AVOSETTA MEETING Vienna 2018 – QUESTIONNAIRE

SPAIN

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FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Policies of prioritising economy and ecology

1. Introductory remarks

We are not aware of *specific* initiates as the one adopted in Austria.

The 'economy' is a fairly broad notion as well as the 'ecology'. This also applies to 'burocracy' (*red tape*). A whole range of economic activities carried out in Spain are now under the influence of environmental laws as well as other instruments that have not yet been subject to EU secondary legislation (e.g., town and country planning). It may be debatable whether such requirements represent apparent obstacles to competitiveness or, rather, an incentive to innovate, as reflected by the progressive attachment of green objectives in public procurement legislation. It should be observed that in the case of EIA obligations the Commission (COM(2009) 378 final, at 4, footnote 6) indicates that the costs of preparing an EIA as a share of project costs typically range from 0.1% for large projects to 1.0% for small projects. These costs provide an initial perspective but, as the Commission acknowledges, do not take into consideration other costs (e.g. subsequent amendments, reporting, delays)'. This contradicts opinions (particularly in a Member State about to leave the EU) that EIA provisions are an obstacle to development. Therefore, from a broad environmental perspective it remains to be seen whether environmental requirements do represent such an obstacle or rather an improvement of basic living conditions or of services that very much sustain citizens' needs (e.g., water resources or clean air). This is important in so far as environmental concerns have adopted increasing importance in Spain perhaps more in written legal texts than in policy and decision-making structures. Needless to say, no one is so naïve to conclude that environmental compliance is high as reflected for instance in the still low percentage of recycling or the maintenance of illegal waste sites.

For the sake of this introduction it may be interesting to refer to certain data concerning industrial expense in environmental protection in Spain. The latest data of 2015 (released in July 2017 by the Spanish Statistics Office)[1] showed a decline of 1,1% in respect of 2014 (2.374 million euros). 53,4% of environmental investments were done in equipment and autonomous installations and the other 46,6% in integrated installations. The sectors that concentrated the greatest expenditure were food, beverages and tobacco (22.9%), chemical and pharmaceutical (17.0%) and metallurgy and manufacture of metallic products (13.9%). The industrial sector with the greatest positive contribution was electricity, gas, steam and air conditioning supply with a contribution of 2,074 %, while metallurgy and metal products production had a negative impact (-1,381 %). In 2015, industrial establishments in Catalonia made the largest expenditure

[1] http://www.ine.es/prensa/egpm_2015.pdf.

in environmental protection, with 536.2 million euros (22.6% of the national total). Behind were Andalusia (15.4%) and Valencia (8.6%).

2. Impact of Directive 2006/123 and guarantee of the (Spanish) internal market

More specifically, current Spanish laws include references to simplification and deregulation. These provisions are of different origin but have mostly been motivated by the adoption of Directive 2006/123, on services in the internal market. Apart from this provision, there was already a tendency directed at reducing and simplifying administrative requirements under the assumption that public law (in general) is inefficient and burdensome. Therefore, the adoption (and subsequent transposition) of Directive 2006/123 (by Law Ley 17/2009, of November 23) has certainly favoured a more flexible approach to deregulation as reflected in general administrative procedural laws [currently, Law 39/2015, formerly Law 30/1992 (as amended)]. Accordingly,

(a) Any regulatory initiative must avoid unnecessary or ancillary administrative burdens and rationalize, in its application, the management of public resources.
(b) A new simplified administrative procedure has been designed, the maximum time lapse for a decision being no more than 30 days. However, it should be observed that this procedure has hardly any application in the case of environmental decision-making in so far as the latter requires much longer periods. In addition, environmental procedures usually include a phase for the verification of the true nature of allegations submitted by citizens seeking an authorisation.
(c) Authorisations have been substituted (particularly at local level) by prior communications (*comunicación*) (therefore not subject to *ex ante* controls making them lawful) or by an operator's own declaration (*declaración responsible*), whereby he (i) confirms compliance with any existing requirements and (ii) assumes the consequences derived from his actions (e.g., harm to third parties or to the environment). The dividing line between a communication and a *delaración responsible* is not entirely clear in Law 39/2015. However, in both cases, the corresponding activities may be immediately be carried out once they are notified to a public authority. Whilst the operator remains liable of any wrongdoing it is for the public authorities to undertake *ex post* monitoring of the activities, a matter that in the light of existing resources does not always take place.[2] Needless to say, this approach cannot be applied to any activity since existing laws still do require authorisations either by reason of EU or national law (e.g., activities subject to EIA, to IPPC; or to others not subject to these former groups).
(d) Other Laws have also been amended to reduce decision-making procedures. This is the case of IPPC Law (adopted by Royal Legislative Decree 1/2016) which reduced the time lapse for the grant of an authorisation from 10 to 9 months.

