AVOSETTA ANNUAL MEETING:
"FREE ACCESS TO ENVIRONMENTAL INFORMATION"

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NATIONAL REPORT: SPAIN

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Question 1: ***Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?***

In Spain, the right of access to environmental information (thereafter, "AEI") cannot be construed as a "constitutionally guaranteed right". On the one hand, the Constitution does not mention this right in any provision. Moreover, the "right" to the environment, certainly enshrined at art. 45 of the Constitution, is not really a "basic" or "fundamental" right in the technical meaning of it, bus a simple "guiding principle" of public policy, addressed to the several branches of government. This "systematic" interpretation of the said provision has been consistently supported by the case-law of the Spanish constitutional law, and by the majority of scholars.

However, one may see some *radiations* of the right of AEI in other constitutional provisions, namely: art. 9.2 (principle of citizens participation in political, economic, and social life) and art. 105 (principle of citizens access to governmental archives and registers). Therefore, access to environmental information is a statutory right, defined and regulated by infra-constitutional legislation. An interesting case on this question was adjudicated by the Supreme Court: *Ruling of 15 February 2011* (appeal 2053/2008). In that case, the Autonomous government of the Basque Country approved the Basque Listing on Clean Technologies. A company sued the regional government, by instituting a special proceeding on constitutional protection and alleging (i.a.) a violation of the fundamental right to the environment and a violation of the domestic law that transposed Dir. 90/313, since the regional department had not granted the information (concerning some competitors) asked for by the applicant. Both the High Court of the Basque Country and the Supreme Court dismissed the claim on the ground, i.a., that no constitutional matter was involved in the case.

Question 2: Other (national) legal acts providing access to information held by public authorities. Relations with laws transposing Dir 2003/98, on the re-use of public sector information

For years, the laws on access to environmental information (*see infra*) have been the only pieces of legislation on access to information held by public authorities. In 2013, a State Act established for the first time a general regulation of the access to that information: Act 19/2013, of 19 December 2013, on transparency, access to public

information and good governance. This piece of legislation has a broader and larger scope than the AEI legislation, and follows to a certain extent its model.
On the other hand, Dir. 2003/98 was transposed by another piece of State legislation, Act 37/2007, of 16 November 2007, on the re-use of public sector information.

The connection between the "general" law on access to public information (Act nº 19/2013) and the specific AEI legislation is clarified by the former (supplementary provision number one): Access to environmental information must follow the specific legislation on AEI. This legal scheme works as a "lex specialis" in respect with the general legislation on access to public information (19/2013 and 37/2007 statutes); consequently, the Act nº 19/2013 works as a "default rule" in case of lacuna or loophole in the AEI legislation. In practice, the general legislation on access to public information plays little role in AEI disputes or litigation, because the "special" legislation is complete and detailed enough.

Question 3: ***National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?***

Before the transposition of Dir. 90/313 (by means of the Act nº 38/1995, of 12 December), there was no general statute regulating the AEI. Therefore, the EC legislation has had a key impact on the national law on the subject. This does not mean that, before that transposition, it was impossible to get any environmental information. Actually, there were different possibilities to obtain that information: (a) if a piece of sectoral environmental legislation would allow the citizens to ask for it; (b) by filling a general or "plain" application to the competent body or authority; (c) by exercising the general right of access to administrative archives and registers, a right enshrined in the Law on Administrative Procedure.

Anyway, the promulgation of the Act nº 38/1995 represented a radical change in the prior situation.

Question 4: ***Statistical information about the use…Difficulties of the administration handling the number and/or the scope of applications.***

There is no centralised statistical information about the use of the AEI in Spain, due to the fact that the legislation applies to thousands of different governmental bodies at local, regional and State level, and each level is autonomous or "independent" from each other. Each governmental body is responsible to enforce the AEI statute (act 27/2006), and each one is supposed to produce or release statistical information about the actual application of this legislation.

Just as an example, we may indicate the data contained in the last report produced by the national Ministry of Agriculture, Food and Environment[1]: in 2013, the environmental information office of the said Ministry processed 12.907 requests on

[1] For instance, the State environment department produces every year, since 2008, data about the handling of AEI queries addressed to that agency. The last one pertains to 2013: *http://www.magrama.gob.es/es/ministerio/servicios/informacion/Aarhus_informe_estad%C3%ADstico_2013_tcm7-360636.pdf.*

strict "environmental information"[2], of which: 10.187 by phone, 1.844 per e-mail, 822 face-to-face requests, etc. The total number of requests of information (both at State and Autonomous Communities level) went up to roughly 295.000 requests[3]: 114.000 were addressed to Autonomous Communities, 77.000 to the Ministry of Environment, and 104.000 to other State departments.

