) PLOA excludes "acts classified as crimes of torture or inhuman or degrading treatment in accordance with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, with the exception of treatment which does not exceed a minimum threshold of severity because it is not likely to humiliate or degrade a person or show a diminution of his human dignity, or to cause fear, distress or inferiority in a manner likely to break his moral and physical resistance". The notorious lack of definition of these concepts makes it extremely difficult to properly understand the conduct excluded from the amnesty, leaving it up to the judicial bodies to assess it, but without proposing objective weighting criteria that would make it possible to know, with a sufficient degree of certainty, whether or not a certain conduct is included in the objective scope of the PLOA.

In an attempt to make an effort at interpretation, the rule may have sought to take up the doctrine of the ECtHR, which has been present since the judgment of 18 January 1978 (*Ireland v. United Kingdom, para. 162). United Kingdom,* paragraph 162), which establishes circumstantial assessment criteria (duration of the ill-treatment and its physical or mental effects, as well as, sometimes, sex, age or state of health, among others), which are included under the term "the victim's vulnerable situation" in the more recent ECHR of 4 December 1995 (*Ribitsch v. Austria*, paragraph 36), which, in reality, serve to distinguish the conduct as torture, inhuman or degrading treatment.

This is clear from what is stated in STC 166/2021, of 4 October (FJ 2), in which, citing other pronouncements of the ECtHR, it states the following: "*the European Court has repeatedly recognised that Article 3 of the ECHR ('No one shall be subjected to torture or to inhuman or degrading treatment or*

punishment') constitutes one of the fundamental principles of any democratic society, prohibiting in absolute terms 'torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the conduct of the victim' (ECHR 6 April 2000, Labita v. Italy, § 119). Italy, § 119). This Court has also specified that not all ill-treatment can be considered as 'torture', being necessary that it reaches a minimum level of severity in order to imply an infringement of Art. 3 ECHR. In short, '[t]he assessment of this requirement is by its very nature relative; it depends on all the circumstances of the case, and especially on the nature and context of the treatment or punishment and its methods of execution, its duration, its physical and mental effects and, sometimes, on the sex, age and health of the victim' (ECHR of 7 July 1989, Soering v. United Kingdom, § 100).

Como un segundo grado tras la tortura se encuentran, según el mismo tribunal, los tratos inhumanos que son definidos como 'los sufrimientos físicos o psíquicos provocados voluntariamente con una intensidad particular' (STEDH de 25 de abril de 1978, Tyrer c. United Kingdom, § 129) and degrading treatment conceptualised, in turn, as that which 'has diminished the human dignity of the victims or aroused in them feelings of fear, anguish and inferiority capable of humiliating and degrading them' (ECHR of 11 December 2003, Yankov v. Bulgaria, § 104). The same judgment states that in order to determine whether treatment can be considered 'degrading' within the meaning of Art. 3 ECHR it must be assessed 'whether its purpose is to humiliate and degrade the person concerned and whether, as regards the consequences, it adversely affected his personality in a manner incompatible with Article 3 ECHR, even though the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (ECHR of 19 April 2001, Peers v. Greece, § 74; SSTEDH of 19 April 2001, Peers v. Greece, § 74; SSTEDH of 19 April 2001, Peers v. Greece, § 74; SSTEDH of 19 April 2001, Peers v. Greece, § 74; SSTEDH of 19 April 2001, Peers v. Greece, § 74; ECHR of 19 April 2001, Peers v. Greece, § 74. Greece, § 74; 15 July 2002, Kalashnikov v. Russia, § 101; 11 December 2003, Yankov v. Bulgaria, § 105)'".

In short, the greater or lesser intensity of the conduct will determine its classification as torture, inhuman or degrading treatment, but on the basis that, by their very definition, all these conducts are intrinsically serious. In fact, Art.

15 EC categorically prohibits ("in no case") the subjection to these practices, in coherence with the provisions of Art. 3 ECHR ("no one shall be subjected to torture or to inhuman or degrading treatment or punishment"). To differentiate, for the purposes of amnesty, between a kind of serious or less serious torture is not only contrary to the very characterisation and nature of these crimes, but also to the absolute prohibition of protecting these conducts, by constitutional and European mandate.

Furthermore, as the aforementioned STC 166/2021 points out, Articles 2 and 3 ECHR confer positive obligations on states, consisting of a duty to carry out an effective official investigation, since otherwise these rights would be violated in their procedural aspect. Specifically, this judgment recalls that "*when an individual claims to have suffered ill-treatment at the hands of the police or other comparable State services contrary to Article 3 ECHR, this provision, combined with the general duty imposed on the State by Article 1 ECHR to 'accord to everyone within its jurisdiction the rights and freedoms defined [...] [in] the Convention', implicitly requires that there be an effective official investigation. Such an investigation, similar to that resulting from Article 2, must be capable of leading to the identification and punishment of those responsible (ECHR 27 September 1995, McCann and Others v. United Kingdom, § 161; 11 July 2000, Dikme v. Turkey, § 101; and 8 March 2011, Beristain Ukar v. Spain, § 28). If this were not the case, Article 3 ECHR itself would in practice be empty and it would be possible 'for State agents to abuse the rights of those under their control with virtual impunity' (ECHR 28 October 1998, Assenov and Others v. Bulgaria, § 102)*". Failure to prosecute conduct constituting crimes of torture, inhuman or degrading treatment, on the basis of an alleged graduation of its seriousness, would be a violation of the provisions of Art. 3 ECHR itself.

iii) Paragraph c) refers to terrorist offences, in a wording that has been subject to successive modifications in the parliamentary procedure followed before the Congress of Deputies, as is public and notorious.

The first wording referred to "acts classified as terrorist offences (...) provided that a final judgement has been passed". In this way, the amnesty would benefit all those investigated, prosecuted and/or accused of terrorist offences, and

even those already convicted, if the sentence was not final. The vagueness of a factual element such as the speed of the criminal proceedings gave this exception a random nature which, in the opinion of this Council, would contradict the principles of equality before the law and legal certainty.

The second wording referred to "acts classified as terrorist offences (...) provided that, manifestly and with direct intent, they have caused serious violations of human rights, in particular those provided for in [Articles 2 and 3]" ECHR, "and in international humanitarian law". And, along these lines, the current regulation, the result of a third drafting, expressly refers to "acts which by their purpose may be qualified as terrorism, according to Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, and which in turn have intentionally caused serious violations of human rights, in particular those covered by Articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by international humanitarian law".

As already stated in section IV.2.2 of this report, when analysing the compatibility of the PLOA with international and European law, the current wording of art. 2, c) PLOA ignores the true nature and seriousness of terrorist offences, as defined by international treaties and, in particular, by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017. It is truly striking that the precept analysed contains an express reference to this Directive and yet does not take into account that, in its second recital, terrorism is described as "one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and the enjoyment of human rights and fundamental freedoms, on which the Union is founded. They also represent one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the Union is founded". The same is true of the preamble to the Warsaw Convention of 16 May 2005, already cited, which states that "terrorist offences, as well as those covered by this Convention, whoever the perpetrators may be, are in no case justifiable by considerations of a political, philosophical, ideological, ideological, racial, ethnic, religious or any other similar nature, and recalling the obligation of the Parties to prevent such acts and, failing that, to prosecute them and to

ensure their punishment by penalties which take into account their grave nature".

