Legal aspects of climate change.

In particular, emissions trading mechanisms

SPAIN

by:

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QUESTIONS

-Question 1: Council Decision 2002/358 introduced, among others, a compulsory burden sharing for EC Member States as regards the commitments ....

In general terms, Council Decision 2002/358 did not raise too much concern or legal discussion in Spain. The matter was regarded to be more technocratic and political than purely legal. The most important feature of that Decision was not the actual accuracy of the final burden shared by Spain, but the very important fact that Spain was given a margin of +15% increase over 1997 figures. That seemed to respect the fact that the economic situation in Spain needed not to be hampered too much by the Kioto Protocol. Spain was included in the „cohesion belt" countries, with Greece, Ireland and Portugal and the whole scheme could be presented by political rulers as a fair deal from Brussels. As far as I remember, there was not a formal mechanism for participation of the public, or even better: there was no public participation at all.

Important notice: Spain was allocated a burden share of +15% of CO2 emissions over 1997 figures. However, by early 2005 different studies concluded that the country had already attained a +45% increase over 1997 figures. Spain is then one of the countries that have deviated the most from the theoretical targets. This fact is important to understand the underlying strategy of the Spanish National Allocation Plan, *see infra., question 8(a).*

-Question 2: Directive 2003/87 introduces a system ...

(a) to (c): In general terms, there was no major legal or mass media discussion in Spain about these questions of Directive 2003/87. I believe the reasons were: (1) those questions were too technical and they "came from Brussels"; (2) the real important battle was really the (then) future National Allocation Plan (NAP) and how the Community scheme was to be transposed in Spain (*see, infra*). Of course, the competence of the EC in this matter appeared undisputed

(d) When and by what legal act (if at all) was the Directive transposed …

Transposition of Directive 2003/87 in Spain involved the enactment of the following norms:
-(1) First, Royal Decree-Law 5/2004, of 27 August 2004, was approved by the Council of Ministers (The Cabinet, or the Government, *el gobierno*). In Spain a Royal Decree-law is a governmental regulation having the force of a statute, enacted by the

Government (Council of Ministers) in case of exceptional urgency. In this case, the urgency was based on the fact that the transposition period had already expired. The new government in power expressed several times its complaints that the former administration had taken little action in the transposition of the directive.
In a nutshell, the transposition of the directive may be described as follows: (a) Very little, if anything, was made by the government since the enactment of Directive 2003/87. At least, there was not information on any draft or project prepared; (b) the transposition was made by a new governmental team, in an urgent way; (c) the transposition was made in a context of secrecy and somewhat official hermetism, with hurry …and in the middle of the summer, when everyone is at the seaside or wants to be at the seaside. Clearly, the directive was not transposed in due time, neither.
As for the public attention given to the performance of the country in the transposition of the Directive, this fact was mainly used by the new administration resulting from the elections of March 2004. complained that the former team had taken little action in this sector.
-(2) As required by Spanish constitution, that Royal Decree-Law was validated by Parliament (Congreso). At the same time, the Parliament decided to approve a Statute based on that Royal Decree-Law. The legislative process resulted in the Act of 9 March, 2005 (*Ley 1/2005)*, which was published in the Spanish Official Gazette (*Boletín Oficial del Estado)* of 10 March 2005. This is the basic legal framework for emissions trading in Spain.

-Question 3: Article 9, national allocation plans ...

(a) *national*-**regional?.... exact dates of the approval/publication of the plan ...**

Although there was some discussion on the possibility of implementing the emissions trading system at regional level, the allocation plan in Spain is national, there are no different regional allocation plans. The plan was approved by the Council of Ministers, through a Governmental regulation: Royal Decree (Real Decreto) number 1866/2004, of 6 September 2004, published in the *Boletín Oficial del Estado (*the Spanish official gazette) of 7.9.2004. Consequently, this Plan was also approved later than required by the EC deadline. This Royal Decree was later modified by Royal Decree 60/2005, of January 21, 2005 (published in the "BOE" of 22.1.2005).

-(b) Was the public informed of the draft national allocation plans (NAP)? …This question is answered together with the questions in Section 4 (*see infra)*

-(c) What allocation criteria were followed in your country? Or does the plan just mirror political power play? What kind of empirical information was used in order to draft the plan? Was it really accurate/updated?

