AVOSETTA NETWORK OF ENVIRONMENTAL LAWYERS
2016 MEETING

27-28 May 2016, Riga Graduate School of Law

Topic: "Permit procedures for industrial installations and infrastructure projects: Assessing integration and speeding up" (plus "national developments")

Report on Spain

Angel M Moreno, Carlos III University of Madrid [1]

---o0o---

QUESTIONNAIRE

.- A.- BASELINE INFORMATION

.I.- Industrial Installations

.1. - Forms and scope of permits

Forms and scope of permit necessary to construct and operate an industrial installation (e.g. an industrial installation in the sense of Annexes I or II of Directive 2011/92/EU?)

In Spain there is no uniform, nationwide regulation of the different forms and scope of the permits that are necessary to construct and operate an industrial installation in the sense of the Directive 2011/92 annexes. The normative context is very fragmented because:

.(a).- there are different types of industrial installations included in those annexes, and each one may be regulated by specific, sector-base legislation (for instance, waste incinerators, electricity power plants, etc.). For instance, electricity power plants are regulated by the Electric sector Act of 2013; Chemical or mining extraction industries are regulated in different pieces of legislation, etc.

.(b).- Spain is a very decentralised country, where the State does not have all the legislative powers in the different sectors of governmental action. These legislative powers are shared between the State and the 17 Spanish Regions ("communidades autónomas") in a complex set of lines. In environmental affairs, for instance, the State legislature/government can only approve "basic" or "essential" legislation, whereas the Regions may approve "additional" or "more stringent" laws and regulations. In this way, they can establish in their own rules different types of permits/authorisations, different types of procedures, even different types of offences and administrative sanctions. In areas such as Industry or Agriculture the situation is even more fragmented because, at least in theory, all the legislative and executive powers lay

[1] I would like to thank Prof. Dr. Agustín García Ureta (Basque Country University) for his revision of the draft and his comments.

in the hands of the regions (or the local authorities). This matrix produces a set of complex variables for what concerns the form and scope of permits in the environmental arena, for industrial projects and infrastructures.

With this idea in mind, it is possible however to describe the permitting system in broad lines as follows:

- 1.- Any new industrial installation would need, first of all, a building permit (*licencia urbanística*). An installation can only be built in a plot of land that is qualified with an "industrial use" by the local land development plan.
- 2.- Second, a special environmental decision/permit: in the case or large or big projects/installations, that permit will in general be the IPPC permit.
- 3.- Third, the industrial installation will need specific permits, provided by State or regional sector-based legislation. Here, it is almost impossible to establish a closed list of permits. For instance: if the industry is a power generation plant, then it will require a specific permit issued either by the Ministry of Industry or the Regional competent agency (as provided by the Electricity Sector Act of 26 December 2013). In other fields, there is no explicit "permit" established, but the company must get a registration in a special register, something which is only possible if it complies with certain requirements. This is close to a "virtual" authorisation. For instance, in the case of the Seveso type of insdustries, as provided by Royal Decree 840/2015, of 21 September[2] and Royal Decree 379/2001, on the storage of chemicals. Etc.
- 4.- Fourth, the industry might require additional permits, established by environmental or public domain legislation:
    - for instance, if the installation needs water for its operations (as usual) and it needs to extract underground water, the company will need a special permit (concession), issued by the competent River basin authority.
    - if it will produce dangerous waste, it will also require the different types of permits established in the waste legislation (if this has not been already covered by the IPPC permit) granted by the regional authorities.
    - if it releases CO2 emission, it will require a special permit for that form of pollution (that is not included in the IPPC permit), granted by the regional authorities
- Fifth, the industry may also need an operating permit/licence, that is issued by the competent local authority (although here there might be deep differences among the several regions).