Law 20/2013, on the guarantee of the single market, has also lowered standards applicable to activities affecting the environment.

(a) The Law accepts the requirement of an authorisation provided the principles of necessity and proportionality concur. This is deemed to happen:
    (i) With respect to economic operators, when justified for reasons of public order, public safety, public health or protection of the environment in the specific place where the activity is carried out, and these reasons cannot be safeguarded by submitting a *declaración responsable* or a *comunicación*.

[2] See point 6, below.

(ii) Regarding physical installations or infrastructures necessary for the carrying out of economic activities, when they are likely to cause damage to the environment and the urban environment, safety or public health and historical-artistic heritage, and these reasons cannot be safeguarded by the presentation of a responsible statement or a communication.
(iii) When the scarcity of natural resources, the use of public domain, the existence of unambiguous technical impediments or depending on the existence of public services subject to regulated tariffs, the number of economic operators in the market is limited.
(iv) When so provided by EU regulations or international treaties and agreements, including the application, where appropriate, of the precautionary principle.

Law 20/2013 added two further provisions of interest that were quashed by the Constitutional Court in its judgment STC 79/2017:

(a) The first one indicated that as soon as an economic operator was legally established in Spain, it could exercise its activity in the whole territory, provided it met the requirements of access *of the place of origin* (e.g., Autonomous Community A) even if the economic activity was not subject to any requirements in that place. In addition where requirements, qualifications, prior checks or guarantees to economic operators, other than those required or obtained under the rules of the place of origin, were required according to the regulations of the place of destination (e.g., Autonomous Community B), the destination authority had to accept full validity of those of origin, albeit they could differ in terms of scope or amount. Likewise, free exercise was available even if the regulations of the place of origin (Autonomous Community A) did not require any requirement, control, qualification or any guarantee.
(b) The second rule granted full effectiveness throughout Spain, without the need for the economic operator to carry out any additional procedures or comply with new requirements, to all means of intervention by the competent authorities allowing access to an economic activity or its exercise, or prove compliance of certain qualities, qualifications or circumstances. This was applicable in particular to authorisations, licenses, ratings and professional qualifications obtained from a competent authority for the access or exercise of an activity, for the production or placing on the market of a good, product or service.

The underlying reasons for such approach were enshrined in the Law's preamble, according to which the fragmentation of the internal market produced high costs that considerably complicated the activity of companies. The need to eliminate those costs as well as the obstacles stemming from the growth of regulation had been one of the main demands of economic operators in recent years. Market fragmentation hindered effective competition and prevented taking advantage of economies of scale by operating in larger markets, which discouraged investment and, ultimately, reduced productivity, competitiveness, economic growth and employment, with the significant economic cost involved in terms of prosperity, employment and citizens' wellbeing. As can easily be observed no reference was made to the environment.

The Constitutional Court first observed that the obstacles to economic activity owing to the fragmentation of the national market would be nothing but a consequence of regulatory plurality derived from the legitimate exercise by the Autonomous Communities of their attributed powers. In other words, it was a fragmentation derived from the normal functioning of the State. Secondly, the principle of effectiveness throughout Spain meant replacing the territorial criterion by the criterion of the origin of the economic operator. According to the Court, the regulation of the place of origin (Autonomous Community A) displaced the regulations of the place where an activity was to take place or a product was to be sold (so-called regulations of

the place of destination; Autonomous Community B)). The principle of national efficiency implied that any economic operator was authorized to act in any part of Spain provided he complied with the requirements of access to the activity of the place of origin, even if the economic activity was not subject to any requirements in that place. By attributing supraterritorial effectiveness to the rules of origin, to the detriment of those of the competent authority in the territory where the activity was intended to be carried out the Law lacked any harmonising effect since the conditions for access to economic activities and the circulation of products were not going to be the same as they would depend on the regulations chosen by the operator when determining the place of origin.