Different allocation criteria and empirical information were followed in Spain:

- Historical measures and official registries for emissions, especially in the context of Commission Decision 2000/479/EC (EPER mechanism).

- Official registers on installations producing electricity

- Databases derived from local, regional and national inventories and enforcement activities

- Industry declarations and questionnaires

This initial stream of information was increased by new sources (see, infra, question 4, (a) and (b))

-(d) What happens if the Commission exceeds the three months attributed to it under Article 9(3)? What is the situation in your country in similar legislative cases?

The Member State must in any case wait until the Commission takes its decision. The hypothetical question has never happened and should be resolved in political terms

-(e) Would Article 10 allow Member States to recur to Article 176 EC Treaty? If so, did your state allocate lower percentages?

In my view, yes. No, Spain did not allocate lower percentages

-(f) **What is the weight of Clean Development Mechanisms as compared with pure „reductions" in emissions?**

Clean Development Mechanisms are very important in the Spanish system (See question 8)

-Question 4: Article 11(1) provides that before 1 October 2004 Member States shall decide on the total number of allowances and their repartition on each installation, "taking due account of comments from the public".

-(a) and (b): comments from the public, procedure develop, publication, distributional choices, etc…

In Spain, the list of individual installations and the allowances granted to them constitutes an annex of the NAP. Consequently, it is difficult to distinguish –at least from a formal point of view- between the approval procedures of the NAP (the big figures) and of the list of individual installations.

In general terms, the content of the plan was mainly discussed with the affected industries, although environmentalists and the public at large had an opportunity to make comments in the context of the different participation organisms and commissions established by the Ministry of the environment (especially in the National Commission on Climate issues, *Consejo Nacional del* Clima). Apart from that, the Ministry of the Environment published the draft NAP on its website on 8 July 2004. The public was given the opportunity to make comments until July 19, 2004, which in my view is clearly insufficient, especially considering that critical period of the year.

During the month of August 2004 there were working sessions, hearings and consultations with the affected industries in order to determine the actual installations covered and the allowances granted to each of them. In September 2004, the provisional list of installations affected by the NAP and the number of allowances granted was published in the Official Gazette: Resolution of the Ministry of the environment of September 7, 2004 (published in *BOE* of September 10, 2004). The list was in form of a separate administrative decision (*Resolución*), but in reality it is an annex of the NAP approved by Royal Decree (Real Decreto) number 1866/2004, of 6 September 2004, published in the *Boletín Oficial del Estado (*the Spanish official gazette) of 7.9.2004.
After the publication of this provisional list, the Ministry of the environment opened a twenty-day period of public consultation with industry, were individual firms could

make remarks on the correct identification of their installations and the accuracy of the allowances granted. It has to be remarked that by that time individual firms were already filing their requests for the allocation of allowances and, simultaneously, they were filing applications to be granted the special authorisation to emit CO2 (*see, infra, question 11).* According to the Ministry of the environment, these two different sources of information (individual remarks, plus concrete applications) were very fruitful: during the public information period 512 remarks and observations were received; for what concern individual applications, 1054 were filed by corporations, of which 926 were considered to be correct.

In the light of this information, the list of installations was corrected and sent to the Commission together with the NAP as such (Royal Decree 1866/2004, of 6 September 2004). The Commission adopted Decision of 27 November 2004, on the Spanish allocation plan. In that decision, the Commission approved the Spanish NAP but urged Spanish authorities to introduce several amendments in the Plan, especially for what concerned installations with a thermal power of more than 20 MW. It also found several inaccuracies.

After the Commission Decision, a new period of consultation and rectifications with firms was opened,. At the end of this second stage the preliminary NAP was modified, by virtue of *Real Decreto* (Royal Decree) 60/2005, of January 21, 2005 (published in the "BOE" of 22.1.2005). The final version of the list of installations was approved by a governmental decision the same day, January 21, 2005.

In this second, final version of the list of installations, the Government decided to increase in 4,5 million TM the allowances initially granted in favour of coal-heated power plants. This sum was obtained by reducing in 1,1 MTM the allowances initially granted to the power plants using a combined cycle. The rest came from the "reserves" section that was included in the first version. Clearly, this change was the result of political and economic pressures from the big electricity companies, especially Endesa, whose power plants mainly use coal.