The difficulties at the stage of administrative implementation, (usually overlooked or ignored by practitioners and scholars) should be kept in mind if one wants to carry out a "realistic" appraisal of this legislation. The basic point is that the 2006 statute on the right to AEI did not establish more resources or funding for the affected agencies. However, this piece of legislation involves a significant increase in the work to be done by those governmental bodies (making information available, replying to the demands of access, compiling statistical data and reports, opening a specific point of information, etc,), to be done with the same employees, or even with fewer employees (in Spain there has been during the last years a moratorium on recruiting public employees, and many agencies are under-staffed). And it is not only the amount of work to be done. Specific training for civil servants is also highly needed. In this sense, the 2006 statute established the necessity of a national plan on training for civil servants on this matter, but little has been done.

These difficulties are even worse in the case of small municipalities, understaffed and with no specialised civil servants. It is not unrealistic to guess that, in many small Spanish small towns, the City Hall has never heard about the AEI.

Question 5: *Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC)*

Directive 2003/4 was transposed in Spain, by means of the Act nº 27/2006, of 18 July. This piece of State legislation covers also the matters of public participation and access to justice in environmental matters (therefore transposing in the same rule Dir. 2003/35)[4]. A comparison between the wording of art 1.1 of Dir 2003/4 and the corresponding provision of the Act 27/2006 (art. 2.3) reveals that the Spanish statute follows literally the wording of the EU rule.

For what concerns "jurisprudence" or case-law in Spain on AEI, an <u>important remark</u> should be made, relevant for the rest of the items in this questionnaire: the right of AEI has not produced a significant body of judicial proceedings/rulings. Litigation focuses mainly on participation in decision-making and access to justice. On the other hand, we are not aware of any preliminary ruling to the ECJ formulated by a Spanish court dealing with AEI.

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[2] Plus 23.387 requests on agricultural information. This information includes several items which may be considered also as "environmental" information under the EU directive and domestic legislation (waters, soil, coastal areas, etc.)

[3] This information does not include data from the Autonomous Community of Canary Islands, and from the autonomous cities of Melilla and Ceuta, for which no data were available to the Ministry.

[4] *Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente.* This statute was published in the State, official Gazette on 19 July 2006. It entered into force the very next day.

There are different reasons for this situation: the controlling statute is broad and clear and it follows faithfully the EU rule; litigation in administrative courts is costly, lengthy and cumbersome (a final judgment may come out 4 to 7 seven years after the original application, depending on the procedural intricacies of the case). Therefore, many potential litigants on AEI matters decline to go to court.

On the basis of the cases that have been identified, it is clear, nonetheless, that Spanish courts have proclaimed that the definition of environmental information should not be construed in a restrictive way. In case of doubt, an expansive criterion should be followed. This reasoning may be found, i.a., in the *Ruling of the National Administrative Court* (Audiencia Nacional) of 30 June 2011 (closure of the nuclear power plant of Sta. María de Garoña), especially at point 14.

Question 6: ***Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Art. 3 para 1 Dir 2003/4/EC)***

Art. 3. 1 of the Directive was transposed by art. 3.1 of the AEI Act. In our view, the domestic provision is even more liberal than the European rule: of course, the "without having to state an interest" provision is reproduced verbatim; in addition, the Act clarifies that the right of access may be used by anyone, independently of his nationality, residence or head office. Apart from his "hardcore right", the Spanish statute recognises other ancillary rights. The citizen has the right: (a) to be informed about the rights recognised to him by the statute; (b) to receive advise and guidance in their search for information; (c) to know in advance the fees payable, if any, for any search or query, etc.

Moreover, no relevant case-law has been identified on this precise question.

Question 7: ***Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 . 2 nº b and c of the Directive. (see ECJ 279/11 (Fish Legal)***

In harmony with the Directive provisions, the Spanish Act on AEI considers those private parties as "public authorities" (art. 2.2). The definition complies with the wording of the directive, certainly, but indents "a" and "b" are consolidated into a single indent, which in our view makes more sense since there is a certain overlap or duplication of concepts between these two indents of the directive. Private persons are bound by the same obligations to provided environmental information as any other public authority. Apart from that, art. 21 of the said Act establishes that affected parties may file a claim in the administrative agency or department under whose authority the "private party" is acting. The resolution of this claim is executive. If negative, the citizen may sue in the administrative courts, but this possibility is rare.

No relevant case-law has been identified on this specific aspect of access to information.

Question 8: National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Art. 3 para 1 Dir 2003/4/EC)

This aspect of the directive has been transposed in art. 1.1.(a) of the 27/2006 Act on AEI, in a rather literal way. To our knowledge, this specific aspect of AEI has not triggered complaints or litigation, and no case-law has been retrieved on this matter.

