

## Purchases of products outside the Law on Public Sector Contracts

*Regarding the Judgment of the High Court of Justice of Andalusia of 21 October 2024*

### The reality of direct purchasing

In its assessment of public spending in 2019, the Independent Authority for Fiscal Responsibility (“AIREF”, by its Spanish acronym) said that 68.6% of medicinal product purchases in Spain were “non-standardised”. This category included purchases via minor contracts and direct purchases through commercial offers outside the Law on Public Sector Contracts (“LCSP”, by its Spanish acronym).

These pre-pandemic data may have changed, but there is no doubt that direct purchasing through commercial offers remain a practice with some prevalence.

Given this reality, several considerations can be made, including the fact that the data shows the LCSP lacks adequate mechanisms for managing the public purchase of medicinal products. As a result, several initiatives have been proposed with the aim of addressing the issue by amending the LCSP. Until an amendment is approved, it is likely that direct purchases, involving requests from the Administration for companies to submit their commercial offers, will continue to occur. This reality raises questions about the rights of companies in the context of these types of commercial agreements.

### On the judgement

The judgement handed down by the High Court of Justice of Andalusia (“TSJA”, by its Spanish acronym), which has been recently published, deals with a debt claim presented by a translation servi-

ces company. The Administration refused to pay, arguing that the contract lacked formal validity because there was no contract processed according to the LCSP.

The company claimed that the services had been provided in full conformity and to the satisfaction of the public entities that received them, and, thus, the non-payment amounted to an unjust enrichment of the Administration.

In response, the Administration continued to refuse payment, arguing that in order to pay an amount by way of compensation for unjust enrichment, a special procedure of nullity or validation of the expenditure should have been followed.

The judgment upheld the company’s appeal, stating, inter alia, that the Administration could not benefit from its own failure to follow the applicable procedures (i.e., under the LCSP) and could not invoke formalities to refuse payment for a service that has, in fact, been provided.

### On commercial transaction interest

However, the court did not accept that the company’s claim that it was entitled to receive interest for late payment under the Law 3/2004 against late payments in commercial transactions (Law 3/2004 allows interest at very high rates, up to 7 points above Euribor).

The judgment denies the company’s right to this high interest on the grounds that the company submitted a claim based on the Administration’s



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unjust enrichment of the Administration, rather than a claim for payment due for the provision of the service.

Interestingly, the judges uphold the payment claim on the grounds that the Administration cannot oppose payment on formal or procedural grounds; but they deny the right to interest for late payment on formal grounds.

### Conclusion

When supplying medicinal products to public sector entities, until LCSP is modified, it will always be safer to enter into a contract under the LCSP, particularly for those medicinal products that are eligible for the negotiated procedure without advertising due to exclusivity. The request for commercial offer, however, is an option that will continue to be used by many public sector entities. Responding to these requests by submitting an offer and then supplying and invoicing the product remains a valid option. If this approach is followed, it is advisable to be cautious and to follow up the relationship in a timely manner, as subsequent issues with the Administration may arise.

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