



ICLG

The International Comparative Legal Guide to: **Public Procurement 2016**

8th Edition

A practical cross-border insight into public procurement

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Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

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59 Tanner Street
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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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General Chapters:

1	EU Public Procurement Rules – Euan Burrows & Edward McNeill, Ashurst LLP	1
---	---	---

Country Question and Answer Chapters:

2	Albania	KALO & ASSOCIATES: Elira Hroni	10
3	Australia	Baker & McKenzie: Geoff Wood & Anne Petterd	18
4	Belgium	Stibbe: David D’Hooghe & Arne Carton	25
5	Brazil	CGM Chaves, Gelman, Machado, Gilberto e Barboza Sociedade de Advogados: André Marques Gilberto & Álvaro Adelino Marques Bayeux	32
6	Bulgaria	CMS Cameron McKenna LLP: Kostadin Sirleshtov & Angel Bangachev	39
7	Canada	Norton Rose Fulbright Canada LLP: Martin Masse & Erin Brown	48
8	Cape Verde	Vieira de Almeida & Associados: Rodrigo Esteves de Oliveira & Catarina Pinto Correia	55
9	Chile	Fernandois & Cía.: Arturo Fernandois Vöhringer & Luis Hevia Campusano	62
10	China	DeHeng Law Offices: Ding Liang & Li Hongyuan	68
11	Czech Republic	Gürlich & Co., attorneys-at-law: Richard Gürlich, Ph.D. & Jan Bárta	77
12	England & Wales	Ashurst LLP: Euan Burrows & Edward McNeill	84
13	France	Earth Avocats: Thomas Laffargue & Yves-René Guillou	97
14	Germany	Dentons: Dr. Maria Brakalova	104
15	Greece	Kyriakides Georgopoulos Law Firm: Elisabeth Eleftheriades & Gus J. Papamichalopoulos	113
16	Italy	Legance – Avvocati Associati: Filippo Pacciani & Alessandra Palatini	122
17	Japan	Anderson Mōri & Tomotsune: Reiji Takahashi & Makoto Terazaki	133
18	Macedonia	Debarliev, Dameski & Kelesoska, Attorneys at Law: Jasmina Ilieva Jovanovik & Dragan Dameski	140
19	Malta	Mamo TCV Advocates: Dr. Franco B. Vassallo & Dr. Joseph Camilleri	148
20	Mexico	Ibáñez Parkman Abogados: Juan Fernando Ibáñez Montaña & José Álvarez Márquez	157
21	Mozambique	TPLA – Taciana Peão Lopes & Advogados Associados: Taciana Peão Lopes & André Cristiano José	162
22	Netherlands	Legaltree: Willemijn Ritsema van Eck	171
23	Norway	Kvale Law Firm DA: Henrik Svane & Charlotte Bang-Hansen	177
24	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Margarida Olazabal Cabral & Ana Robin de Andrade	184
25	Romania	VASS Lawyers: Iulia Vass & Bianca Bello	192
26	Singapore	Allen & Gledhill LLP: Kelvin Wong & Tan Wee Meng	203
27	South Africa	Ledwaba Mazwai Attorneys: Metja Ledwaba & Lungile Mazwai	211
28	Spain	PAREJA & ASSOCIATS, ADVOCATS: Carles Pareja i Lozano & Norma Munné Forgas	218
29	Sweden	Mannheimer Swartling Advokatbyrå AB: Sven Vaxenbäck & Johanna Jonsson	224
30	Switzerland	Lenz & Staehelin: Dr. Astrid Waser & Dr. Benoît Merkt	230
31	USA	Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett	237