Question 9: Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements" (see Art.3 paras 3 – 5 Dir 2003/4/EC)

The provisions enshrined at art. 3, par. 3 of Directive 2003/4 have been correctly transposed into art. 10.2 of the Act nº 27/2006. There is slight nuance, though, since the Spanish version of the Directive speaks of "if a request is formulated in too i*mprecise* a manner…", while the English version says: "If a request is formulated in too *general* a manner…". The difference in meaning, though, is almost neglectable. In any case, the public authority will ask the applicant to specify the request, and shall assist him in doing so. The possibility foreseen in the Directive (to refuse the request under art 4(1)c) is alto included in the Spanish legal scheme (art. 13.1,c).

Par. 4 of Art. 3 of the Directive has been –almost literally- incorporated by the Act 26/2007, precisely at art. 11. Finally, the provisions of art.3 , par. 5 have been correctly transposed into art. 5.

To our knowledge, this aspect of AEI has not triggered significant legal disputes, and no case-law has been retrieved on this particular issue.

Question 10: Law and practices/jurisprudence on charges for access (copying? administrative time?)

The EU Directive provisions on charges for access of EI have been reproduced in a faithful way by art. 15 and by the Additional provisions nº1 and 2 of the Spanish Act 26/2007. Within this legal scheme, State administration departments, regional agencies and local authorities are free to establish the charges of fees that they consider appropriate. They determine the said charges and fees by means of a specific regulation or administrative order. In general, the access to environmental information is free, when the request is made orally, in person, by mail or phone. Most times the required information is already available in pre-existing databases, reports or publications (which may be eventually consulted free of charge in the appropriate documentation center or by surfing the appropriate website). Only when the information involves facilitating a huge amount of documents or copies, or complex maps or graphs, can a charge be applied.

At the State level, a recent Order of 5 September 2014 has established the fees and charges that may be applied by State agencies in the context of AEI. Different fees are envisaged, i.a.:

- Black/white photocopies in DA4 format(starting from the 20th, as the first 19 are exempted): 0,03€ per page.
- Black/white photocopies in DA3 format(starting from the 20th, as the first 19 are exempted): 0,04€ per page.
- photocopies of maps (b/w): 0,42 per square meter
- Per each DVD/DWR: 0,87

- local postal mail: 2,30€
- international mail: 6,37€

At regional level, each Autonomous Community is free to establish the amount of the charges and fees, within the statutory criteria. For instance, in the Madrid Region the said charges have been established by means of the Administrative Order of 14 May 2009, according to which, the facilitation of copy of maps may be charged with a fee between 2 and 5€ each, according to its complexity and scale.

Due to the modest amount of these charges and fees, this precise aspect of AEI has not triggered any relevant controversy, and no relevant case-law has been identified in domestic courts on this issue.

Question 11: Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?

No

Question 12: National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)

There is no specific regulation of that question in the domestic statute.

Question 13: Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC).More specifically: (a) Confidentiality of commercial or industrial information; (b) Confidentiality of the proceedings of public authorities / internal communications /(c) Approach to the disclosure of: "raw data'), etc

In the matter of exceptions, the domestic legislation (art. 13.2, Act 27/2006) follows literally the wording of the EU Directive (art. 4.2).

The rather limited case-law on this issue deals mainly with two exceptions: "information unrelated to the environment" and "materials/documents in the course of completion" vs. "unfinished documents. Some judicial rulings (administrative courts) have analised this aspect of the AEI, which are summarily described infra:

.- *Ruling of the Supreme Court of 19.9.2011 (appeal nº 2071/2009*). An e-NGO and an affected local authority requested (April 2004) the access to some studies and reports performed by the Water Basin Authority of the Ebro River, in connection with the building and exploitation of a dam project (Itoiz). The agency rejected to facilitate such studies and reports, alleging that they consisted of unfinished, provisional information. The regional high court of Castilla y León found illegal that decision, understanding that, although those reports and studies were a part of an unfinished procedure, they had been duly completed and received their final format. Therefore they could not be understood as "provisional". The Court stressed the point that the AEI legislation goes further than the general legislation on administrative procedure, and imposes deeper disclosure requirements on the public administration. The State administration appealed to the Supreme Ct (claiming, in addition, that the reports and studies did not constitute

"environmental information"). The Supreme Ct. rejected the appeal and confirmed the lower court ruling and *ratio decidendi*, relying on its precedent case-law, namely its rulings of 28 October, 2003 (appeal nº 3928/1999) and of 3 October 2006 (appeal 2424/2003).