Two big observations:

- In spite of these several stages and rectifications, it has to be said that there are still several industries and firms who keep complaining that the list contains several mistakes. The problem is now to see how can the national authorities "rectify" the list.
- We can appreciate urgency and hurry in the elaboration of the NAP and of the list of individual installations

-Question 5: Art. 12 provides that the trading of emission allowances shall be possible

Here, I will alter the order of the questions, first: (d), (e) and(f):

(d) How as „allowance" been translated in your country? does your national linguistic version of the term „allowance" convey the idea of a „right" (subjective/objective) to pollute? (like the Spanish does); (e)What is the legal nature of the „trading"? Is there any doctrinal controversy about the possibility of „trading" on „rights"? (provided the question to „d" was positive); (f)Has there been much discussion about other areas of law that might be relevant to this dogmatic issues (eg.property rights, tax law, administrative law, etc.)

In my view, this is a critical aspect of the Spanish legal scheme. To begin with, we must start from the Spanish version of Directive 2003/87, whose title has been established as follows: *régimen para el comercio de derechos de emisión de gases de efecto invernadero*. Literally, it means in English: " a regime for the commerce/trade of

rights to emit greenhouse gases". It is very interesting to compare the different linguistic versions of this norm. As for the title of this directive the English version says "scheme for greenhouse gas allowance trading". In this expression the word "allowance" is most important one. Generally, an "Allowance" is not really as "right" (subjective aspect), but other things: a grant, a quota, a portion, etc. The other important linguistic versions (the Spanish one is not really important, I´m afraid) also void the use of the word "right". For instance, the French version talks of "quotas d´émission", the Italian version says "quote di emissioni" and the German one use the word "Zertifikat", that is, a certificate or title . As for the legal definition of the "emission rights", the Spanish version says that such a right is *el derecho a emitir una tonelada equivalente de dióxido de carbono durante un periodo determinado* that is, "the right to emit one equivalent tonne of carbon dioxide within the period of one year". As it can be observed, the defined concept is used in the definition, so there is a total confusion between the right/allowance as a document/permit and the right/subjective to pollute. In the other versions, the difference is clear. For instance, the French version defines the "quota d´émission" as "le quota autorisant à emmettre …", and in Italian the *quota di emissione* is "il diritto di emettere…".

In our view, the Spanish version is an incorrect one. The text should not use the word "right"(derecho), but the word "certificate", "quota", or other. In Spain, the use of the word "derecho" (right) to identify the allowance may have serious dogmatic consequences.

On the basis of the Spanish version of the directive, the Act 1/2005, which transposes the European norm, has also reproduced the same wrong terminology in article 2(a) : *el derecho subjective a emitir una tonelada equivalente de dióxido de carbono* ("the subjective right to emit one equivalent tone of CO2).

In my view, there a serious conceptual mistake in the terminology used, which is an authentic dogmatic revolution in Spain. One thing is to have the right to do something or having property rights on something, an another very different thing is the paper, the document, the diploma or the title which is the documentary basis for such right. Under the Spanish laws and regulations, it appears that the firm is the real owner of a subjective right to pollute. In my understanding, at least under the Spanish legal tradition, nobody may have the right to pollute. The Constitution recognises the right to establish and to run businesses, to become rich, but that right is conditioned to the need of having all permits and licences necessary, which may be denied by the public administration if the environment is already too much polluted. So, an individual has an economic freedom, which can be exercised with due respect with laws and regulations, but doesn´t have the right to pollute. On the contrary, the Constitution says that we all have the "duty" to preserve the environment (article 45.1). From a philosophical perspective, pollution cannot be construed as a right, it is just a "collateral damage" produced on the environment by the economic activity, controlled and tolerated by the public administration to the extent that is feasible and advisable in order to enjoy a "decent environment", which, in turn, may be perfectly construed as a right, even a fundamental one. Finally, it has to be said that the "original property" of the allowances (*derechos/rights)* belong to the State administration, who conveys those "rights" to the companies in a free way, without economic compensation (article 20.2 of the Act of 9 March, 2005). There is a National Register of allowances, which is managed by the Ministry of the environment

"Trading"

Under article 21 of the Spanish Act of emissions trading, the "derechos" may be the object of transmission ("comercio") which means commerce or trade. This word has an economic, monetary ingredient, for it conveys the idea of a market, with all its perverse effects (distortion of prices, insider trading, etc.) Here again there is a mistake in my view, for the same reasons presented earlier. I consider that the French or Italian versions are better since they speak of "interchange", instead of "comercio". The Act of 9 March 2005 only says that allowances may be traded (or interchanged) and determines who may participate in such a trade, but it does not say how this trade is to be made (with money, without, etc.) or what is its legal nature

a)How is trading supervised in your country?