In short, the international instruments binding our state leave no room for doubt: all terrorism is a violation of human rights. There is no such thing as serious or less serious terrorism. Therefore, although not all conducts classified as terrorist offences are assigned the same penalties, depending on their respective characteristics, they share a common nature which, in itself, entails a serious violation of human rights, since they attack legal assets of special value for coexistence in peace and freedom in a democratic society. With the current wording of the PLOA, objectively serious conduct such as the manufacture or possession of explosives, or causing serious havoc or damage to public roads, communication networks or airport installations could be covered by the amnesty. Conduct which, in addition to creating a deep sense of fear among the population, would affect basic fundamental rights such as freedom and security (art. 17 EC), among others.

Moreover, as already indicated in section IV.2.2 of this report, the Directives are not directly applicable criminal rules, but instruments for harmonising the legislation of the EU Member States. Once transposed into national law, they lose their validity as such instruments, without prejudice to their being indicative of general principles and objectives, in this case as regards the prosecution of certain types of conduct [on the direct effect of the Directives on relations between citizens and States, and their possible useful effect for the benefit of the citizen when they have not been transposed, see STC 13/2017 of 30 January and the SSTJUE of 4 December 1974 (*Van Duyn* case), 5 April 1979 (*Ratti* case) and 19 January 1982 (*Becker* case)]. However, given that the PLOA does not contain a provision repealing the precepts of the Criminal Code dedicated to terrorism, these will remain in force and will have to be interpreted and applied in accordance with their typical description, and taking into account the international commitments assumed by Spain in the effective prosecution of this particularly serious form of criminality. Moreover, the regulations contained in the Spanish Criminal Code on terrorism derive from the successive transposition of various European harmonisation instruments. On the one hand, the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating

terrorism, assumed by Spain in its reform of the Criminal Code carried out by Organic Law 2/2015 of 30 March; and, on the other hand, the aforementioned Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, which was transposed into our criminal legal system through LO 1/2019 of 20 February. In fact, the 2015 reform was so far-reaching and anticipated the content of the 2017 Directive to such an extent that the explanatory memorandum of the 2019 Law refers to the need to "introduce slight adjustments" to our criminal law. Consequently, there can be no contradiction between the Spanish Criminal Code and the EU Directive. For the same reason, neither can a new definition of terrorism be established that differs from that contained in the PC, nor can Spain's national and international obligation to effectively and dissuasively prosecute terrorist offences be eliminated.

An alleged direct effect of a Directive to the detriment of a citizen cannot be opposed to the foregoing, because this doctrine is only applicable when the Directive has not been transposed, which is not the case. This is the ruling of STC 13/2017, of 30 January, FJ 6, citing STC 145/2012, of 2 July, FJ 5 and several SSTJUE. Specifically, it recalls that "*always in relation to the useful effect of the Directive in the vertical sense (enforceability of the individual against the State,...), the case law of the Court of Justice has been consolidating, including, among others, the judgments of 26 February 1986, Marshall case, no. 152-1984 (paragraphs 46 and 46), and the judgments of the Court of Justice of the European Communities, no. 152-1984, no. 152-1984, no. 152-1984, no. 152-1984 (paragraphs 46 and 46). 152-1984 (paras 46-49); 22 June 1989, Fratelli Costanzo SpA, No. 103-1988 (paras 29-31); 1 June 1999, Kortas, No. C-319-1997 (paras 21-23); and most recently those of 8 May 2013, Marinov, No. C/142-2012 (para 37); and most recently those of 8 May 2013, Marinov, No. C/142-2012 (para 37). C/142-2012 (paragraph 37), and 7 July 2016, Ambisig and AICP, No. C-46-2015 (paragraph 16: 'it is settled case-law of the Court of Justice that where the State has failed to transpose a directive into national law within the prescribed period or has transposed it incorrectly, individuals have standing to rely, as against the State before the national courts, only on those provisions of the directive which, from the point of view of their content, are unconditional and sufficiently precise')*".

Therefore, citizens will be able to invoke a useful direct effect of a non-transposed Directive, insofar as it is favourable to them and subject to a number of conditions, but it can never be applicable to their detriment, precisely because it is not criminal in the strict sense of the word. Once it has been transposed into national law, what will be applicable in any event is the national legislation.

Apart from the above, it is noted in the proposed wording that exclusion from amnesty would only take place if the terrorist offence had been committed "intentionally". An intention which, in principle, can only be determined once an oral trial has been held with all the guarantees and which, therefore, should not prevent the case from continuing. Moreover, the expression used seems to refer to direct or first degree malice which, however, cannot ignore the existence of various forms of malice, such as second degree malice or eventual malice, which are perfectly defined in criminal dogma and which could be prosecuted due to their notorious seriousness. The same would be true of the imprudent conduct set out in Art. 576.4 PC, relating to the financing of terrorism.

In any case, the expression with which the wording begins ("acts which by their purpose can be qualified as terrorism") is simply redundant, given that, in coherence with European regulations, terrorist offences are defined precisely by a specific intention which, in our Penal Code (art. 573) is described as follows:

"Subverting the constitutional order, or suppressing or seriously destabilising the functioning of the political institutions or the economic or social structures of the State, or forcing the public authorities to carry out an act or to abstain from doing so.
2. Seriously disturbing the public peace.
3. seriously destabilising the functioning of an international organisation.
4. to provoke a state of terror among the population or a part of it.

A description that does not differ, in substance, with that contained in Art. 3.2 of Directive 2017/541:

"(a) seriously intimidating a population;
(b) unduly compelling a public authority or an international organisation to do or to abstain from doing any act;
(c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

In any case, the legislative technique employed, by introducing references to terrorism in the precept dedicated to describing the conducts excluded from the application of the amnesty, cannot make us lose sight of the fact that, in reality, this technique amnesties the vast majority of terrorist crimes, with the consequent violation of the human rights of the victims and the failure to comply with the most elementary functions that citizens entrust to the institutions to guarantee the freedom and security of all. A State that ceases to prosecute terrorist behaviour can hardly be considered a true State governed by the rule of law.

(iv) Subparagraph (d) excludes from amnesty "acts defined as offences in the commission of which discriminatory motives have been found".

Once again, the intentionality of the PLOA is evident in the wording of this section. A brief comparison between the conducts excluded in the PLOA and the list of discriminatory motivations included in the so-called hate crime (art. 510 PC) or in the discriminatory aggravating circumstance (art. 22-4ª PC), allows us to appreciate that the amnesty includes conducts committed for "ideological" reasons, membership of a "nation" or the "national origin" of the perpetrator. It seems clear that the intention is precisely to benefit those who are supposed to have committed certain criminal acts for a specific ideological purpose, to the detriment of those who commit them for another purpose, but also those who chose the victims because of an unfocused concept of their national origin or their belonging to the Spanish nation.

(v) Paragraph (e) excludes from the amnesty "acts defined as criminal offences affecting the financial interests of the European Union".

On this point, we refer to what has already been said in section III.2.4 on the difficulty of establishing which specific conducts are or are not covered by the amnesty. Moreover, it is particularly striking that the EU's financial interests are to be protected, but the same is not done for the economic interests of Spanish citizens.

In any case, as already stated, the EU's financial interests cannot be separated from the proper planning, management and execution of the Member States' budgets, in a scenario of fiscal and monetary union. Moreover, European legislation obliges states to effectively prosecute all forms of corruption, including embezzlement, regardless of the formal origin of the funds. On this point, we refer to sections IV.2.1 and IV.2.3 of this report.

(vi) Subparagraph (f) refers to acts classified as offences under Title XXIII of Book II of the Criminal Code, i.e., crimes of treason and against the peace or independence of the State and relating to National Defence. In its wording, there is - once again - a modification with respect to its initial description, as the following is now included: "whenever there has been both an effective and real threat and an effective use of force against the territorial integrity or political independence of Spain in the terms established in the United Nations Charter or in Resolution 2625 (XXV) of 24 October 1970, which contains the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations".