.- *Ruling of the Supreme Court of 11 July 2014 (appeal nº 1296/2012).* In this case, an e-NGO requested the Regional Government of Madrid to submit a copy of the reasoned opinion produced by the European Commission, in the context of an infringement procedure against Spain for an alleged violation of the EU nature protection rules by a project of duplicating a major highway in Madrid region (the "M-511 Road"). The application was filed in June 2007, and rejected by the regional agency (at several instances). Basically the Region of Madrid considered that the EU Commission's reasoned opinion could not be facilitated to the applicant because it was "EU *documentation"*, and therefore it was controlled by EU Regulation 1049/01. Consequently, the Commission´s opinion could not be released without the express authorisation of that body. Then the applicant sued the regional government, first in the regional court, and then in the Supreme Court. The regional court annulled the contested administrative decision, considering that the regional government was incompetent to reject, on the merits, the access to the information (that should be done by the Commission itself). However, it did not grant the applicant the right to obtain the information required, for strictly procedural reasons. Then, the regional government appealed to the Supreme Ct, which sided with the lower court. In this case, the controlling rule is Regulation 1049/01, and not the domestic statute.

.- *Ruling of the Regional High Court of Castilla y León, of 23 July 2014* (appeal nº 589/2013). In October 2010, an ornithology NGO (SEO/Birdlife) filed a request in a regional agency to obtain some reports dealing with the fight against a plague of rodents known as "little moles" (*microtus duodecimcostatus*), released by free-lance experts hired by the regional environment agency**.** The agency did not respond to the request and, on a second request, denied the requested information, claiming that the reports were "unfinished" and "provisional" documents, since no final decision had been reached on the subject. After losing an administrative appeal, the NGO filed a judicial challenge in the first instance administrative court, which was admitted. The court ordered the agency to facilitate the said report. Then the agency appealed against this ruling in the Regional High Court of Castilla y León. The appeal was rejected by a ruling of 23 July 2014, and the lower court ruling was confirmed.

.- *Ruling of the Regional High Court of Castilla y León, of 13 November, 2009* (appeal nº 1765/2008). In this case, an e-NGO requested to have a copy of the draft plan for the conservation and the management of the wolf, eventually approved by the environmental agency of the autonomous community of Castilla y León. The agency refused to facilitate the document, alleging that it was very long and included many complex graphs and maps. However, the agency decided to make available the said plan in a local environmental information documentation center, located in the city of Valladolid, the capital of the region, were it was publicly available for a period of more than three months. The NGO sued the regional government for not facilitating a hard copy of the said plan, and because the plan infringed national and EU rules. The court admitted the appeal on the merits (it declared the plan illegal in some challenged points) but dismissed the appeal on the AEI issues. It considered that, although the agency had not given the applicant a hard copy of the requested information, the applicant could

have consulted the plan at the local documentation center, where it was openly available for a reasonable period of time.

.- *Ruling of the Regional High Court of Madrid, of 22 February, 2013* (appeal nº 335/2010): In March 2009, WWW-Spain asked the Ministry of Industry to have a copy of the transfrontier consultation made between Spain and Portugal, as well as other complementary information pertaining to the environmental impact assessment produced in connection with a project of oil refinery in the Extremadura Region. The Ministry declined to submit the information, alleging that the requested information was "unfinished"/"in progress", The NGO sued in the Regional High Court. In the trial (evidence stage) it was proved that the said information was actually held by the Ministry at the time of the application, for the Portuguese authorities had forwarded their opinions before the agency openly rejected the access application. Therefore, the court quashed the decision and ordered the agency to facilitate the required information.

Question 14: Judicial control of access-decisions (a) Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?; (b) Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?

No specialised administrative appeal bodies have been established for AEI. If a request of access is denied, the applicant may file the regular administrative appeal established in the general law on administrative procedure (*recurso de alzada*). The general deadline for filing the appeal is one month. The appeal should be adjudicated in a deadline of three months. In the contrary, the applicant may understand that the appeal has been rejected. In that case, he may decide to litigate in the administrative courts.

Judicial proceedings dealing with AEI do not have any special feature as compared to the general regulation of judicial control of administrative action. Therefore, there are no special provisions on standing.

Question 14: How do states fulfill the duty to make information actively available?

From the practical point of view (at least from the perspective of the "regular citizen") this aspect is the most aspect in the domain of AEI. In the last 30 years, Spanish bureaucracy has made an impressive work in organizing and making available to the public a wide array of environmental information databases. There are dozens of such databases, which provide at least the regular environmental information that someone might be interested in. These databases may be consulted at State[5] or regional level.

Moreover, both the State Ministry of the environment and the counterpart regional agencies have established information points, where civil servants work fulltime in responding to requests for information[6]. Many agencies have even opened or run a library or a documentation center. At local level, however, the situation is not so satisfactory, especially for what concerns small towns.

[5] See, at national level, the website of the Environment Ministry: www.magrama.es. At regional level, see the website of the Basque Environment Department:

[6] For more date, see the report mentioned at footnote 1.

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.