AVOSETTA ANNUAL MEETING:
"FREE ACCESS TO ENVIRONMENTAL INFORMATION"

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RECENT DEVELOPMENTS: SPAIN

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NATIONAL DEVELOPMENTS

The last year (since the Maribor meeting) has been significantly irrelevant in legislative terms in Spain, as no major piece of environmental legislation has been approved at State level. Only some Decrees (regulations approved by the central cabinet) have dealt with such aspects as the waste from electric appliances (transposing Directive 2012/19/EU).

This situation of legislative atony or apathy should continue at least until our next meeting in 2016, since general elections will be probably called in November this year and no major environmental legal projects are in the pipeline at Parliament at the moment.

Some Autonomous communities have approved different statutes and regulations on a variety of subjects, such as hunting (Aragón, Castilla- La Mancha), sustainable urban development (Navarra), contaminated soils (Andalucía), and the like.

At case-law level, the most interesting subject is probably the one dealing with fracking, that is opposing the central government and some autonomous communities. This controversy has not only statutory but also constitutional implications:

1.- At present, there is no substantive regulation on fracking at national level. Anyway, this technology could be allegedly put in practice within the existing regulatory framework (mining and mineral oils legislation). A draft, specific legislation is now been discussed in Parliament but it is unclear whether it will be approved before the forthcoming dissolution of Parliament. The prospect of putting in practice this technology has raised much opposition at popular level, especially in the north of the kingdom.

2.- In the past, several autonomous communities took several initiatives against fracking: Cantabria, La Rioja, Navarra and Catalonia. Some of them approved parliamentary legislation by which they prohibited the use of fracking in their territory, or they subjected that technique to so many requirements and restrictions that it became virtually unfeasible (Cataluña).

3.- Those regional measures were challenged in the Constitutional Court by the central government, on the ground that autonomous communities do not have the constitutional power to adopt the challenged measures. On the contrary, the defendant regions claimed that they could do so under the constitutional provision that grants autonomous communities the power to introduce more stringent measures (than those adopted at State level) for the protection of the environment (art. 149.1.23, Spanish Constitution of 1978). Other alleged competences of the autonomous communities deal with land and territorial planning, and public health. . It is important to note that, upon a challenge is filed by the State administration, the regional statutes are automatically suspended.

4.- The mentioned judicial challenged have triggered several rulings by the Constitutional Court, which has consistently sided with the central government position. In a nutshell, the reasoning of the court may be summed up as follows: the State competences do prevail over the "environmental" competences of the regions. The State competences deal with "the general basis regulation of the economy" and with "the basic regulation on mines and energy". The absolute ban on fracking is deemed as disproportionate. Moreover, the Environmental Impact Assessment technique already provides a way to determine the compatibility of a given fracking project with the protection of the environment
The rulings are the following ones:
.- Ruling nº 106/2014, of 24 June 2014: concerning the statute approved by Cantabria
.- Ruling nº 134/2014, of 22 July 2014: concerning the statute approved by La Rioja
.- Ruling nº 208/2014, of 15 December 2014: concerning the statute approved by Navarra
.- Interim order of 23 March 2015: concerning the statute approved by Catalonia (final ruling not issued yet).

5.- Another litigation front stems from the local authorities level: Several municipalities approved institutional resolutions declaring that the town or city territory will be "free of fracking". Those resolutions have also been challenged by the State administration in the administrative courts. Other local authorities decided to call for a local referendum on the matter. This possibility was also challenged by the central government. An example comes from the municipality of Kuartango (Basque Country). The city council decided to organise a popular consultation on the question whether the local, master land use plan should not include fracking projects as a form of authorised use of the soil. On 30 August 2013, the central government adopted a decision by which the city council was not authorised to carry out such local referendum. Then, the city council sued the central government in the administrative courts. Finally, the Supreme Ct. dismissed the challenge filed by the local body and siding with the government. According to the said court, a city council lacks statutory authority for calling such a referendum: Ruling of 19 November 2014 (appeal nº 5027/2014).

More case-law is expected in the next months, as long as the different challenges and appeals will be adjudicated by the constitutional court and by the administrative courts. However, the reasoning of the Constitutional Court is rather clear and monolithic on this issue, and the Supreme Court understands that municipalities do not enjoy the power to ban or to restrict fracking in their territory, because: (a) they lack the powers to do so, under the in-force statutory scheme for local government; (b) fracking is an authorised, lawful activity at national level; (c) fracking is a part of the energy supply strategy, which is a national, compelling interest.