Insofar as these are criminal conducts that affect the essential interests of states, there are no international provisions aimed at harmonising the criminalisation of treason. However, these are criminal offences that affect universally protected legal interests. Any threat to these values for a Member State affects the Union itself as an institution, because of its potential destabilising effect on all the Member States. Therefore, the mere possibility that some form of treason could be covered by amnesty is contrary to the principles and values on which the European Union is founded (Art. 2 TEU), in a shared area of freedom and security (Art. 21 et seq. TEU).

The European Union's growing concern about interference by third states has recently been highlighted in two ways. On the one hand, Commission Recommendation (EU) 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union with a view to strengthening the European character and the efficient conduct of elections to the European Parliament (paragraphs 28-30); and, on the other hand, the Resolution of 8 February 2024 on the Russian plot: allegations of Russian interference in democratic processes in the European Union [2024/2548(RSP)]. The latter expressly refers to the 'alleged relations between Catalan secessionists and the Russian government; (...) which, if confirmed, (...) would be part of a broader Russian strategy to promote internal destabilisation and disunity in the EU (...) [and therefore] calls on the European Parliament and the Council to take the necessary steps to ensure that the Russian authorities do not interfere in the democratic processes of the European Union (...).) [therefore] calls on the competent judicial authorities to investigate effectively the connections of the Members of the European Parliament allegedly linked to the Kremlin [among whom Mr Carles Puigdemont is expressly mentioned in paragraph N of the Recitals] and Russia's attempts to destabilise and interfere in the European Union and its Member States' (paragraph 11).

Therefore, the qualified reference to the exclusion of crimes of treason, in addition to appearing to be aimed at exempting very specific individuals from criminal liability to the detriment of the principle of generality of laws, implies the omission of the duty to investigate crimes of treason when they affect general interests, which would be contrary to the essential principles of democracy established in Art. 2 TEU, damaging the interests of the supranational entity of which Spain forms part.

In this sense, references to the United Nations Charter or to a Resolution of that body from 1970 are not well understood, unless the intention is to assimilate the Autonomous Community of Catalonia as an independent state or as a colonial territory. These texts are based on due respect between equal nations and establish as one of their principles the duty of states to refrain, in their international relations, from resorting to the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

incompatible with the purposes of the United Nations. Furthermore, Resolution 2625 (XXV) only considers aggression by means of force as aggression, which is understandable given the date of its adoption. However, it is far removed from today's reality. The aforementioned European Parliament resolution of the same year refers to "hybrid warfare" and "manipulation of information" that "threaten the pillars of our democracies" (paragraph 17). These, and no others, are the European Union's concerns and objectives in the face of conduct that, if the PLOA is approved, would be expressly amnestied.

(vii) Subparagraph (g) refers to acts defined as offences against the international community in Title XXIV of Book II of the Penal Code.

This mention is of no practical relevance, as there is no record of any offence of this nature having been committed, not only in the context of the so-called Catalan independence process.

1.3 Assessment of the objective scope and exclusions : the PLOA is contrary to the principles of criminal legality, legal certainty, equality before the law and EU law.

The assessment of the description of the objective scope of the rule could not be more negative. The references made in this report (sections III.2.3 and III.2.4), on the violation of the principles of equality before the law and legal certainty which, in general, can be predicated of an amnesty, are confirmed by the specific analysis of the articles of the PLOA.

The extraordinary indeterminacy of the conducts included and excluded (in an exercise of apparent funambulism to try to cover the maximum number of recipients who share a certain purpose based on their ideology), the arbitrary and paradoxical selection of the cases, and the absence of a justification that could fulfil the principles of weighing up the reasonableness appropriateness, necessity and proportionality of the proposed measure, make the PLOA an initiative which, if approved, would violate the principles of criminal legality, legal certainty, equality before the law, in addition to the clear contravention of European Union law, already mentioned.

a) Infringement of the principle/right to criminal legality

An amnesty law is a criminal law. The MS seems to admit this when, in section IV, it compares it to the power to criminalise or decriminalise offences (without prejudice to what has already been stated in section VI.5.5 of this report), or when it admits that it regulates cases of exemption from criminal liability. This being the case, it is necessary to comply with the requirements derived from the principle/right to criminal legality (art. 25.1 EC), repeatedly set out by the TC, in its aspect of *lex certa* or the guarantee of the criminal law's taxativity. In an amnesty law, it is just as important to determine who is going to benefit as who is not. The guarantee of taxatividad reaches not only those who commit an offence, but also those who can trust that they will not be prosecuted for carrying out a certain conduct.

In accordance with the doctrine of the Constitutional Court (see, for example, STC 14/2021, of 28 January, FJ 2), "*[summarised in SSTC 136/2011, of 13 September, FJ 9, and 243/2012, of 13 December, FJ 8, among others and recently reiterated in STC 81/2020, of 15 July, FJ 14 b)], legal certainty must be understood as 'certainty about the applicable legal system and the legally protected interests' (STC 156/1986, of 31 January, FJ 1), seeking 'clarity and not normative confusion' (STC 46/1990, of 15 March, FJ 4), as well as 'the citizen's reasonably well-founded expectation of what the actions of the authorities in the application of the Law should be' (STC 36/1991, of 14 February, FJ 5). In short, 'only if in the legal system in which they are inserted, and taking into account the rules of interpretation admissible in law, the content or omissions of a regulatory text produce confusion or doubts that generate reasonably insurmountable uncertainty in those to whom they are addressed about the conduct required for compliance or about the foreseeability of their effects, could it be concluded that the rule infringes the principle of legal certainty' (SSTC 96/2002, 25 April, FJ 5; 93/2013, of 23 April, FJ 10, and 161/2019, of 12 December, FJ 4, all of them).* (...)

According to the doctrine of this court, the principle of criminal legality contained in art. 25.1 CE incorporates the rule nullum crimen nulla poena sine lege, which

is also 'applicable to the administrative sanctioning system', and is essentially a specification of various aspects of the Rule of Law in the field of State sanctioning law (STC 133/1987, of 21 July, FJ 4). It is linked, above all, to the rule of law as a presupposition of State action on citizens' legal assets, but also to the right of citizens to security, provided for in the Constitution as a fundamental right of wider scope, as well as the prohibition of arbitrariness and the right to objectivity and impartiality in the judgement of the courts, guaranteed by Article 24.2 and Article 117.1 EC and implies at least three requirements: the existence of a law (lex scripta); that the law is prior to the punishable act (lex praevia), and that the law describes a strictly determined factual situation (lex certa).

The constitutional guarantee of lex certa, as a specific facet of the right to the legality of penalties, is developed, in our doctrine (see, for example, SSTC 146/2015, of 25 June, FJ 2; 219/2016, of 19 December, FJ 5, and 220/2016, of 19 December, FJ 5), in two different spheres:

a) Normative scope. On the one hand, the guarantee of certainty may be violated by the insufficient ex ante determination of the punishable conduct, as an immanent defect in the legal drafting of the sanctioning precept under scrutiny; a violation that would affect the quality of the law, that is, the accessibility and foreseeability of the scope of the rule in the criminal or punitive sphere (SSTC 184/2003, of 23 October, FJ 3, and 261/2015, of 14 December, FJ 5) (...)*".*

The indeterminacy of the PLOA means that it is not possible to know in advance the conducts included and excluded from the amnesty, which contravenes the requirement of foreseeability inherent to the principle/right to criminal legality. The wide margin of assessment of the judicial body to determine whether or not to apply the rule will affect not only those who are being investigated or convicted, but also all the victims or those harmed by the punishable act, including the victims of any police abuses that may have occurred [art. 1.1.e) PLOA].