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Spain

Carles Pareja i Lozano



Norma Munné Forgas



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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Since Spain joined the European Union in the year 1986, our legislation regarding public procurement has been obliged to refer to EU regulations, and has had to adapt to the requirements of successive EU Directives on this subject. Currently, state regulation on public procurement is set out in Real Decreto Ley 3/2011, dated 14 November, in which the Revised Text of the Law on Public Sector Contracts (hereinafter, TRLCSP) is approved. The TRLCSP has been partially developed through the approval of Real Decreto 871/2009, dated 8 May, for which the Law 30/2007, dated 30 October, for Public Sector Contracts, was partially developed. However, the majority of public procurement standards of a regulatory nature are still set out in Real Decreto 1098/2001, dated 12 October, for which the general Regulation of the Law for Public Administration Contracts was approved.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

At the end of 2013, Law 19/2013, dated 9 December, was published for transparency, access to public information and good governance, the objective of which, according to its own Explanatory Memorandum, is to establish obligations concerning setting up active public exposure which should connect a wide range of subjects, among which all of the Public Administrations, Judicial and Legislative bodies (for activities concerning Administrative Law), as well as other constitutional and statutory bodies, are included. Additionally, the Law is applied to certain entities which, due to their particular public relevance, or if they receive public funds, will be obliged to reinforce the transparency of their activity.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As already mentioned, given that Spain is a European Union member state, the regulations on public procurement must be adapted to the principles derived from the Treaties of the European Union as well as the EU Directives set out on this subject. The primacy of EU law

means that its regulations take preference over those for national law, so in the event of any conflict or clash between them, the EU law will always take precedence, regardless of the rank of internal regulations, and independently of whether they have been approved afterwards; in other words, aside from their status or length.

Furthermore, this principle of primacy also obliges the Spanish judiciary and courts to apply EU regulations and give preference to these over national legislation. The national court is obliged to guarantee full effectiveness of EU regulations, by, if necessary, disregarding out of its own initiative, any provisions from national legislation that go against these, even if they are subsequent, and is not obliged to request or wait for prior derogation of these through legislation or any other constitutional procedure.

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

As a consequence of all of this aforementioned information, the general principles of public procurement applicable in Spain are those that derive from EU Treaties and EU Directives on this subject. More specifically, the principles of freedom of access, transparency, public exposure, and equal treatment without discrimination are the underlying principles of the whole regulatory standards concerning public procurement, and are characterised by their mainstreaming, given that they appear in all of the stages of contracting, from the preparatory state of contracts, through to their execution.

1.5 Are there special rules in relation to procurement in specific sectors or areas?

The EU Directives concerning public procurement only apply to contracts for public works, supplies and general services, and therefore do not apply to many other types of contracts which public administrations open up, and which are subject to special regulations set out in internal Spanish law. Article 4.1 of the TRLCSP sets out that the following negotiations and legal relations are excluded from the application of law and are to be governed by their own specific regulations.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

In accordance with Article 3.1 of the TRLCSP, this regulation is applied to all bodies and entities that make up the so-called public sector, conforming to the regulations of the European Directives.

2.2 Which private entities are covered by the law (as purchasers)?

Article 3 of the TRLCSP defines its scope of application for certain private entities according to the law. Legislation concerning public procurement is most definitely applicable for trade companies with share capital that is over 50% owned either directly or indirectly, by public administrations or other bodies comprising the current public sector. These companies are considered contracting authorities according to the law and, as a result, are subject to its provisions. In the same way, other private legal entities are also subject to this regulation: in fact, any organisation, body or entity with its own legal status, which has been specifically created to meet general needs, that does not have an industrial or trade purpose, as long as one or several subjects belonging to the public sector are majority financiers of its activity, control its management or appoint more than half of the members of its administrative body, management or supervisory board.

2.3 Which types of contracts are covered?

Within the scope of application of the TRLCSP, administrative contracts, such as those set up by a body considered to be a public administration, should be distinguished from private contracts. Both are subject to the law, but differ in their degree of connection.

2.4 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Article 55 of the TRLCSP provides the required obligations to non-EU companies.

2.5 Are there financial thresholds for determining individual contract coverage?

EU Directives establish certain economic thresholds in order to determine in which way contracts are subject to its provisions. Accordingly, state regulations (in this case, the TRLCSP) distinguish between contracts subject to harmonised regulations, such as contracts that are directly subject to the application of European Directives, and contracts for a lower amount which are only connected to the regulations fixed by national legislation.