As it can be seen from the precedent lines, the domain of environmental and sector-related permits may look like a maze, due to the plurality of permits required. In view of this situation, there is a widespread feeling that co-ordination mechanisms should be extensively put in place. However, this is one of the noteworthy failures of the Spanish system. In general, every level of government is fierce in defending its own competences, and coordination schemes in the permitting arena are usually regarded by local or regional authorities as a backdoor mechanism re-centralisation.

This does not mean that there are no co-ordination mechanisms at all. The most "succesfull" has been the inception of the IPPC permit. Before the enactment of the Law that transposed the 1996 IPPC directive (Act 16/2002), starting the operation of an industry

[2] Transposing Directive 2012/18/EU, of 4 July 2012.

required different types of sectoral permits, each one being delivered by a different agency/level of government. The IPPC Act incorporates the principle of integration by substituting the different permits by one single permit (the IPPC permit), which is delivered by the regional environmental agency. Furthermore, art. 6 of the said Act explicitly establishes the need for inter-administrative co-operation

However, integration is controversial even in this case, because the "old" sectoral permits have been transformed in "opinions" (inter-administrative opinions) that are obligatory and must be issued by the competent local authority (planning "opinion", issued by the Municipality) or by State agencies (mainly the River basin authority for the water discharges), see point 2.2, *infra*. These opinions must be taken into consideration by the regional agency when issuing the IPPC permit. In a nutshell, the "old" competent authorities still keep a saying in the procedure for the delivery of the IPPC permit.

Moreover, the initial integration achieved by the Act Nr. 16/2002 was put into question by the Act 1/2005 (transposition of the EU directive on CO2 allowances trading). After this act the industrial installations covered by the CO2 emissions scheme need a new, different permit, which is granted by the regional body and is not integrated into the IPPC permit itself. Not to mention the allowances themselves, which are assigned to each individual installation by the Central Cabinet, each times it approves the National Plan on allowances.

Consequently, one can notice a clear tendency to partially or fully integrate different types of permits. However, this is an on-going process and the results are not fully satisfactory (see comments at point 5).

The territorial decentralised structure of the country, coupled with the intensive over-regulation in many sectors of governmental action produce a situation where each level of government, and each agency or department therein, are empowered by different pieces of legislation to conduct different permitting/licensing, inspections, registers, sanctions and so for. Moreover, the "one window" approach, promoted by the transposition of the "Bolkenstein" directive has triggered a simplification of the requirements for starting-up a new company and a suppression of several permits in the field of services provision. However, this had a limited impact as concerns large industrial installations.

.2.- Procedures

.2.1.- Short case study: Can you present a simple flowchart of a permitting procedure for the following installation, indicating the (estimated) time frames of the various steps, key authorities involved, including EIA, and the total time needed to go through the whole procedure in case of administrative appeal ?: "Waste disposal installations …. with a capacity exceeding 100 tonnes per day" (Annex I, pt. 10 EIA Directive).

The "basic" permitting requirements and procedure for such installation (as well as their operating conditions) are regulated by Royal Decree 815/2013, of 18 October 2013, which supplements the Act on IPPC (16/2002). Therefore, the main permit for these installations is the IPPC permit. Some features of this procedure are explained at point 2.2 below.

It is extremely difficult, even impossible, to provide accurate data about the "time frames of the various steps" of such procedures. Not only does the time depend on the actual features of the project, but also on the procedural complexities of each file. Since the permitting competence corresponds to each region, there may be strong differences among the

several regions. Providing exact figures would entail carrying out a comprehensive field research, which to my knowledge has not been completed nationwide.

It is true that, for what concerns the IPPC permit, the State legislation (Act 16/2002) establishes that the competent regional authority has to adjudicate the application of the operation within a maximum time-frame of nine months. If this is not the case, the application must be understood to have been rejected (administrative "negative silence"). However, and under general Administrative Law, an administrative procedure can be "stayed" in some cases, which means that, in some particular cases, the actual time spent in forming and resolving a file maybe longer than nine months.