According to the Act of 9 March, 2005 the allowances/rights may be transferred (transmitidos). Any interchange or trade with "rights" ahs to be notified to the Central Register of emissions.

b)Is trading also possible for other bodies than installations, such as a fund, a charity, a millionaire who has an interest in preventing climate change?: NO

c)To which extent is transparency for the public ensured?

Under the Spanish Law all the transaction should be made public. The public has also access to the National Register of emissions

-Question 6: Arts. 14 – 16 provide guidance for monitoring, verification and penalties. (a) How is monitoring and verification organised in your country?

First of all, firms must apply for the necessary allowances, in the framework of the NAP. The allowances are granted by the Central Government. Separate allowances are granted for every and single individual and autonomous installation. The application should have been filed before the end of the year 2004. Once the allowance has been granted, the firms must elaborate periodic declarations/reports, which must be verified by an external, independent organisation (mainly, consultancy firms which have been authorised to do so by the competent authorities). Then, those verified declaration has to be checked by the Autonomous Community. If the regional body understands that the verified report complies with applicable legal and technical requirements, it forwards it to the Ministry of the environment, which incorporates the information in the National Register. The idea is that any information on performance, excess over allowances granted, changes and transmissions of rights has to be notified to the Ministry of the environment, which keeps updated the National Register.

b)What about the penalties that were fixed according to Article 16? Are they effective, proportionate and dissuasive? Are they of criminal, administrative or civil law nature? Are they comparable to national sanctions in similar, comparable cases? Is there any fear that penalties might be too divergent from one country to the other?

Penalties are extensively regulated in article 30 of the Act of 9 March 2005. They are of administrative nature, imposed by the Ministry of the environment or the Regional authorities. Apart from other conducts, like operating an installation without a special permit of emissions (*see, infra, question 11*), a firm that pollutes more CO2 than allowed must pay 100 euros for each tone of C02 emitted in excess.

-(c) **How is transparency of monitoring and verification results ensured?**

In my understanding, there is little transparency on this issue. Furthermore, the whole mechanisms rest on the shoulder of private business: the firm declares to have polluted a certain amount, and another private company says this is correct.

-Question 7: The emission allowance scheme and traditional BAT approach under the IPPC Directive 96/61 somewhat conflict with each other.

-(a) and (b) : This set of questions has not been widely discussed . Under the Spanish administrative tradition, the legal regime of licences may be changed, and new restrictions imposed on business. Monetary compensation only is necessary in the case of open deprivation of rights, which is not the case. Yes, the Spanish IPPC system has been changed in order no to contain emission limit values for greenhouse gases, when the installation participates in emission trading.

-Question 8: Directive 2004/101 (OJ 338/2004 p. 18) provides a framework for joint implementation („JI") (see Art. 6 Kyoto Protocol) and the clean development mechanism („CDM")(see. Art. 12 Kyoto Protocol).

a) Is there a discussion in your country about whether JI and CDM will be used?

Yes, a lot. Indeed, JI and CDM are play a crucial role in the final implementation of the NAP in Spain. Since the current figures are so divergent from the expected reductions and it does not seem realistic to expect that the Spanish industry will make dramatic reduction efforts, the big hopes from the NAP are JI and CDM. The main strategy of the NAP is to stabilize emissions in the current figures along the period 2005-2007, and make the main part of the reductions in the next phase (2008-12). As a matter of fact the plan foresees an overall national reduction of 2% coming from sinks (mainly, reforestation activities) and another 7% from credits gained in the international market, via JI and CDM.

This possibility is especially useful in the case of large electricity producers, who have subsidiaries in several southern American countries. They expect to carry out several projects in order to gain credits or grants for the reduction targets.

b) **What will be the organisational devices in your country ensuring the requirements of a fair use of JI and CDM, and in particular its additionality, truthfulness and transparency?**

Formally, all reduction credits coming from JI and CDM must be incorporated into the national register of emissions and allowances. However, there is no specific devise or instrument to ensure truthfulness and transparency of those mechanisms, since they are based on a mutual recognition approach.