3. Coastal "protection"

Further laws have lowered administrative requirements in favour of economic activities. This is the case of coastal "protection" Law 2/2013, amending Law 22/1988. The 2013 Law provides greater legal certainty to private property owners in coastal areas, including those whose lands were in the process of being transformed into franchises. The following represent some examples:

(a) First, in relation to the areas forming part of the so-called "banks of the sea" (*ribera del mar*). When fixing the scope of the terrestrial-maritime public domain (MTPD),[3] the reach of the waves will be in accordance with technical criteria established by ancillary regulations" and not according to "proven references" as the previous legislation indicated. This second criterion was far more objective even though it was also criticized as too rigid because it was focused on historical elements capable of objective evidence but not on administrative criteria and discretion. According to the Constitutional Court (judgment STC 233/2015), the 2013 reform does not alter this criterion but rather limits its application through the evolution of technical knowledge, which offers greater guarantees of rigor and objectivity.

(b) A special regime for MTPD urbanisations is established. They are defined as mainland residential nuclei with a navigable system, built as a result of artificial flooding. Even though the flooded lands form part of the MTPD, private properties adjacent to dwellings and recessed from navigable channels and intended for individual and private yacht parking are not included into the MTPD, nor those adjacent to navigable channels and flooded as a result of excavations, which are intended for collective and private nautical parking.

(c) Previously granted franchises for the occupation of the MTPD may be extended, upon request before their expiry, for another 75 years. This extension is remarkable. It exceeds twice the ordinary term of franchises in Spanish administrative law and tolerates those granted under the 1988 Law to prolong their effectiveness, as a minimum since the express wording of the Law allows an even more generous application, until the year 2093!

(d) In addition, franchises not only are transmissible *mortis causa*, as in the 1988 Law, but also *inter vivos*.

(e) According to the Law, court rulings forcing to relocate wastewater treatment facilities outside the MTPD will be met "once economic circumstances so permit" (except in areas belonging to the Natura 2000 network).

[3] The scope of the MTPD was broaden in the 1988 Coastal Law due to the amendment of the notions of foreshore and beaches. Accordingly, the foreshore included the area comprising the lower low water and the limit to which the waves reach during the greatest storms known or the peak spring tide. It also covered the margins of the rivers up to the place where the efects of tides were perceptible, and embraced salt marshes, lagoons, marshes, estuaries and, in general, low areas flooded with the flow and ebb of tides, of waves or of water filtration of the sea.

Some other amendments directly affect the environment:

(a) This is the case of the constraints affecting dunes. Before 2013 dunes were always included within the concept of beach "with or without vegetation, formed by the action of the sea or the sea wind, or other natural causes". In the 2013 reform that reference is replaced with the following phrase: dunes "will be included to the extent necessary to ensure the stability of the beach and coastal defence". This requirement was not quashed by the Constitutional Court in its judgment STC 233/2015.

(b) A few different criteria for the demarcation of the MTPD were specifically mentioned in the case of the island of Formentera due to its "special" geomorphological configuration. However, the Law did not explain any reasons justifying the special treatment to that island in comparison with others of similar configuration (for example, the island of El Hierro in the Canary Islands). In practical terms, the new legal criteria tolerated the declassification of approximately 90% of lands previously classified as MTPD. The Constitutional Court accordingly quashed that provision.

4. Forests, wildfires and use of burned terrains for development purposes

Other pieces of legislation have also eroded more stringent standards. This is the case of Law 43/2003, or *Montes* Law.[4] It initially prohibited any change of the use of burned terrains. However, in 2005, the Law was amended. Whilst it ordered the Autonomous Communities to guarantee the conditions for the restoration of burned forest lands, and prohibited (a) the change of use for at least 30 years; and (b) any activity incompatible with the regeneration of vegetation cover, during the period determined by regional legislation, it also empowered the Autonomous Communities to adopt exceptions to the foregoing prohibition provided, the change of use was foreseen prior to the forest fire in any of the following instruments

(a) A planning instrument already adopted.