This indeterminacy will also make it difficult to apply the rule from the perspective of the principle of retroactivity of the most favourable criminal rule (art. 9.3 EC), just as it would not be possible to retroactively apply a rule that decriminalises a conduct if it does not make it very clear what the decriminalised conduct is. A principle, that of retroactivity of the most favourable rule, integrated into the right to criminal legality, which also applies to rules of a "*procedural or adjectival nature*" if their application or non-application leads to the "*existence or not of an effective and unforeseeable limitation of personal freedom*" (STC 54/2023, 22 May, FJ 6).

b) Infringement of the principles of legal certainty and equality before the law.

On this point, we refer to what is set out in general terms in sections III.2.3 and III.2.4. The indeterminate nature of amnestiable and non-amnestible conduct inevitably affects the principle of legal certainty (art. 9.3 EC), in its aspect of the unpredictability of the rule (STC 14/2021, FJ 2), and is indissolubly linked to the principle/right to criminal legality (art. 25.1 EC).

But it also violates the principle/right to equality before the law (art. 14 EC), given the impossibility of finding an objective and reasonable justification that would make it possible to know the reasons why certain conducts are going to be amnestied, to the detriment of others.

c) Failure to weigh up the proportionality between the aims that this amnesty is said to pursue and the seriousness of the conduct that is amnestied.

Another aspect that is striking is the absence of any reference whatsoever to the weighting elements that may have been taken into account, where applicable, to justify the amnesty for conduct that seriously undermines legal interests of unquestionable general interest.

Some of the amnestiable acts fall under Title XXII of Book II of the CP, dedicated to crimes against public order, i.e. those that threaten the normal functioning of public institutions and services, the exercise by governmental and judicial authorities of their functions -always in accordance with the democratic

principles that confer legitimacy to their actions- and the set of conditions that allow the normal development of civic life in the framework of the democratic organisation of the State [STS 459/2019, 14 October, FJ B).4]. Others are included in Title XIX, crimes against the Public Administration, that is, against the correct performance of the public function in accordance with the constitutional mandate of objectively satisfying general interests (art. 103.1 CE), and whose maintenance corresponds to all citizens because it is at their service, and not at the service of partisan or private interests. Some others may be classified as crimes against collective security (Title XVII), referring to the set of conditions instituted by the public authorities that ensure life and health, physical and mental integrity, as well as public and private property, all of which are considered to be common goods. The renunciation of security is intrinsically contrary to the rule of law.

The principle of proportionality in the establishment of conducts and their sanctions (in the terms already established by STC 136/1999, of 20 July 1999, FJ 23 et seq.) must have, as a logical counterpart, a justification of the reasons why certain conducts, which seriously violate elementary legal rights in a democratic society, are to be amnestied and not others.

d) Failure to meet the requirements for constitutional validity as a single law.

The indeterminate nature of the conduct eligible for amnesty prevents us from really knowing the criteria of reasonableness, appropriateness, necessity and proportionality that would constitutionally justify a singular law such as the one now proposed. On this point, we refer to what is set out in section III.2.5 of this report.

e) Contravention of EU law

e.1) As already stated in section IV.2.1 of this report, the inclusion of the offence of embezzlement in the objective scope of the PLOA entails the contravention of European Union law. More specifically:

i) Art. 1.1, paragraphs a) and b) PLOA, in its allusion to embezzlement, and Art. 1.4, contravene Spain's international commitments assumed in the United Nations Convention against Corruption of 2003 (Arts. 17, 31, 30.3 and 57).

ii) Art. 1.1, paragraphs a) and b) PLOA, in its reference to embezzlement, and Art. 1.4, contravene Art. 83 TFEU and European Union law on corruption, by application of the aforementioned UNODC convention against corruption as a source of European Union law with a higher normative rank than secondary law.

iii) Art. 1.1, paragraphs a) and b) PLOA, in its allusion to embezzlement, and Art. 1.4, are contrary to the essential principles of the social and democratic rule of law established in Art. 1.1 EC and against the principles of Art. 2 TEU.

iv) Insofar as Article 1(4) lacks a general character because it affects specific persons, it contravenes the essential principles of the social and democratic rule of law laid down in Article 1(1) EC and the principles of Article 2 TEU.

v) The PLOA introduces into the Spanish legal system a contradiction with Article 30.3 of the Convention against Corruption, in such a way that national courts, as well as other legal enforcers including the Public Prosecutor's Office, will have to consider the continuation of investigations in the specific case, without prejudice to the formulation of preliminary questions before the CJEU.

Incompatibility with EU law extends to the references to the offence of embezzlement in Art. 8(1) and (2).

In the same way, the resolution by free dismissal established in art. 11 PLOA is contradictory to the international commitments assumed by Spain and to European Union law on the matter. The resolution by means of a free dismissal could not prevent the continuation of the proceedings for the purpose of determining the material truth of the facts.

Furthermore, Articles 3, 4(d) and 11(5) PLOA contravene Article 3(1)(7) of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14

November 2018 on the mutual recognition of freezing and confiscation orders issued pursuant to Article 82 TFEU on corruption.

e.2) For its part, as already explained in section IV.2.2 of this report, the exclusion of terrorist offences, as finally drafted, also contravenes European Union law. More specifically:

i) Article 1 PLOA, insofar as it seeks to cover certain forms of terrorism, contravenes Articles 3 and 20 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

ii) Art. 1 PLOA, insofar as it covers certain forms of terrorism, contravenes Art. 5 of the 2005 Warsaw Convention against Terrorism of the Council of Europe and Art. 1.1.d) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971.

(iii) Article 2(c) PLOA, insofar as it excludes only certain forms of terrorism, contravenes Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, by preventing the effective application of European Union rules under Articles 82 and 83 TFEU, both in the prosecution and in the imposition of penalties and in the confiscation of the proceeds of crime. 82 and 83 TFEU, both in the prosecution and in the imposition of penalties and the confiscation of the effects derived from the offence.

Incompatibility with EU law extends to references to terrorist offences in Art. 8 PLOA.

Furthermore, arts. 3, 4. d) and 11.5 PLOA contravene art. 3 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime in the European Union, in the case of understanding that confiscation has been

included among the consequences of the crime benefited by the amnesty; as well as art. 3.1.2) of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018, issued pursuant to Art. 82 TFEU, and which includes the execution, likewise, of terrorist offences.

e.3) Article 2(f) PLOA, insofar as it only excludes certain forms of high treason, contravenes the principles of the rule of law enshrined in Article 2 TEU, as defined by Commission Recommendation (EU) 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union and in the European Union. 2 TEU, as defined by Commission Recommendation (EU) 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union and with a view to strengthening the European character and the efficient conduct of elections to the European Parliament; and in the European Parliament Resolution of 8 February 2024 on the Russian plot: allegations of Russian interference in democratic processes in the European Union [2024/2548(RSP)].

2. Analysis of Title II. Effects

Title II of the PLOA is responsible for specifying the effects of its entry into force. After establishing the general rule in Article 3, in the sense of declaring the extinction of the criminal, administrative or accounting liability of the acts subject to amnesty, the following articles specify the effects in the different areas covered by the norm, i.e. criminal (Article 4), administrative (Article 5), on public employees (Article 6), on compensation and restitution (Article 7) and on civil and accounting liability (Article 8). Of all these, the regulation contained in Art. 4 PLOA is particularly noteworthy.