-Question 9: Could or should emission trading be introduced in other sectors (water, waste)? In my view, no (see question 5)

- Question 10: To which extent emissions trading has been discussed so far in your national legal literature?

Emissions trading have started to been discussed very recently. Spain had no prior experience in this device, so most doctrinal work so far has consisted in explaining foreign models, especially the US and UK cases. We should have in mind that the definitive legal scheme has only recently crystallised (Act of 9 March, 2005), so doctrinal approaches should come in the future (for an account of legal doctrine on this issue in Spain, see the Annex)

- Question 11: Besides emissions trading and national plans, does your national legislation create other kinds of devices, such as a specific permit for releasing greenhouse gases emissions? If this is the case, what is the relation between the plan, the trading mechanism and the permit? What body/level of Administration is responsible for performing the respective duties and responsibilities?

This is a crucial aspect of the Spanish system on emissions trading, since it is based on two pillars. The first pillar is the tradable allowances, whose main features have been presented in the previous answers. The other pillar is the authorisation. In a nutshell, the system works as follows. All companies and firms running installations included in Annex I of the Statute on emissions trading (electricity, cement, glass, etc.) are required to obtain a specific authorisation for the emission of carbon dioxide. According to Royal Decree 5/2004, all those companies should file their application before the end of the year 2004. The legal profile, content and obligations stemming from this authorisation greatly follow the requirements laid down by Directive 2003/87, articles 4 to 7. The authorisation is to be granted by the regional administrative department, not by the Ministry of the environment. In this authorisation there is no mention as to the quantity of carbon dioxide that may be released from each installation.

In this feature we see the basic organisational/competence strategy devised by the Spanish system, which must respect the constitutional allocation of powers between the central government and the regions: (a) the authorisation to emit has to be granted by the regions; (b) the allowance to emit a specific amount of carbon dioxide is granted by the central government (Ministry of the environment); (c) the control on the actual use or the excess of allowances granted is carried out by the Ministry of the Environment, through the National, central register of allowances; (d) in doing so, the Ministry mainly rely on the enforcement and supervision activities of the regions (*see, supra, question 6(a))*.

As a consequence, the firm is required to follow several different procedures at one time: (a) in any case, it must apply for the granting of allowances to the central government. Even in the case of a firm having different installations, the different applications may be consolidated in one single file; (b) apart from that, the company must apply for an authorisation to the region where its installation is located; (c) if the firms is running different installations in different regions, it has to file different application, one in each of the different regional department. The procedures, in this case, are not coordinated.

Apart from the technical difficulties which are inherent in the emissions trading system, an additional challenge of the Spanish system will be to ensure that all competent bodies (central-regional) are working in a cooperative and coordinated manner.

ANNEX

I.- LEGAL REFERENCES:

I.A).- *Transposition of Directive 2003/87:*

- Royal Decree-Law 5/2004, of august the 27th, 2004 (BOE of 28.8.2004): transposes Directive
- *Ley 1/2005, de 9 de marzo, por el que se regula el régimen del comercio de derechos de emisión de gases de efecto invernadero.* Act of 9 March, 2005 (Ley 1/2005), which was published in the Spanish Official Gazette (Boletín Oficial del Estado) of 10 March 2005.

I.B) *National Allocation Plans, List of installations:*

- Royal Decree (Real Decreto) number 1866/2004, of 6 september 2004, which approves the NAP on Spain (BOE of 7.9.2004)

- Royal Decree 60/2005, of January 21, 2005 (published in the "BOE" of 22.1.2005), which modifies the precedent one

  - Provisional list: Resolution of the Ministry of the environment of 7 September, 2004 (published in *BOE* of September 10, 2004): provisional list

  - Definitive list: Decision of 21 January, 2005

II.- DOCTRINAL WORKS ON EMISSIONS TRADING IN SPAIN

Antonio Fortes, "Reflexiones a propósito del futuro régimen europeo de intercambio de derechos de emisión de gases de efecto invernadero". *Revista Aranzadi de Derecho Ambiental,* (2004-1), n.5.

I. Sanz Rubiales, "Una aproximación al nuevo mercado de derechos de emisión de gases de efecto invernadero". *Revista Española de Derecho Administrativo* (enero-maro 2005).