2.6 Are there aggregation and/or anti-avoidance rules?

One of the main changes introduced by Law 30/2007, currently the TRLCSP, was to increase and define more precisely the types of public sector entities and bodies that have to subject their contracts to public sector regulations, with different levels of adherence depending on the nature of the entity in question. Therefore, the

extent of the application is one of the measures adopted to ensure the adherence of these entities to the regulations for public procurement.

2.7 Are there special rules for concession contracts and, if so, how are such contracts defined?

Spanish legislation sets out special regulations for concession contracts, distinguishing between public works concession contracts and public services concession. The concession of public works is defined by a contract whereby the contractor is assigned to carry out building work in exchange for either only the right to exploit it or the same right, as well as the right to receive payment.

2.8 Are there special rules for the conclusion of framework agreements?

The framework agreements are regulated in Articles 196 to 198 of the TRLCSP.

2.9 Are there special rules on the division of contracts into lots?

The main rule for dividing contracts up into separate lots is that this must not affect the estimated value of the contract. As a result, Article 88.7 of the TRLCSP sets out that if the contracting of public works or of a service or standard supply gives rise to a simultaneous awarding of contracts in separate lots, consideration shall be given to the estimated overall total of all the lots together. Articles 14, 15 and 16 of the TRLCSP sets out that when the accumulated value of the lots of the divided contract is equal to or more than the threshold determined for contracts to be subject to harmonised regulation, these regulations will be applied to the awarding of each separate lot.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

In accordance with the provisions in Directive 2004/18/EC, the TRLCSP considers the following tender procedures for the awarding of contracts: an open procedure; a restricted procedure; a negotiated procedure, with competitive dialogue; and the tender of projects.

3.2 What are the minimum timescales?

When contracts are subject to harmonised regulation, minimum time limits are established by the EU Directive, and the national legislator may extend these limits if it is considered appropriate. During the procedures for the awarding of contracts subject to harmonised regulation, the time limit for presenting offers is no fewer than 52 days, counting from the date of sending the announcement of the contract to the European Commission. For contracts not subject to harmonised regulation, the minimum time limit for receiving offers for the contracts is 26 days from publication of the tender announcement in the corresponding gazette for public works offers and concession of public works. For remaining contracts, the minimum time limit is at least 15 days, although these limits may be extended in any case at the discretion of the contracting body.

3.3 What are the rules on excluding/short-listing tenderers?

Articles 60–61 of the TRLCSP regulate conditions for prohibiting entering into these contracts, so the tenderers that are in these situations will not be able to enter into contracts with public sector bodies. Among these conditions, for example, is that the tenderer has been declared financially insolvent during any of the procedures, or is not up to date in tax or social security obligations, etc.

3.4 What are the rules on evaluation of tenders?

The regulation for criteria for awarding the contract is related to the principles of equality and non-discrimination, as well as the principles of free competition and the prohibition of arbitrary action. Article 150 of the TRLCSP regulates the assessment criteria of the offers, by setting out that in order to determine the criteria for awarding contracts, preponderance will be given to those who make reference to the characteristics of the object of the contract, which can be evaluated in figures or percentages obtained through the application of the formulas described in the tender Specifications.

3.5 What are the rules on awarding the contract?

Article 151 of the TRLCSP states that the contract should be awarded to the tenderer who has presented the most economically advantageous offer. However, this does not mean that the contract must be awarded to the tenderer who has offered the lowest price for those cases in which the Specifications set out several assessment criteria for the offers. In this event, the contract will be awarded to the tenderer whose proposal as a whole, by applying the assessment criteria set out in the Specification, obtains the best assessment.