2.1 Specific analysis and assessment of Art. 4 PLOA: the PLOA interferes with judicial functions and is contrary to the useful effect of questions of unconstitutionality, preliminary rulings and European arrest warrants.

According to this precept, which has also undergone significant modifications throughout the parliamentary process, judges and courts are apparently given the power to apply the rule in relation to the precautionary measures of a

personal or real nature that have been adopted, where appropriate. However, the attribution of this power is more apparent than real because the text uses imperative terms in all cases, that is to say, terms that do not leave any room for manoeuvre to the judicial bodies.

Thus, the judicial body "shall order the immediate release of the persons benefiting from the amnesty" and "shall agree to the immediate lifting of any precautionary measures of a personal or real nature that may have been adopted" [art. 4, a) PLOA]; it shall also "proceed to rescind the search and arrest warrants and arrest warrants for the persons to whom this amnesty applies, as well as national, European and international arrest warrants" [art. 4, b) PLOA]; the suspension of criminal proceedings for any reason "shall not prevent the lifting of [the] precautionary measures (...) involving the deprivation of the exercise of fundamental rights" [art. 4, a) PLOA]. 4, b) PLOA]; the suspension of criminal proceedings for any reason "shall not prevent the lifting of [the] precautionary measures (...) involving the deprivation of the exercise of fundamental rights and public liberties" [art. 4, c) PLOA]; furthermore, it "shall proceed to terminate the execution of all sentences", of any kind [art. 4, d) PLOA]; penalties which, in the case of custodial sentences, "may not be paid in other criminal proceedings" [art. 4, e) PLOA]; and "shall proceed to the erasure of the criminal record derived from the conviction for the criminal act amnestied" [art. 4, f) PLOA].

a) Art. 4 PLOA is a flagrant interference in the judicial function, which art. 117.3 CE attributes exclusively to the judges and courts. The PLOA imposes on the judicial bodies the meaning of the decision to be adopted, without them being able to exercise any power to weigh up the circumstances. Furthermore, they must do so "immediately", preferentially and urgently (art. 10), at any stage of the process (art. 11.8).

If all this is the case, the purpose of the prior hearing of the Ministry and the parties (art. 9.1) is not well understood, except to clarify whether the alleged offence falls within the objective scope of application of the rule. And, on this point, the system proposed by the legislative proposal could generate relevant dysfunctions for the purposes of criminal proceedings. It does not seem

reasonable that the precautionary measures should be annulled without first having determined whether the amnesty can be applied in the case in question. Lifting a precautionary measure of pre-trial detention may lead to the risk of absconding, which the precautionary measure was intended to prevent, being put into effect or confirmed, if the amnesty is not applied and the proceedings have to continue. And the same can be said of the risk to the securing of civil liabilities derived from the crime, with the consequent undermining of the reasonable expectation of the victim to see the damages derived from the crime compensated. The provision for the lifting of precautionary measures only makes sense if, once the parties have been heard, the judicial body considers that the amnesty is applicable to the case, which it will have to decide within a maximum period of two months and not necessarily "immediately" and "after the law comes into force".

b) One of the most relevant modifications to this precept throughout its parliamentary processing has been that relating to the possible influence or effectiveness that the raising of questions of unconstitutionality before the TC or preliminary rulings before the CJEU may have. The original wording of Article 4.4 established that precautionary measures would be raised "even when a question of unconstitutionality is raised". In the current wording, a more subtle reference is observed, which also includes preliminary rulings before the CJEU.

Indeed, the rules contained in art. 4 PLOA, as described above, shall apply "without prejudice to the provisions of Article 163 of the Constitution and Article 267 of the Treaty on the Functioning of the European Union", as stated in the first paragraph of art. 4 PLOA itself. However, this initial general clause contradicts the material content of the precept itself. In other words, the application of the provisions of Article 4 is incompatible with stating that it is "without prejudice to the provisions of Article 163 of the Constitution and Article 267 of the Treaty on the Functioning of the European Union".

The MS, in the last paragraphs of section V, introduces an explanation of this precept which, however, is manifestly contrary to the very nature of preliminary rulings and questions of unconstitutionality. According to the legislative proposal, the immediate lifting of precautionary measures, even if the

proceedings are suspended, is determined by the need for any limitation on the exercise of rights to always respect the requirements established in the ECHR, the CFREU and the EC, guaranteeing a solid legal basis for restrictions on rights and freedoms. Adding that this provision is consistent with the regime of questions of unconstitutionality and European preliminary rulings, which do not affect the validity or effectiveness of laws, in such a way that the normative force of rights requires that any measure restricting them must be duly supported by law. However, the MS does not take into account that the application of the rule itself and the consequent lifting of the precautionary measures must also have adequate legal and constitutional authorisation which, in case of doubt, obliges the raising of the questions and the consequent paralysation of the procedure.

i) In effect, the question of unconstitutionality, as already recalled in STC 17/1981, of 1 June (FJ 1), is "*an instrument designed primarily to ensure that the legislator's actions remain within the limits established by the EC*", which binds all public authorities (art. 9.1 EC). As an instrument of concrete, not abstract control -like the appeal of unconstitutionality-, questions of unconstitutionality require a weighing up of two essential elements, known as "*judgement of applicability*" (STC 133/2004, 22 July 2004, FJ 1) and "*judgement of relevance*" (STC 166/2007, 4 July 2007, FJ 7). In this way, the judicial body must justify that the rule whose constitutionality is in doubt is directly applicable to the case and is absolutely decisive for issuing the corresponding decision. In view of the above, it is not possible to raise a question of unconstitutionality if, at the same time, the rule whose constitutionality is in doubt is applied; in the same way that the raising of the preliminary ruling question must suspend the processing of the original proceedings (art. 35.3 LOTC).

The doctrine of the TC is crystal clear in this respect, as set out in ATC 220/2012, of 27 November (FJ 3), citing other previous ones, according to which "*ATC 184/2009, of 15 June, FJ 2): 'In view of this way of proceeding we must remember that the question of unconstitutionality is a preliminary ruling in our legal system, so that, as we have already stated in the ATC 361/2004, of 21 September, FJ 4; and 134/2006, of 4 April, FJ 2, 'the present question of unconstitutionality must be rejected as, in effect, it has not been raised, as it*

should have been, at the appropriate time because, when it was raised, the body had already applied the rule whose constitutionality could not be doubted, pronouncing itself unequivocally on the object of the question that is now before us, thereby violating the true purpose of questions of unconstitutionality. In effect, insofar as the purpose of the question of unconstitutionality is to suspend the procedure and await the response of this Court for the application of the rule, in the present case the judicial body would already have applied it, so that the doubt that subsequently arises would be meaningless'.

Consequently, if the judicial body doubts the constitutionality of the PLOA, it must raise the issue before the TC, leaving the proceedings in abeyance, and without applying any precept of the rule, including those relating to precautionary measures, whether personal or real. Decreeing the lifting of the measures or annulling the arrest warrants would imply applying the rule, which would be incompatible with the doubts as to its constitutionality. Furthermore, the right to effective judicial protection (art. 24.1 EC) includes precautionary protection, as expressly stated, among many others, in STC 26/2022, of 24 February (FJ Único), citing STC 159/2008, of 12 December (FJ 8), so that the lifting of precautionary measures could affect the effective outcome of the proceedings, with the consequent harm to the right to judicial protection of the victims or those harmed by the criminal act. As the Constitutional Court points out, "*the constitutionally protected purpose of precautionary measures is none other, as has already been said, than to ensure the effectiveness of the future pronouncement of the judicial body relating precisely to the legitimate rights and interests brought before the judges and courts in the main proceedings*".

ii) The same applies to the question referred for a preliminary ruling under Art. 267 TFEU.