(b) A planning instrument pending approval and previously subject to environmental assessment or, if this was not required, to public information process.

(c) An agroforestry policy directive contemplating agriculture or livestock uses of unforested terrains.

5. Illegal developments, priority projects and projects adopted by Law of parliament

Some Autonomous Communities have adopted Laws (subsequently quashed by the Constitutional Court) halting the demolition of previously declared illegal developments (Cantabria, law 2/2011; Galicia, law 8/2012). In the first case, the Law required a previous procedure for determining whether the public authorities were liable owing to the authorisation of the developments. In the second case, the owners of illegal dwellings were entitled to use them until the liability of public authorities was determined. The Constitutional Court (STC 92/2013 and 82/2014) quashed the laws based on the invasion of State powers on procedural law.

On certain occasions, the Autonomous Communities have also given priority to certain so-called 'strategic' projects (e.g., Legislative Decree 1/2015, on industrial policy, of the Autonomous Community of Galicia). Accordingly, those projects prevail over other public interests and do not require any municipal authorisation for their execution nor previous communication (*comunicación*).

[4] Despite its name, this Law was not related to the common notion of mountains, e.g., natural elevations of the earth surface rising more or less abruptly from the surrounding level, but to any surface covered with vegetation, either trees or bushes, and carrying out environmental, landscape, productive, amenity or protective functions

A further contentious matter is the approval of singular development projects by a Law of parliament. The Constitutional Court has condemned this practice by requiring that those affected by the project are to be entitled to appeal to the Court. However, according to the Spanish Constitution, a very limited number of institutions (not private individuals) may appeal against a Law. Hence, laws adopting projects have no margin of manoeuvre, albeit it remains to be seen whether this *case law* does in effect comply with the incorporation (*in Law*) of the requirements of the Aarhus Convention as interpreted by the ECJ in the *Boxus* case.

6. Weak inspection infrastructure

Last but not least, the ability of public authorities to monitor activities likely to affect the environment is still a matter requiring a comprehensive review. Whilst deregulation has certainly eased controls over the 'economy', checks of the day-to-day functioning of such activities is weak. Although the Autonomous Communities have adopted inspection plans (following Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States), there are large disparities in terms of personnel (e.g., part-time inspectors are frequent), sectors to monitor, consequences derived from breaches of applicable rules and the like. Therefore, as indicated in academic sectors, less rules plus less prevention lead to *small* regulation rather than *smart* regulation.

II. Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

1. (How) was the possibility of using international credits transposed into national legislation?

In Spain there are approximately 1.100 installations subject to EU-ETS.[5] Law 1/2005, establishing a scheme for greenhouse gas emission allowance trading, provides (Article 27 bis) that the use by holders of fixed installations and air operators of certified emission reductions or emission reduction units from flexibility mechanisms to comply with the delivery obligation will only be possible insofar as quantitative limits established for this purpose are not exceeded. The limits corresponding to each installation and to each air operator shall be specified by regulation, taking into account the harmonized standards on this matter adopted by the European Commission. Law 1/2005 allows air operators and operators to use CERs and ERUs in accordance with the limitations established by Article 11 bis of Directive 2003/7 and Regulation 389/2013. Royal Decree 1031/2007, sets out the framework for participating in Kyoto Protocol flexibility mechanisms. According to this regulation, CERs and ERUs complying with the requirements for recognition established in Law 1/2005 may be validly used for compliance with the delivery obligation provided for in this Law. Each installation owner may deliver CERs and ERUs for compliance purposes in accordance with the limits set by the National Allocation Allowance Plan. Article 5 of Royal Decree confirms that all account holders in the national emission rights registry may transfer and acquire CERs and ERUs in

[5] There are some data regarding emissions and absorptions at the end oft he questionnaire.

accordance with Article 17 of the Kyoto Protocol. It should be added that Royal Decree 986/2015, regulates the transfer of credits from the first trading period (2008-2012) to the second period (2013-2020), including CERs and ERUs.