3.6 What are the rules on debriefing unsuccessful bidders?

The selection of the most economically advantageous offer, and as a result the one awarded to the contract, must have been made on the basis of the assessment criteria of the offers made and previously published by the contracting entity. The result of the assessment of offers must be accessible to the rest of the tenderers, who may contest this assessment if they do not agree with it.

3.7 What methods are available for joint procurements?

The TRLCSP anticipates some joint tender procedures, the objective of which is to rationalise administrative proceedings and make the public procurement process more efficient. In this regard, an example of this would be the framework agreements referred to in question 2.7, the dynamic purchasing systems, and central purchasing bodies.

3.8 What are the rules on alternative/variant bids?

Article 147 of the TRLCSP sets out the rules for accepting variations or improvements in the offers presented by tenderers.

3.9 What are the rules on conflicts of interest?

Conflicts of interest in the public sector are currently regulated under Law 5/2006, dated 10 April, for the Regulation of Conflicts

of Interest of Members of the Government and Senior Officials of General State Administration, as well as on a general basis, in Law 53/1984, dated 26 December, for Incompatible Activities Related to Public Administration Staff, and Organic Law 5/1985, dated 19 June, for the General Electoral System, relating to conflicts of interest and incompatible activities related to elected representatives.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Article 4 of the TRLCSP sets out the businesses and legal relations which are excluded from the application of Law and are to be governed by their own specific regulations.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Article 4.1 (n) of the TRLCSP expressly excludes from the application of the law, the legal businesses by virtue of which the contracting authority entrusts an entity which has the condition of its own means as well as their technical service to provide a certain service.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

In accordance with the regulations set out in the European Directives, and particularly, in Directive 2007/66/EC, dated 11 December, regulating the review of the procurement process, Articles 37 to 50 of the TRLCSP regulate the so-called question of nullity of contracts in a special review of the procurement procedure.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

As already mentioned, both the special review procedure for procurement and the question of nullity are optional, and it may not be necessary to effectuate these in order to access the ordinary courts of justice.

5.3 Before which body or bodies can remedies be sought?

Spanish legislation has created a new specialised body, the Central Administrative Tribunal for Procurement Remedies, for the resolution of special reviews for procurement procedures that are filed against contracts or procurement records within the scope of general state administration. The TRLCSP states that autonomous regions may create a similar independent body of an administrative nature for the resolution of appeals that are filed against contracts, within the scope of the respective autonomous region's authority. To date, the majority of autonomous regions have created these specialised administrative tribunals.

5.4 What are the limitation periods for applying for remedies?

The filing of a special review for procurement must be announced in advance before the contracting authority. This announcement, and the subsequent appeal, must occur within 15 working days counting from the following day after notification of the action that is being appealed against.

The question of nullity must be presented in a period of 30 working days from publication of the contract's allocation, or from notification to the tenderers affected of the reasons for rejection of their application or proposal. For other cases, the question of nullity may be presented in any case before six months after the contract has been formalised.

Ordinary administrative appeals must be presented within a month from notification of the action appealed against.

5.5 What measures can be taken to shorten limitation periods?

There are no procedures which can reduce the time for filing appeals, although these are already quite short. However, it should be noted that, in accordance with the Central Procurement Review Court Report for 2013, the average time required for the resolution of appeals filed during that year was 17 days.

5.6 What remedies are available after contract signature?

Once the contract has been formalised and for a maximum period of six months, the interested parties may present the question of nullity regulated in Articles 37, 38, and 39 of the TRLCSP, as long as one of the conditions specifically set out for this has been met.

5.7 What is the likely timescale if an application for remedies is made?

The period during which the special review for procurement procedures will be resolved cannot be established in advance, and the duration of the processing of this will depend on the complexity of the matter on those affected. It will also depend on whether it is necessary to open a probationary period or not. However, the law sets out very short processing periods (five days to resolve continuation of the suspension, five days to present allegations, 10 days for probation).