As already explained in section IV.2.3 of this report, the preliminary ruling is an instrument of European law which aims to ensure its effective and uniform application throughout the territory of the Union. National judges are European judges insofar as they must apply the provisions of Union law, ensuring its real and effective application. As the CJEU of 8 December 2022 (Case *CJ,* C-492/22 PPU, paragraph 63) states, '*[t]his obligation to interpret national law*

correctly is inherent in the FEU Treaty regime, in so far as it enables national courts to ensure, within the framework of their jurisdiction, the full effectiveness of Union law when deciding the disputes before them (judgment of 8 November 2016, Ognyanov, C-554/14, EU:C:2016:835, paragraph 59 and the case-law cited)";

If there is any doubt as to the compatibility of a national rule with European Union law, the national court must refer the question for a preliminary ruling. The exceptions to this obligation, laid down in the CJEU of 6 October 1982 (*Cilfit* case), have recently been systematised in the CJEU, Grand Chamber, of 6 October 2021 (Case C-561/19 *Consorzio Italian Management and Others*, paragraph 33), and are as follows: (i) the question raised has been found to be irrelevant; (ii) the Community provision at issue has been the subject of an interpretation by the Court; or (iii) the correct application of EU law is so obvious as to leave no room for reasonable doubt. The second scenario corresponds to what the doctrine refers to as the "clarified act", while the third scenario is identified with what the case-law of the Court of Justice refers to as the "clear act" scenario. None of these cases is applicable to the PLOA.

As stated in the CJEU of 17 May 2023 (Case *BK and ZhP* C-176/22, paragraphs 26 and 27), Art. 267 TFEU '*establishes a judge-to-judge dialogue between the Court of Justice and the courts of the Member States, the purpose of which is to ensure unity in the interpretation of European Union law, thereby making it possible to guarantee its consistency, its full effectiveness and its autonomy and, ultimately, the specific character of the law established by the Treaties (see, to that effect, Case C-132/20 Getin Noble Bank, EU:C:2022:235, paragraph 71 and the case-law cited)* (...). (...)
It is settled case-law that a judgment given in preliminary ruling proceedings binds the national court as regards the interpretation of European Union law for the purpose of deciding the dispute before it (see, to that effect, inter alia, Case 52/76 Benedetti [1977] ECR 52/76, EU:C:1977:16, paragraph 26, and Case C-430/21 RS (Effects of judgments of a constitutional court) [1977] ECR 2022, EU:C:2022:99, paragraph 74).

Thus, the national court cannot be obliged to apply a national rule if it considers that it may be contrary to European Union law. In this regard, the CJEU of 11 September 2014 (Case A v. B and Others C-112/13, paragraphs 36 and 37) states that '*the Court has already held that the national court responsible for applying, within its jurisdiction, provisions of EU law is required to ensure the full effectiveness of those rules by disapplying of its own motion, where necessary, any contrary provision of national legislation, even subsequent legislation, without seeking or awaiting its prior repeal by the legislature or by any other constitutional procedure (see, in particular, Simmenthal, 106/77, EU:C:1978:49, paragraphs 21 and 24; Filipiak, C-314/08, EU:C:2009:719, paragraph 81; Melki and Abdeli, EU:C:2010:363, paragraph 43 and the case-law cited; and Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 45).* (...) [and that]

It would be incompatible with the requirements inherent in the very nature of European Union law for any provision of a national legal system or any legislative, administrative or judicial practice to reduce the effectiveness of European Union law by denying the court having jurisdiction to apply that law the power to take, at the same time as that application, all necessary steps to exclude national legislative provisions which might constitute an obstacle to the full effectiveness of European Union rules (see Simmenthal, EU:C:1978:49, paragraph 22; Factortame and Others, C-213/89, EU:C:1990:257, paragraph 20; and Åkerberg Fransson, EU:C:2013:105, paragraph 46 and the case-law cited). That would be the case, in the hypothesis of a conflict between a provision of EU law and a national law, if the resolution of that conflict were reserved to an authority other than the court responsible for the application of EU law, vested with a discretion of its own, even if the resulting obstacle to the full effectiveness of that law were only temporary (see Simmenthal, EU:C:1978:49, paragraph 23, and Melki and Abdeli, EU:C:2010:363, paragraph 44).

Therefore, if a Spanish judge were to decide to ask a question for a preliminary ruling, he or she would be entitled to suspend the proceedings. Article 23 of the Statute of the CJEU expressly provides that the national court or tribunal may stay its proceedings by raising a question for a preliminary ruling; and the CJEU's own Recommendations for the raising of these questions (OJEU of 8 November 2019) recognise this. And, along these lines, the CJEU of 17 May

2023 (Case BK and ZhP C-176/22, paragraph 32) states that "*Article 23 of the Statute of the Court of Justice of the European Union must be interpreted as not precluding a national court or tribunal which has made a reference for a preliminary ruling under Article 267 TFEU from staying the main proceedings only in respect of those aspects of those proceedings which may be affected by the answer which the Court gives to that reference*", precisely in order to ensure the effectiveness of the question referred for a preliminary ruling and the effective and uniform application of European Union law. It could not be otherwise, since it is not possible to make a reference for a preliminary ruling if the rule whose contravention with EU law is in doubt is applied, and this also applies to interim measures.

The regulation contained in Art. 4 PLOA, by seeking that the judicial bodies apply the rule regardless of its compatibility with EU law, entails an interference in EU law contrary to the rules governing the question referred for a preliminary ruling, as well as to its useful effect and, ultimately, to the general principle that obliges the national judge, as a European judge, to ensure the validity and real and effective application of European law.

iii) On the other hand, it must be borne in mind that the question of preliminary rulings, as a matter of ordinary legality, will have to be raised prior to a possible question of unconstitutionality.

As stated in STC 120/2021, of 13 May (FJ 3), citing other previous ones: "*it is indeed the doctrine of this court that 'the organs of ordinary jurisdiction cannot inapply a post-constitutional law in force without raising a question of unconstitutionality* (...). *As it is also consolidated doctrine that '[i]t is contrary to the right to a process with all guarantees (art. 24.2 EC), to fail to apply a domestic rule (whether or not it has the status of law) without raising a preliminary question before the Court of Justice of the European Union, when there is an 'objective, clear and definitive doubt' about that alleged contradiction [SSTC 58/2004, FFJJ 9 to 14; 232/2015, FJ 5 a)] (STC 37/2019, of 26 March, FJ 4)'. Thus, "the jurisdiction's own power to determine the rule applicable to the case in question also extends to the interpretation of the provisions of international treaties (STC 102/2002, FJ 7), as well as to the analysis of the*

compatibility between a domestic rule and an international provision (...) *It will be the task of the Constitutional Court 'through the constitutional appeal, to review the selection of the law formulated by ordinary judges in certain circumstances under the parameter of Article 24.1 EC, which guarantees 'that the basis of the judicial decision is the non-arbitrary and non-unreasonable application of the rules considered appropriate to the case, since whether the application of legality is the result of a patent error with constitutional relevance, or whether it is arbitrary, manifestly unreasonable or unreasonable, it cannot be considered founded in law, given that the application of legality would only be a mere appearance (for all, SSTC 25/2000, 31 January, FJ 2; 221/2001, of 31 October, FJ 6, and 308/2006, of 23 October, FJ 5)' (STC 145/2012, of 2 July, FJ 4)*".