2. *Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?*

The acquisition of international credits is foreseen in Law 2/2011, on sustainable economy. Article 91 creates a Fund (initially with 170 million euros) for the purchase of carbon credits in order to generate low carbon economic activity and contribute to the fulfilment of the reduction objectives of greenhouse gas emissions assumed by Spain. This provision has been supplemented by Royal Decree 1494/2011. Article 6 of this regulation indicates that in the case of acquisition of carbon credits from projects developed under the Kyoto Protocol or other norms of international law, priority will be given to projects of energy efficiency, renewable energies and waste management, as well as those that represent a high component of technology transfer in the country where they are carried out. The Carbon Fund will try to encourage the participation of Spanish companies in those projects. In addition, the Carbon Fund may condition the acquisition of credits to companies participating in projects to the realization of investments in sectors not subject to the ETS. The initial beneficiaries of the Fund are those Parties to UN Convention on climate change with special attention to the geographical areas of Latin America, Eastern Europe and North Africa. Spain also participates in two Funds Participation in two funds managed by the World Bank for the execution of sustainable projects with the environment.

3. *How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?*

We lack specific information on this matter. However, it should be noted that, according to Eurostat, Spain increased its CO_2 emissions by 1.6 % from the combustion of fossil fuels in 2016 whilst the EU reduced them by 0.4%. Spain is the sixth country with the highest proportion of emissions from the EU, with 7.7% of total emissions. Another factor to take into account is the shortage of water resources in spite of 2018 rainfall (as of 25 April 2018 water stored in dams amounted to 39.388 hm^3, that is to say 70.24 %).[6] However, during January-June 2017 and owing to the drought the electricity sector liberated 41.2 million tons of CO_2 into the atmosphere, 17.2 million more than in the same period of 2016. Therefore, depending on future weather conditions Spain may well be unable to comply with EU-ETS requirements.

b) Effort Sharing (Non-ETS)

1. *(How) were the flexibility mechanisms of the ESD transposed into national law?*

This is transposed into Law 1/2015. See also answers to questions 1 and 2, *supra*.

[6] https://www.embalses.net. However, there are significant differences between Nortern and Southern regions.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

At present Spain does not foresee the use of international credits for the fulfilment of its objective in diffuse sectors. However, it continues to support actively market mechanisms as valuable instruments that foster the development of project of clean technologies, while supporting sustainable development and low carbon.

3. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

If Spain is unable to meet its commitments it may rely on flexibility mechanisms.

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?

This possibility was incorporated into Water Law (currently Royal legislative Decree 1/2001), by Law 62/2003, transposing (among other things) the Water framework Directive.[7] Spanish legislation does not add different requirements from those included into the Directive. Article 92 bis.3 of the Law reads as follows: 'Where water masses are very affected by human activity or their natural conditions make it impossible to achieve the stated objectives or demand a disproportionate cost, less stringent environmental objectives will be indicated under the conditions established in each case through river basin plans.' The Regulation on River Basin Plans (Royal Decree 907/2007, of July 6) sets out the time limits to achieve environmental objectives. According to Article 36, they are to be achieved by December 2015 at the latest. However, the Regulation also provides that those time limits may be extended in respect of a specific watercourse if no further deterioration takes place and any of the following circumstances occur:

(a) When improvements necessary to obtain the objective can only be achieved, owing to technical possibilities, in a term that exceeds that established.
(b) When compliance with the established deadline results in disproportionately high costs.
(c) When the natural conditions do not allow an improvement of the state within the indicated period.

The extensions of the established term, their justification and the necessary measures to achieve the environmental objectives related to the water bodies will be included in the river basin's

[7] Spain was condemned by the ECJ in Case 403/11. The Court held that by failing to adopt, by 22 December 2009, river basin management plans, except in the case of the river basin district of Catalonia, and by failing to send to the European Commission and other Member States concerned, by 22 March 2010, copies of those plans, in accordance with Article 13(1) to (3) and (6) and Article 15(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended by Directive 2008/32/EC of the European Parliament and of the Council of 11 March 2008, and by not having undertaken, by no later than 22 December 2008, except as regards the river basin districts of Catalonia, the Balearic Islands, Tenerife, Guadiana, Guadalquivir, Andalusian Mediterranean basin, Tinto-Odiel-Piedras, Guadalete-Barbate, Galician coast, Miño-Sil, Douro, Western Cantabria and Eastern Cantabria, the process of public information and consultation concerning the proposed river basin management plans, in accordance with Article 14(1)(c) of that directive, had failed to fulfil its obligations under those provisions.

water plan, without exceeding the date of December 31, 2027, save if natural conditions prevent achieving the objectives.