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In accordance with the Central Procurement Review Court Report for 2013, a total of 1,067 special reviews for procurement processes were presented regarding general state administration, out of which 1,009 had been resolved by 1 February 2014. Out of these, 172 were totally upheld and 168 were partially upheld. 314 reviews were dismissed and 340 were declared inadmissible, mainly due to lack of legitimacy of the appellant. Therefore, over 50% of appeals admitted were either totally or partially upheld.

5.9 What mitigation measures, if any, are available to contracting authorities?

In the event that the administrative court perceives temerity or bad faith in the filing of an appeal or in the application for interim

measures, the responsible party may be fined for this. The amount of this would be between 1,000 and 15,000 euros, to be determined depending on the degree of bad faith perceived and the damage occurred to the contracting authority and the rest of the tenderers.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Once the tender announcement has been published, no possibility has been set out for the contracting authority to change the tender Specifications and Conditions for awarding the contract. If the administration intends to make changes, it should leave the already started tender procedure unaffected, and approve new Conditions and Specifications, opening up a new tender.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As a general rule, no negotiation is allowed after the submission of a final tender. Only in a negotiated procedure is it possible for bidders to negotiate the final tender, in terms of Article 178 of the TRLCSP.

6.3 To what extent are changes permitted post-contract signature?

Regulation of contract modification during execution of them, and therefore, after they have been formalised, is currently set out in Articles 105 to 108 of the TRLCSP.

In accordance with this regulation, modification of contracts during their execution will only be possible, as a general rule, when this is expressly set out in the Tender Specifications or in the tender announcement, and the conditions under which this can be made has been expressed precisely and in clear detail.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

In the event that this transfer is carried out due to company mergers or spin-offs, the TRLCSP states that the contract should remain with the entity awarded, as long as it has the financial solvency required upon agreement of awarding it. Article 226 of the TRLCSP also regulates the conditions under which it is possible to assign a contract to a third party, once it has been formalised.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Regulations relating to liberalisation of certain sectors in the economy that had traditionally been state monopolies do not form

part of the legislative body of Spanish legislation for contracts, nor are they included in the EU Directives on public procurement.

Article 275 of the TRLCSP states that the administration may indirectly manage services within its competence, through a concession, as long as they are susceptible to being exploited by private companies.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Article 11 of the TRLCSP includes the collaboration contract between the public and private sectors, regulated in Articles 313 to 315. However, it should be taken into account that Spanish legislation concerning contracts has traditionally accounted for the existence of institutionalised public and private collaboration as types of indirect management of public services. The additional 29th Provision of the TRLCSP regulates the contractual regime of this type of company in detail, as institutional forms of collaboration between public and private sectors.

8 Enforcement

8.1 Is there a culture of enforcement either by public or private bodies?

Public procurement represents approximately 18.5% of GDP in Spain. Despite this, one of the traditional characteristics of public procurement has been the absence of many legal conflicts regulating awarding of contracts. This situation has been largely due to the slim possibilities of obtaining a highly efficient control over this. However, the amendment made for reviews in Directive 2007/66/EU, as well as the new regulation for public procurement introduced in Spain via Law 30/2007 for public sector contracts and administrations adopting good codes of conduct regarding governance and transparency, have given rise to a greater level of commitment in this area, both from public administrations and also, in general, from potential tenderers, which are more and more attentive and demanding with strict compliance of the Law. This has caused an increase in lawsuits.

8.2 What national cases in the last 12 months have confirmed/clarified an important point of public procurement law?

In the last year, several proceedings relating to public procurement have taken place. Especially notable for its high media coverage was the conflict that arose from the awarding of a contract by the Catalan Government (*Generalitat de Catalunya*), through a public service management contract managed by Aigües Ter Llobregat

water company, as well as the water supply infrastructure that this entity has. One of the tenderers filed a special appeal against the awarding of this contract to the administrative courts for contractual review, which partially upheld the special review for procurement proceedings in the sense of excluding the awarded company from the procedure.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

In 2014, the European Union provided a new set of legislation for public procurement:

- Directive 2014/23/EU, dated 26 February 2014, concerning concession contracts.
- Directive 2014/24/EU, dated 26 February 2014, concerning public procurement which replaces Directive 2004/18/EC.
- Directive 2014/25/EU, dated 26 February 2014, concerning contracting by entities operating in the water, energy, transport and postal services sectors.
- Directive 2014/55/EU, from the European Parliament and the Council, dated 16 April 2014, concerning electronic invoicing in public procurement.