In case of administrative appeals, the time frame is easier to determine, in the sense that the national legislation on administrative procedure (mainly the Act 30/1992) establishes short timeframes to resolve administrative appeals: three months in the case of "alzada" appeals (appeal before a higher body) and one month in the case of "reposición" appeals (appeal before the same body). In both cases, if no decision on the appeal has been made by the competent authority, the appeal should be understood to have been rejected ("negative silence").

.2.2.- What are the main characteristics of the applicable permit procedure or procedures?

- Who is (are) the competent authority (authorities)?: The regional environmental agency

- Is EIA integrated in the permitting procedure or is it an autonomous procedure that precedes the introduction of an application for a permit (or for the various permits)? In the latter case, can EIA be carried out once more at the next stage of the development process (e.g. in the building or environmental permit procedure)?: Yes, the EIA is integrated in the permitting procedure.

- Is there a differentiation between large, intermediate and smaller installations? Is a notification to the relevant public authority in some cases sufficient? Is there a possibility to exclude certain installations even from the notification requirement?

Yes, there is a such a differentiation under Royal Decree 815/2013:

.- (a) installations included in the annexes/scope of application of the IPPC Act, must obtain an IPPC permit. This is handled through the general IPPC procedure

.- (b) installations not included in the annexes/scope of application of the IPPC Act, do not need to obtain an IPPC permit, but must obtain several other permits, regulated by different pieces of environmental legislation:

- waste management permits, as regulated in the State Act on Waste and Contaminated soil (Act (22/2011)
- air pollution permits, as regulated by the State Act on Atmospheric Pollution (Act 34/2007).
- Water discharge permits, as regulated by the State Act of Waters (Act 1/2001)
- "any other pemit or license required by other laws and regulations", which is a rather broad terminology.

However, this dichotomy is more theoretical than real in the case of the installation proposed, because, in view of its processing capacity (more than 100 tones/day) these installations are included in Annex I of the IPPC Act. Therefore, any project of an installation such as the one considered here will be subject to an IPPC permit. The precedent alternative (b) would only apply to small installations: below 3 Tonnes/hour in the case of non-dangerous waste, and below 10 tones/day in the case of dangerous waste.

- Are competent planning and environmental authorities consulted during the decision-making procedure or procedures, if more than one permit is needed? Within what time limit have they to give their opinion? Are these opinions binding or not? Do they have some weight in practice?

Since the general IPPC permitting procedure applies here, the competent planning and environmental authorities must be consulted and several opinions (informes) must be obtained: a "planning opinion" from the Municipality and a "Water discharge limits" opinion, if needed, from the River Basin Authority. As for the "binding" or not "binding" nature of those opinions, in practice they are. For instance, if the operator wishes to build an installation in a area/plot where the land use status does not allow for such construction, it is clear that the procedure cannot arrive to a favourable result, since the construction itself would be illegal (and it could be stopped by the Mayor). The deadline for giving this opinion is thirty days.

In the case of the opinion that must be delivered by the River Basin Authority (which is a State body), it is clearly said in the Law that it will be binding for the regional agency. For instance, if the River Basin Authority determines that the water discharge is inadmissible, the regional agency is obliged to reject the application of the operator. This opinion must be delivered within a deadline of six months.

If these opinions are not delivered in due time, the procedures may continue in order to reach a final decision by the regional agency.

- **Is there public participation in every case? At which stage of the development? Is it broadly announced and used? What time frames apply?...**

    - Yes, public participation is mandatory and well regulated. It must be no shorter than thirty days. Public participation is carried out at an early stage, before requiring the inter-administrative opinions mentioned *supra.*

- What time frame applies from the introduction of the application to the decision in first administrative instance …

See reply provided at point 2.1

- Is there an administrative appeal against a decision on a permit or the various needed permits? What is the competent authority (or authorities) to whom an appeal can be lodged? Who can lodge the appeal (only parties of the proceeding, NGO, everybody), within what time? What time frame applies to reach a decision on appeal? What if the time frames are not respected?