As regards less rigorous objectives, Article 36 of the same regulation reproduces the wording of the Law and requires river basin plans to set out the conditions under which those objectives are to be included:

(a) Socioeconomic and ecological needs served by human activity may not be achieved by other means constituting a significantly better ecological alternative and that do not involve disproportionate costs.
(b) The best possible ecological status and chemical state for surface waters and the minimum possible changes in the good state of groundwater are guaranteed, taking into account, in both cases, the repercussions that could not reasonably have been avoided owing to the nature of human activity or pollution.
(c) No further deterioration in the state of the affected water body takes place.

In the assessment of some river basin plans it is included a provision according to which the fulfilment of environmental objectives in water bodies related to Natura 2000 cannot, as a general rule, be left to less rigorous objectives. If that cannot be feasible, the final version of the Plan is to be updated and must detail the bodies of water located in Natura 2000 subject to exemption, the causes of non-compliance with environmental objectives and the reasons that justify the impossibility to develop appropriate measures for each area.

There are two cases concerning the issue of less stringent environmental objectives.

(a) In its judgment of November 20, 2015 (appeal 455/2014) concerning Royal Decree 129/2014, which adopted Ebro's river basin plan, the Supreme Court held that it did not violate Article 92 bis of Water Law because it did not affect the ecological flow of the river. In addition, the Court held that the plan contradicted neither the Water Framework Directive nor the Regulation on river basin plans because these regulations allowed the adoption of exemptions (i.e., less stringent environmental objectives) and the plan provided the reasons for their adoption. It can be inferred from the judgment that as long as a river basin plan advances enough reasons for the setting out of less demanding standards (in the light of the physical features of a watercourse) the courts will not quash the plan.
(b) In a different case (judgment of March 23, 2017, appeal 878/2014, concerning Júcar river basin plan, approved by Royal Decree 595/2014) two municipalities alleged failure to comply with Article 4 (paragraphs 4 and 5) of the Water Framework Directive, since in their opinion, the had not analysed the existing gap between the current state of the water (that was bad according to the plan) and the state to be reached. The Supreme Court held that the determination of 'less rigorous' environmental objectives could not be based on a mere appreciation of the public authorities. The exception to the fulfilment of the general environmental objectives had to be based, at the regulatory level, on the conditions provided for in Article 4.5 of the Framework Directive. When the Directive referred to water bodies 'affected by human activity', to 'non-viable' objectives, their 'disproportionate' cost, the 'ecological alternatives', among others, the inability to achieve the objectives had to be demonstrated. According to the Court, there was no lack of justification for the exceptions since the extension until 2027 and the 'less stringent' objectives, respectively, were based on a report that had taken into account the requirements and conditions set out in the Water Framework Directive (Articles 4.4 and 4.5), which related to the real situation of the masses of groundwater in the aforementioned areas, and analysed their likely evolution.

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?

Spanish authorities have sometimes rely on the provisions mentioned in the previous question albeit it may be concluded that they have not regularly been employed. The following table summarises the situation as it stands now in river basin plans:[8]

River basin plan	Watercourses with less rigorous objectives
Eastern Cantabrian river basin plan	0
Western Cantabrian river basin plan	3
Miño river basin plan	0
Duero river basin plan	57
Guadiana river basin plan	It does not set out less rigorous objectives.
Guadalquivir river basin plan	18
Ceuta river basin plan	0
Melilla river basin plan	0
Segura river basin plan	0
Júcar river basin plan	Many watercourses are in bad condition.
Ebro river basin plan	12
Tajo river basin plan	12

3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?