The first three Directives establish that the maximum period during which their provisions should be incorporated into respective state legislation is until 18 April 2016, so it is to be expected that the aforementioned Spanish regulations on public procurement will be mended before this date. Concerning the Directive on electronic invoicing, this must be transposed to the national legislation of each member state before 27 November 2018.

9.2 Are any measures being taken to increase access to public procurement markets for small and medium-sized enterprises and other underrepresented categories of bidders?

As it has been already noted, one of the new European legal framework main objectives is to enable SME access to public contracts. In this regard, in recent years, some measures have been introduced to reduce bureaucracy to contract and to enable electronic contracting in order to access tenders all over Europe, without having the need of a large business structure. The most relevant legal text that points this out is Law 14/2013, on support for entrepreneurs and internationalisation. Likewise, the Royal Decree 773/2015 has recently been approved; this has introduced some measures which avoids the requirement of previous administrative classification.

**Carles Pareja i Lozano**

PAREJA & ASSOCIATS, ADVOCATS
C/ Tenor Viñas, 4
08021 Barcelona
Spain

Tel: +34 93 362 03 00
Email: cpareja@pareja-advocats.com
URL: www.pareja-advocats.com

Founding partner of PAREJA & ASSOCIATS, ADVOCATS.

Graduate in Law, Universitat Autònoma de Barcelona (Hons, 1977).
Doctor of Law *cum laude*, Universitat Autònoma de Barcelona (1989).

Practising lawyer specialised in Administrative Law since 1977. Since 1977, he has developed an intense professional activity, providing legal advice, carrying out studies and legal reports, preparing legislative projects and development plans, as well as litigating in court.

He also carries out intense academic activity as Professor of Public Law at the Pompeu Fabra University. He is also a professor for the Master's Degree in Regional Policy and Land Use and Planning held at Carlos III University (Madrid), and he was the Former Director of the Master's Degree in Land Use and Planning and Environmental Law held at Pompeu Fabra University. He is also a frequent lecturer in courses, seminars and conferences in Spain and abroad. During 1992–1993, he was a visiting scholar at the Stanford Law School (USA).

**Norma Munné Forgas**

PAREJA & ASSOCIATS, ADVOCATS
C/ Tenor Viñas, 4
08021 Barcelona
Spain

Tel: +34 93 362 03 00
Email: nmunne@pareja-advocats.com
URL: www.pareja-advocats.com

Norma obtained a degree in Law, at Universitat Pompeu Fabra (1996). She also completed a postgraduate degree in Land Use and Planning and Environmental Law, Universitat Pompeu Fabra (2000).

During 1996–1998, she completed the Ph.D. courses in Public Law at the Universitat Pompeu Fabra, and presented a dissertation on public intervention in housing ("*La intervenció administrativa en la vivenda. La activitat de foment i els plans de vivenda*"). During 2000–2001, she carried out legal teaching tasks at the Administrative Law Department of the Universitat Rovira i Virgili (Tarragona).

Norma Munné joined PAREJA & ASSOCIATS, ADVOCATS in 2002.

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PAREJA & ASSOCIATS, ADVOCATS is a respected law firm that was established in Barcelona in 1977. The firm specialises in Administrative Law and has developed an intense and well-known practice in the fields of land use and planning, environment and natural resources, compulsory purchase, local and real estate tax, accountability of public authorities, public contracts, public property and public services, public regulation of economic activities, state aid, audio-visual law, telecommunications law, protection of personal data, local government and administrative organisation, and fundamental rights and freedoms.

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Email: sales@glgroup.co.uk

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