

ANALYSIS



Public Law and Regulated Sectors

Supreme Court rules on ‘administrative silence’ in the electricity sector: “public service” or “service of general economic interest”

The Supreme Court judgment of 10 April 2026 characterises the concept of public service under Article 24(1) of Act 39/2015 as an exception to the ‘double silence’ rule, distinguishing it from the concept of service of general economic interest, which applies in liberalized sectors such as that of electricity supply. The Supreme Court thus concludes that in seeking an authorisation to close a combined-cycle power plant, the ‘double silence’ rule applies to the effect of a presumption of approval.

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Supreme Court Judgment no. 430/2026 of 10 April 2026 (appeal no. 5634/2023, reporting (associate) judge: Juan Pedro Quintana Carretero) is of interest in that it addresses a fundamental concept of administrative law — that of *public service* — and clarifies its scope so that it operates as an exception to presumed (tacit) approval. All of this falls within the framework of Article 24 of Act 39/2015, which regulates the meaning of administrative silence and, in particular, the presumption of approval of so-called *double silence* following an application for administrative review. This judgment confirms the legal doctrine established by Judgment no. 3260/2023 of 11 October (reporting judge: Isabel Perelló Domenech), reiterated by Judgment no. 1274/2023.

The ‘cassation’ appeal (appeal on the grounds of a breach of the provisions governing the determination of a dispute) was lodged by the company Naturgy Generación S.L.U. against the judgment of the Madrid High Court of Justice, which rejected the application for judicial review lodged against the presumed rejection of the application for administrative review filed with the Ministry for Ecological Transition and Demographic Challenge against the lower-tier rejection — also presumed by silence (implicit decision) — of the application for authorisation to close a combined-cycle power plant.

The appellant argued that, although the law establishes that silence constitutes a rejection in respect of an application for either (lower-tier) administrative authorisation or (upper-tier) administrative review, in this case a presumption of approval should apply pursuant to the ‘double silence’ rule (administrative silence in response to both applications, for authorisation and subsequent review) provided for in the third paragraph of Article 24(1)

of Act 39/2015. According to this provision, double silence may result in an application for administrative review being treated as successful.

However, the lower court’s judgment rejected the application for judicial review on the grounds that one of the exceptions to the general rule of presumed approval applied, insofar as the electricity system and, specifically, electricity supply, constituted a public service; therefore, as established in Article 24(1), second paragraph, silence has the effect of rejection in those proceedings “whose approval would result in the transfer to the applicant or third parties of powers relating to publicly-owned property or a public service”. It therefore considers that the matter at issue in the application for administrative review may affect the supply of electricity and that, as this is a service of general interest, it is excluded from the mechanism of double silence.

The Supreme Court’s judgment disagrees with the view taken by the lower court, as summarised below.

First, it notes that Article 24(1), second paragraph, of Act 39/2015 “establishes an exception to the general rule of presumed approval by silence, which cannot be interpreted broadly or extensively”.

From this perspective, the judgment addresses the interpretation of the cases that are excluded from this rule on account of involving a “transfer of powers relating to a public service”, which requires a definition of the latter concept.

The Supreme Court acknowledges that “the concept of *public service* is certainly vague and unstable”, citing, in this regard, the statements contained in Constitutional Court Judg-

ment no. 127/1994 when addressing the definition of television as a public service. As this judgment summarises, it is a concept “much debated in legal scholarly writings — with both critics and supporters — subject to various interpretations and used at different historical moments for equally diverse purposes”.

Indeed, rivers of ink have been spilled over the concept of public service, and today it has no unambiguous meaning for either legal scholars or the legislature. In the words of Professor Juan Santamaría (*Principles of General Administrative Law*), “a public service is a paradigm of conceptual ambiguity: it has various meanings and is used for diverse purposes, obscuring language and causing misunderstandings”.

A review of the concept’s history and the various scenarios referred to by this term leads Santamaría to retain the notion of *public service*, but also understand it as comprising two categories: “on the one hand, *public services ‘stricto sensu’*, an expression that includes all those appertaining to the general government, whether provided directly by it or by private individuals; and, on the other, *regulated services*, which refers to those of an economic nature that the law has declared to be privately owned and that are provided by private individuals or companies, under their own responsibility, though subject to the regulations and supervisory powers of the general government”.

This is a very apt characterisation, in which the author avoids EU terminology inasmuch as he considers that it “offers the worst example of chaos and confusion”, the sole purpose of which is to determine whether or not certain activities are subject to European competition rules (with expressions such as “services of general economic interest”, “non-economic

services of general interest”, “universal service,” and “public service tasks”).

The Supreme Court’s judgment employs this dual characterization of public service, applying the first category of “public services *stricto sensu*” to define the scope of application of the exception to the presumed approval contained in Article 24(1) of Act 39/2015, although to refer to “regulated services” it uses the term “service of general economic interest” (SGEI), which is the term generally used, due to European influence, in most laws referring to liberalized activities and, specifically, in the definition of the activity of electricity supply in Article 2 of the Electricity Sector Act.

The judgment states that “SGEIs do not possess the nature or characteristics of a public service from a personal standpoint, as they lack the element of public ownership that is properly defining of the latter”, although, as it notes further on, “there are public powers of varying intensity in the different activities of the electricity sector, including production, marketing and system operation, market operation, transmission, and distribution”. Specifically, in the present case, entry into and exit from the electricity production activity are subject to a regime of prior control through authorisation — as regulated by the Electricity Sector Act.

Based on this distinction, the judgment states that “the literal wording of Article 24(1) LPAC [Common Administrative Procedure Act] refers exclusively to public services and the powers inherent therein, and such cannot be interpreted as being equivalent to services of general economic interest, which have their own defining characteristics; the two terms are neither equivalent nor interchangeable”. It thus leans toward a strict concept of public service, the defining feature of which is public ownership

and the attribution of public powers inherent to that ownership, without prejudice to the fact that its management may be entrusted to third parties (through instrumental entities or an administrative concession contract).

Consequently, the judgment establishes as a doctrine of interest for the formation of case law that, in activities aimed at the supply of electricity — specifically, in relation to the request to close combined-cycle plants — the exception provided for in Article 24(1), second paragraph, of Act 39/2015 does not apply, and therefore the effects of double administrative silence are those determined in the third paragraph of this provision, namely, approval presumed by silence.

This concept of public service for the purposes of presumed approval linked to the ownership of the service is commendable for two reasons. First, it has the enormous potential to provide the legal certainty guaranteed by Article 9(3) of the Constitution in an area that, as we have said, is characterized by great ambiguity and vagueness. The test of public ownership of the service also allows for narrowing the scope of application of this provision in cases of “mixed models” of service provision

in which the same public service may be provided by public authorities (directly or through an agreement) or by regulated private initiative (such as education and healthcare), such that only in the former cases can one speak of a public service for the purposes of the rules on administrative silence.

And it is also commendable, secondly, because it contributes, albeit minimally, to strengthening the sole and battered institution we have to guarantee the right to obtain an express administrative decision in due course, a right now endowed with constitutional force by the case law that upholds the principle of good administration.

Finally, it is worth noting that the concept of *public service* defined by this judgment applies solely for the purposes of the rules on administrative silence under Article 24 of Act 39/2015, since in other legal areas — such as those relating to public authorities’ assets, liability or concession contracts — the term “public service” is used with very different functions and scopes, and therefore its concept must be defined on a provision-by-provision basis and in accordance with the purpose of each category.