In the same vein, the CJEU of 11 September 2014 (Case A v. B and Others C-112/13, paragraph 38) recalls that '*the Court has held that a national court before which a dispute relating to EU law is brought before it and which considers that a national provision is not only contrary to EU law but is also vitiated by defects of unconstitutionality, is neither deprived of the power, nor relieved of the obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice on the interpretation or validity of European Union law on the ground that a declaration that a provision of national law is unconstitutional necessarily requires a prior appeal to the constitutional court. The effectiveness of European Union law would be jeopardised if the existence of a mandatory review before the constitutional court could prevent the national court, when hearing a dispute governed by European Union law, from exercising the power conferred on it by Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of European Union law in order to determine whether or not a national rule is compatible with that law (judgment in Melki and Abdeli, EU:C:2010:363, paragraph 45 and the case-law cited)*'.

iv) Finally, we reiterate what has already been stated in section IV.2.3 on the European Arrest Warrant. The regulation of the EAW is an EU matter that seeks to eliminate impunity and whose competence is exclusive to the judicial bodies, as indicated in the aforementioned CJEU of 8 December 2022 (*CJ* case, C-492/22 PPU, paragraph 63), a doctrine reiterated in the more recent CJEU of 31

January 2023 (*Puig Gordi et al.* case C-158/21) which, in paragraph 67, expressly states the following: "It *follows from the settled case-law of the Court of Justice that Framework Decision 2002/584 seeks, by establishing a simplified and effective system for surrendering persons convicted of or suspected of having infringed the criminal law, facilitate and accelerate judicial cooperation in order to contribute to the achievement of the Union's objective of becoming an area of freedom, security and justice based on the high degree of trust which must exist between Member States (judgment of 29 April 2021, X (European Arrest Warrant - Non bis in idem), C-665/20 PPU, EU:C:2021:339, paragraph 37 and the case-law cited]*". In any event, it is an instrument of communication and execution between judicial authorities (paragraphs 69, 82 and 83). Therefore, the requirement for the lifting of this measure contained in Art. 4 b) PLOA, and the consequent termination of the proceedings provided for in Art. 11 PLOA, is contrary to the effectiveness of a European instrument which it is the responsibility of the national judicial authorities to ensure.

2.2 Analysis of the remaining provisions.

The analysis of the other precepts contained in this Title also deserves some critical consideration. We will focus, in particular, on the provisions of articles 5, 6, 7 and 8 PLOA.

a) Art. 5 PLOA establishes that the "competent administrative body shall agree the definitive closure of any administrative procedure initiated for the purpose of enforcing the administrative responsibilities incurred".

Unlike in the case of other types of liability, it is striking that no distinction is made between proceedings in progress or those that have culminated in a sanction, nor is any reference made to the finality or otherwise of the sanction.

b) The wording of art. 6.3 PLOA is notoriously inconsistent with the purpose of the draft regulation, given that its wording would allow for the interpretation that the "elimination" (or rather cancellation) of unfavourable marks in the service records of public employees could occur for any reason other than that provided for in the regulation itself.

c) Article 7.2 PLOA could raise doubts as to its constitutionality, given that the non-refund of the amounts paid as a fine implies a difference in treatment that is not justified with respect to other cases in which the refund is established, as occurs with the lifting of certain precautionary measures (Article 8.3). The final wording of this art. 7.2 PLOA includes an exception to the general rule, consisting of the possibility of returning the amounts "paid for the imposition of sanctions under Organic Law 4/2015, of 30 March, on the protection of public safety, with the exception [in turn] of those imposed for very serious offences, provided that, at the discretion of the administration that imposed the sanction, it is considered that criteria of proportionality are met". The absence of any justification in the Preamble of the PLOA prevents a well-founded critical judgement of this exception, adding to the appearance of arbitrariness and inequality before the law that pervades this regulatory project.

d) Art. 8 PLOA establishes, as far as is relevant here, the following:

"Civil and accounting liabilities arising from the acts described in Article 1.1 of this Act, including those which are the subject of proceedings before the Court of Auditors, shall be extinguished, except for those which have already been declared by virtue of a final and enforced administrative ruling or decision.
2. Without prejudice to the provisions of the previous section, the amnesty granted shall always leave intact any civil liability that may be applicable for damages suffered by individuals, which shall not be brought before the criminal courts.

Firstly, it is striking that, in the case of civil and accounting liabilities, conduct already established by a final and enforced judgement is excluded from the amnesty, which is not the case for criminal liabilities and is doubtful in the case of administrative liabilities.

Secondly, it is worth pointing out the serious breach of the right to effective judicial protection (art. 24.1 EC) that will occur for the victims of the criminal acts granted amnesty (which appear to be limited to natural persons, not legal entities), given that they will be forced to claim their legitimate rights as injured

parties through a new procedure. A disproportionate procedural burden is therefore imposed on them to initiate new civil proceedings to claim their legitimate rights as injured parties of the criminal act, since they will not be able to claim them in the criminal proceedings already initiated. This is an unjustified exception to the normal functioning of the Spanish procedural model which allows the victim to exercise not only the criminal action but also the civil action in the same process (art. 109 LECrim). In addition to the resulting financial loss, this provision runs the risk of leaving the victim without effective protection, with the consequent lack of defence, given that criminal proceedings allow the factual elements determining civil liability to be obtained through judicial or prosecutorial initiative, whereas in civil proceedings this initiative is the exclusive responsibility of the victim himself. Moreover, it is possible that, at the time of entry into force of the rule, not all these factual elements have been fully determined, which will be detrimental to the real and effective protection of the victim's rights, given the lack of essential data to justify his claim in civil proceedings, where the principle of rogation and the contribution of the party is in force. As is well known, there is no constitutional requirement imposing the presence in criminal proceedings of the victim or injured party of the crime, but, once the legislator has admitted the figure of the private prosecution, he or she has the right to effective judicial protection (STC 1/2023, 6 February, FJ 3). The Public Prosecutor's Office, as a body with constitutional relevance whose missions include the protection of crime victims (art. 3.10 EOMF), cannot remain silent in the face of what could be a violation of a fundamental right.

3. Analysis of Title III. Jurisdiction and procedure

Title III PLOA seeks to define the channels through which the application of the amnesty is to be developed in the different jurisdictional and administrative orders affected, succinctly setting out the procedural aspects which constitute specialities with respect to the ordinary procedure. Thus, this Title III covers the conduit for the application of the amnesty both in criminal proceedings (Article 11) and in contentious-administrative proceedings (Article 12), in the sphere of the Court of Auditors (Article 13) and in administrative proceedings (Article 14). Furthermore, in addition to the special provisions relating to each procedure, Title III establishes common provisions on standing and competence (Art. 9),

the preferential nature of the procedure (Art. 10), the limitation period for actions (Art. 15) and the applicable appeals system (Art. 16).

Article 9 identifies the bodies to which the application of the figure of amnesty should correspond, whether or not in the jurisdictional sphere. With regard to criminal jurisdiction, the very existence of this precept is questionable, since it adds nothing to the list that, with greater or lesser success, the PLOA breaks down in art. 11. The same can be said with regard to administrative and accounting offences, in view of the provisions of arts. 12 to 14 of the PLOA.

Art. 10 begins its wording with a truism: the bodies that the law defines as competent shall have jurisdiction. In reality, the raison d'être of the precept is the affirmation of the preferential and urgent nature of the adoption of the relevant decisions. It is not possible to find any argument in the PLOA that justifies the reason why a privileged channel should be given to the processing of incidents derived from the possible application of the Law, to the apparent detriment of other processes in which situations that also deserve to be resolved urgently and preferentially, in accordance with procedural legislation (for example, in arts. 504.6; 544 quáter; or 803.1-4º LECrim), are also being resolved.