III.- RESSOURCES ON THE INTERNET:

http://www.mma.es (Spanish Ministry of the environment)

http://www.mma.oecc/index (Spanish Interministerial Office for climate change)

http://www.boe.es Boletín Oficial del Estado (BOE, Spanish Official Gazette)

RECENT ENVIRONMENTAL LAW DEVELOPMENTS IN SPAIN

CONNECTED WITH EC LAW

The following lines present the main developments that have recently taken place in Spain, from the EC environmental law perspective. The period covered runs from January 2004 (time of our last Avosetta meeting) to present. The first paragraph is restricted to state, nationwide legislation.

1.- LEGISLATION

(a) Sectoral legislation

During the period analised the developments linked to the emissions trading scheme has almost monopolised all the legislative efforts in Spain, at least at the national level. Apart from these aspects, which have been presented in the precedent paragraphs, the most important piece of sectoral legislation is Royal Decree 208/2005, of 25 February 2005, on electric and electronic appliance and on the management of their waste.

This administrative regulation (which was published in the *Boletín Oficial del Estado* of 26 February 2005) transposed into the Spanish legal system Directive 2002/96, on electric and electronic waste. The transposition is an overdue one, as in many other ocasions.This regulation follows the features of the EC directive in a rather satisfactory way (design obligations and restrictions, prohibition in the use of some substances, take-back obligations, producer responsibility, etc.)

(b) organisational features

Following the general elections held in March, 2004, a new administration entered into office, supported by the socialist party. From the pure environmental perspective, the main organisational developments consist in the fact that the powers and competences of the Ministry of the Environment have been reinvigorated. Namely, the new Ministry has received the whole spending and management power in the domains of waters and coast management, which previously belonged to the Ministry of *Fomento* (infrastructures plus transports).

Apart from the emissions trading mechanism, the most important element in the portfolio is the implementation to the alternative to the Ebro project. This gigantic project (transferring waters from Ebro river to the southern river basins) was the jewel of the crown of former Aznar administration. The new government has cancelled this infrastructure and have designed an alternative project, called AGUA, based on desalination plants and a redistribution of offer and demand. During 2003 and 2004 the

Ebro project received a lot of criticism both from the EEA and from the Commission, and that was one of the arguments for cancelling it.

(c) In the pipeline

- Since last Fall, the Ministry of the Environment is working on a draft project for a statute on liability for environmental damage. The project´s purpose is of course to transpose Directive 2004/35,on liability for environmental damage (OJ L 143, of 30.4.2004). Besides, it will likely go further, in order to reformulate the current Spanish system in this sector, which is still based on a private law approach, namely the Civil Code of 1889.

- Just a couple of days ago, the government approved a draft law on environmental impact assessment for plans and programs. The aim of this statute is naturally to transpose Directive 2001/42, of 27 June 2001, on this subject. Taking into account the regular length in the legislative process the new statute should be probably in force after the Summer, may be in October 2005. This means that the transposition of the Directive will be late, since the deadline expired in July last year.

2.- ECJ Case-law, infringement procedures.

During the period considered, Spain has been subject to a couple of infringement procedures for violation of EC Environmental law:

- (1) Decision of 16 September 2004, *Commission v. Spain* (Case C-227/01). Spain was condemned because a major train infrastructure project was carried out along the Mediterranean, without performing a environmental impact assessment of it. Accordingly, the Court found a violation of Directive 85/337, on the assessment of environmental impact for certain projects.

The position of Spain was that the project was an existing one, which were enlarged and enhanced. The decision is interesting from the point of view that the Court interpret what is to be understood as a "new" and an "existing" project under Annex I of the said Directive.

-(2) Decision of 9 December 2004, *Commission v. Spain* (Case C-79/03). In this case, Spain was condemned because the national authorities did not completely prohibited a traditional killing method called "parany". This method was considered by the Commission to be non selective, thus being in violation of article 8 of Directive 79/409, on the protection of wild birds. It has to be noted that the partial authorisation at stake was not a nationwide system. Rather, it was solely maintained by the region of Valencia, which is fully and exclusively competent in the sector of hunting.

The case is interesting for to reasons: first, because it helps better understanding the concept "non selective method of killing", which is not fully described in the directive. Second, because the sentence condemns Spain as a whole, while the responsible authority is a regional one. This is a hot (and old) question in Spain, which remains unresolved in the light of in-force domestic Constitutional Law.