River basin plans are subject to review. This is required by the Regulation on river basin plans (Articles 87-88). The following items are to be reconsidered:
(a) Evolution of natural and available water resources and their quality.
(b) Evolution of water demands.
(c) Degree of compliance with ecological flow regimes.
(d) State of surface and underground water bodies.
(e) Application of the programs of measures and effects on water bodies.

Royal Decree 817/2015, sets out the criteria for the monitoring and assessment of water course and rules on environmental quality. This regulation includes three types of programmes for monitoring the quality of watercourses:
(1) Monitoring Control Program. It provides a general view of the state of water masses.
(2) Operational Control Program. Its purpose is to determine the status of water bodies at risk of not meeting environmental objectives, as well as to assess changes in the status of these masses as a result of the measurement programs.
(3) Research Control Program. This program is to be implemented if the origin of non-compliance with environmental objectives is unknown; if surveillance control indicates that it is unlikely that objectives will be achieved and operational control has not been put in place to determine the reasons why they could not be achieved; and to determine the magnitude and impact of accidental contamination.
(4) Control of water masses of protected areas.

River basin plans also set out monitoring provisions. No relevant case law has been found on this matter.

[8] This table does not include underground waters.

4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

The establishment of less severe objectives could be challenged under general standing conditions for access to administrative justice (Law 29/1998). It would be for the courts to review the rationale for the adoption of such objectives. The case regarding Spanish Supreme Court judgment of November 20, 2015 (appeal 455/2014) was brought by a private company. The other case was brought by two municipalities.

a) Industrial Emissions Directive: Setting less strict emission limit values

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?

IPPC Law (adopted by Royal legislative Decree 1/2016)[9] transposes the basic obligations of Directive 2010/75. Among those obligations, the Law requires the competent authority (basically the Autonomous Communities) to set emission limit values that ensure that, under normal operating conditions, the emissions do not exceed the emission levels associated with the best available techniques established in the BAT conclusions, applying one of the following options:

(a) The establishment of emission limit values that do not exceed the emission levels associated with the best available techniques. These emission limit values will be indicated for the same periods of time, or shorter, and under the same reference conditions as the emission levels associated with the best available techniques.
(b) The establishment of emission limit values other than those mentioned in (a) in terms of values, time periods and reference conditions. If this clause is applied the competent authority must evaluate, at least once a year, the results of the emission control to ensure that the emissions under normal operating conditions have not exceeded the emission levels associated with the best available techniques.

Nevertheless, the Law also admits the setting out of less stringent emission limit values. Accordingly, the competent authority may, in certain cases, set less stringent emission limit values. This exception can be invoked only if it is made clear through an assessment that the achievement of the emission levels associated with the best available techniques as described in the BAT conclusions would result in disproportionately higher costs compared to environmental benefit owing to:

(a) The geographical location or the local environment situation of the installation in question; or
(b) The technical characteristics of the installation in question.

The values established cannot exceed the emission limit values established in the regulations supplementing the Law, if applicable. In any case, the competent authorities must ensure that no significant contamination occurs and that a high level of protection of the environment as a whole is achieved.

[9] Please note that Spain implemented Directive 96/61 by Law 16/2002.

2. *Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?*

4. This question has required a review of particular authorisations granted by the 17 Autonomous Communities. We can confirm that the foregoing option has been applied albeit not extensively. The following are some examples:
   (a) *Aragón*. Decision of January 16 2018, amending the authorisation of an installation for the production of organic chemical products. Decision of June 7, 2017, amending the authorisation of an installation for the production of lime.
   (b) *Basque Country*. Decision of 8 March 2016, on the amendment of an IPPC authorisation for the production of glass.
   (c) *Castilla-León*. Order FYM/209/2016, of February, 26, amending a previous authorization for the production of glass. Idem Order FYM/211/2016, of February 26.

3. *If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?*

Yes. Another alternative is to allow less stringent emission limits during a brief period of time until new machinery complying with standard emission limits is put in operation (e.g., *Basque Country* decision mentioned above).