The urgency of the procedure is completed by the second paragraph of Article 10, which establishes a "maximum period of two months" to issue the corresponding resolutions in application of the PLOA. The calculation of this period may raise some doubts, although it seems that it should be calculated from the entry into force of the regulation. However, the brevity of this period contrasts with the notorious extension of the "five-year limitation period" provided for in Article 15 for the exercise of "actions for the recognition of the rights established" in the PLOA. It is hard to understand why there is urgency in processing the amnesty when there is not the slightest urgency in the exercise of the actions. On the other hand, there is no indication of the effects of the expiry of the two-month deadline, a situation that cannot be ruled out given the saturation of the corresponding judicial body. Nor is it evident what effect this may have on the Administration, by application of the rules of administrative

silence (arts. 24 and 25 of Law 39/2015, of 1 October, on the common administrative procedure of the Public Administrations).

Art. 10 PLOA provides an additional qualification by stating that decisions "shall be taken" within the time limit indicated, "without prejudice to further appeals, which shall not have suspensive effect". It seems that the lack of suspensive effect refers to the appeals themselves, not to the two-month period. The point is that, in theory, until the judicial or administrative decision is final, the act cannot be considered amnestied (Art. 9.3). This affects not only those to whom the amnesty is initially applied, but also those to whom it is not applied, who cannot be considered to have benefited from the law until the corresponding appeals are resolved, for which there is no time limit other than that provided for in the corresponding procedural rules.

Art. 11 PLOA regulates the procedure to be followed in criminal jurisdiction, depending on the procedural stage of the case. The legislative proposal may cause some dysfunction in cases of ordinary or summary proceedings, given that the case may be in the investigation phase before the examining magistrate, but the "competent judicial body" (art. 11.1 PLOA) to decree a free dismissal is the Provincial Court (arts. 622 et seq. LECrim) [or the Criminal Division of the National High Court]. Once the rule comes into force, if necessary, the judge would be obliged to conclude the case and send it to the corresponding Court. In such a case, it seems that the logical order of the intermediate phase of the case would be seriously altered. The High Court would not first have to decide whether or not to close the case (art. 630 LEcrim), and then decide whether or not to open a trial (art. 632 LECrim), but would first have to assess whether or not the amnesty was applicable and, depending on this, whether or not to revoke the closing of the case. Furthermore, the Court will have to rule on a case which, eventually, will not be materially concluded, because it will have been referred to the Chamber before its natural conclusion through the practice of the proceedings which the Court considers appropriate. And all of this is without prejudice to the Court considering that the amnesty is not applicable in this case and returning the case to the Examining Court, the only way to avoid areas of impunity in the prosecution of particularly serious

criminal acts which should be dealt with in the framework of a preliminary investigation.

Possible dysfunctions will also become apparent with the lifting of protective measures. Article 11.8 unnecessarily reiterates the rule already provided for in Article 4.2.a), a rule which, in the case of the pre-trial phase of an investigation, will mean that the lifting of the measures is attributed to the examining magistrate, but the decision regarding the dismissal of the case falls to the Court of Cassation. This splitting of powers does not seem reasonable, which entrusts one body with the cessation of measures on the basis of an assessment of the applicability of the amnesty which is not its own, given that this will have to be carried out by another body.

Articles 12, 13 and 14 PLOA regulate the procedure to be followed in order to apply the amnesty in the contentious-administrative, accounting and administrative fields, respectively.

In the contentious-administrative sphere, jurisdiction is attributed to "the judicial bodies before which the appeal is being processed" (Art. 12.1), which will have to decree the "supervening nullity of the contested administrative act" (Art. 12.2 and 12.3). Without prejudice to the fact that this rule of jurisdiction may be debatable from the perspective of the strictly revisory nature of the contentious-administrative jurisdiction, it seems that the basis of the nullity would be determined by the provisions of art. 47.1.g) of Law 39/2015 (i.e. the nullity established "expressly in a provision with the status of a law"). However, in the case of final judgments, Article 12.4 refers to the review procedure provided for in Article 102 of Law 29/1998, of 13 July, on contentious-administrative jurisdiction. A reference which, in principle, should be understood for purely procedural purposes, given that the approval of an amnesty law does not find a place in any of the sections contemplated in Article 102 itself as cases which qualify for the review of a final judgement handed down in contentious-administrative proceedings.

In the area of accounting jurisdiction, Art. 13(2) and (3) PLOA seems to make the application of the amnesty conditional on the "public sector entities harmed

by the impairment of public funds or effects related to the amnestied facts (...) not having objected". Nothing is said about the effects that may occur in the event of their possible opposition, a claim that seems logical from the perspective of the necessary protection of the public treasury, which must be used for purposes of general and social interest, by constitutional mandate (arts. 31.2; 33.3 and 40 CE).

In the administrative sphere, art. 14.2 PLOA contemplates the case of application of the amnesty against "final administrative acts or during the execution phase of the sanctions", attributing the review to the "competent administrative bodies". In the absence of greater specificity in this regard, the legislative proposal seems to refer to the general rules on the review of administrative acts which, according to art. 106.1 of Law 39/2015, requires the "prior favourable opinion of the Council of State or equivalent advisory body of the Autonomous Community, if any".

Article 15 PLOA establishes a period of five years to exercise the "actions for the recognition of the rights established in this law". Without prejudice to the analysis of art. 10, it is paradoxical to make the application of the effects of the law conditional upon the exercise of the corresponding actions by the eventual beneficiaries. If, as section II of the MS points out, the amnesty implies "a renunciation of the exercise of ius puniendi for reasons of social utility", it does not seem reasonable that these hypothetical benefits for "democratic coexistence" should depend on the exercise of actions by individuals.

4. Analysis of the Additional and Final Provisions.

The Second Final Provision proposes the inclusion of amnesty among the general causes of extinction of criminal responsibility in numeral 4 of Article 130.1 CP, together with pardon. This reform of the Penal Code does not correspond to the nature of the PLOA as an exceptional and singular law, according to its own MS.

In fact, it is worth remembering that amnesty was deliberately suppressed as a cause for extinction of civil liability in the 1995 Criminal Code, known as "the

Criminal Code of democracy". The explanatory memorandum (section I, penultimate paragraph) of the Draft Organic Law of the Criminal Code presented on 11 September 1992, which expired with the end of the IV Legislature after the report of the Ponencia had been issued - on this point the text of the Draft remained unaltered - states it very clearly: "Book I ends, as at present, with the rules referring to the extinction of criminal liability and rehabilitation. With respect to current law, there are the logical modifications which determine a different technique for formulating and measuring penalties. It can, however, be mentioned that the right of pardon is limited to private pardon without mentioning either general pardon or amnesty, as the former is prohibited by article 62 i) of the Constitution, and the latter can never be admitted as an ordinary legal institution".

This paragraph does not appear in the explanatory memorandum of the Organic Law which finally approved the Penal Code (Organic Law 10/1995, of 23 November) in the following legislature, but it should be taken into account that this memorandum is notably shorter than that of the 1992 Bill which is its predecessor: from 28 pages in the BOCG, it is little more than a page and a half, limiting itself to the inspiring principles and the drafting techniques.

In conclusion, it is proposed that the amendment to Organic Law 10/1995 of 23 November 1995 on the Criminal Code, which aims to include amnesty among the grounds for extinguishing criminal responsibility, be deleted.

The third final provision establishes that the PLOA will enter into force "on the same day of its publication in the Official State Gazette".

In the opinion of this Council, the entry into force of laws should be fixed at least on the day following their publication in the BOE, for elementary reasons of publicity and legal certainty.

In Madrid, at +++++