4. *Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.*

The public is entitled to challenge the setting out of less stringent emission limit values under general standing requirements set out in Law 39/2015 (administrative procedure) and Law 29/1998 (administrative justice). Therefore, the authorisation may be challenged before the authority who grants the authorisation or before the courts. A possible challenge owing to the lack of review of such strict emission limits may be more complicated under the conditions of Law 29/1998 Article 29, which refers to omissions on the part of public authorities). Nevertheless, NGOs can rely on standing conditions set out in Law 27/2006, transposing the requirements derived from the Aarhus Convention. We are not aware of any specific case law on the matter addressed in this section of the questionnaire.

Exemptions and offsetting combined: the case of NATURA 2000

1. *How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?*

Law 42/2007, on the natural patrimony and biodiversity, transposes the requirements of Article 6(4) of the Directive. Unlike the Directive, its wording seems to accept compensation measures during the assessment procedure. Literally, Article 46.5 reads: 'The adoption of compensatory measures will be carried out, where appropriate, during the environmental assessment procedure of plans and programs and environmental impact assessment of projects, in accordance with the provisions of the applicable regulations.' However, Article 6(3) of the

Habitats Directive does not allow such approach. This provision has not be questioned by the Commission.

2. *Does your national law allow for 'mitigating measures' or 'protective measures' to be considered under the rules transposing the appropriate assessment of the Habitats Directive? If so, to what effect? Can such 'mitigating measures' or 'protective measures' allow a developer not to undergo the test set out in Art 6(4) Habitats Directive?*

Mitigating measures are acceptable in assessment procedures. Since they affect the design of a plan or project (e.g., alternatives in terms of dimension, output or location) they may avoid recourse to Article 6(4) provided the assessment coms to the conclusion that a plan or project lacks negative effects.

3. *Are you aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the Natura 2000 framework? If so, please describe these options. If not, are you aware of discussions on this subject pushing for a change of the law?*

Conservation banks are foreseen in Law 21/2013 (on environmental assessment). However, the relevant provisions have not yet been developed. The Law ignores a key issue in a system of conservation banks, namely, the criteria for generating conservation credits. It expressly states that 'conservation banks of nature are a set of environmental titles or conservation credits (...) that represent natural values created or improved specifically'. However, the Law excludes stipulating how they account for such credits. In addition, the credits can constitute compensatory or complementary measures provided for in the legislation on environmental assessment, environmental responsibility or on natural heritage and biodiversity law.

The determination of specific criteria is more necessary because the preamble to Law 21/2013 extends the object of the credits to 'any activity that produces an inevitable and irreparable net loss of natural values'. However, the Law does not include the criteria that may give rise to the generation of such credits. The fact that it indicates that 'the negative effects caused to a natural value are balanced by the positive effects generated on the same or similar natural value, in the same or different place', does not offer a sufficient predetermination in order to be able to specify compensation units. The deficiency is even greater since if the credits are going to serve to fulfil obligations established in Laws (and do in EU rules), the Law should have satisfied this requirement by setting out the specific criteria under which such credits can be generated (e.g., species-species, service-service, surface-area) without leaving this issue to further ancillary regulations ('The general regime, organization, operation and technical criteria of conservation banks of nature will be developed by regulation').

4. *Does ecological economics provide an answer? Is there any debate in your country suggesting that we should better factor in the socio-economic services of natural resources?*

This debate is taking place. However, no conclusions have been adopted. In fact, neither the Spanish government nor the Autonomous Communities have adopted conservation banks in an effort to compensate for the carrying out of plans or projects negatively affecting Natura 2000. The provisions of Law 21/2013 have not been supplemented by ancillary regulations.

Annex

Data on CO_2 emissions

Emissions (MtCO2-eq) in Spain

1990: 287,8
2005: 439,6
2008: 407,7
2009: 370,3
2010: 356,8
2011: 356,6
2012: 351,8
2013: 322,9
2014: 324,2
2015: 335,7

Net absorption (MtCO2-eq) in Spain

1990: -25,1
2000: -34,6
2005: -38,7
2008: -37,7
2009: -37,6
2010: -38,4
2011: -36,9
2012: -34,1
2013: -36,4
2014: -39,4
2015: -38,8

Future emissions (forecast):

2018: 277,6
2019: 280,3
2020: 281,5
2025: 275,3
2030: 282,5