Yes, administrative decisions rejecting the IPPC application (or imposing conditions with which the operator disagrees) are subject to administrative appeals, regulated in the general legislation on Administrative Procedure. "Tacit" refusals (no completion/decision on the merits after the statutory deadline) can also be appealed. The appeal can be brought either before the administrative body that is hierarchically higher to the one who took the decision ("alzada" appeal: for instance, an appeal before the "Minister" against a decision taken by a "Director General") or before the same body who rejected (explicitly or tacitly) the application. As a rule, appeals against IPPC decisions may be filed either by the operator or by persons or groups having standing to do so, for instance Env-NGOs. Concerning the time frame for adjudicating the appeal and the consequences in the case of no-reply, see point 2.1 supra.

.II.- INFRASTRUCTURAL PROJECTS

Here we would like to investigate how according to environmental and planning law a project that is not as such provided for in the land use plans can be realized. We can take as an example the construction of a highway of the type indicated in Annex I, point 7, (b), of the EIA Directive

.1.- Is there a need to draw up a plan or to review a plan in the sense of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment?

Replying to this case-example is not easy in Spain, due to the fact that there is no State, nation-wide planning Law. Town and country Planning and Land Use Law is an exclusive competence of the Regions. Furthermore, the State is competent to regulate the "national" roads (Old Roads Act of 1988 and "new" Roads Act of 2015), but the seventeen regions are fully responsible to regulate their own roads. Plus, roads may be of different types: (a) national; (b) regional; (c) provincial/insular; and (d) local. Here, again, there is a complex matrix of variables that makes extremely difficult to provide a clear and precise reply to the question. The interaction between roads construction and urban and spatial planning will depend mainly from regional legislation on both subjects.

In any case, and beyond this normative diversity, one can assert the general rule that, whenever the State decides to construct a highway, this has to be made with the participation of the affected municipalities. In this sense, the new Roads Act of 2015 provides that regions and municipalities affected by a Central Cabinet plan to build a new national road must be consulted in advance. Those entities have to issue "opinions", where they may disagree from the route proposed, providing objective grounds and reasoned arguments. However, these opinions are not binding on the State authorities, and the Cabinet may take the final decision on the route of the road, even against the position of the affected municipalities and regions (especially for what concerns the proposed route (art. 16, Roads Act)[3]. The "national" interest is considered to be "superior" to that of the local community. Thus, a Municipality cannot oppose the construction, for instance, of a national highway. Once the route has been decided by the Ministry for Infrastructures or the Central Cabinet, the affected municipalities must modify (if needed) their existing spatial plans in order to incorporate the new infrastructure in that planning. If the local bodies don´t do that voluntarily, the central administration may order them to do so. Such modifications of the existing plans do no need to go through a SEA

2. Would there be a need to obtain one or more permits to construct and operate the highway mentioned under point II? Is an EIA necessary? Is there a coordination mechanism integrating the substance and procedure of the permits? What are the characteristics of the procedures?

Here, again, the legal framework is very fragmented and may be uneven across the country, for the reasons presented *supra.* However, in general national highways do not need to get "permits", because they are State governmental projects. Infrastructure projects are not

[3] Of course, at this stage there is a big room for "political" talks and informal negotiations among the several governmental stakeholders.

"authorised", but simply "approved" by the competent public administration. Of course, this project will need an EIA, public participation, etc, in the manner provided for in the national and regional legislation on EIA.

B. DESCRIBING AND EVALUATING INTEGRATION AND SPEED UP LEGISLATION

Note: for a general assessment of "integration and speed up legislation" see the comments at letter D below

Have there been initiatives in your legal order to introduce specific legislation to integrate and speed up decision making for infrastructure projects/industrial installations? YES

If so:

(a) **When was this done?:** The main effort has been achieved in the field of environmental assessment, through the enactment of a new State Act on environmental assessment (Act 21/2013, of 9 December). This act regulates both the "environmental impact assessment" for projects and the "Strategic assessment" for plans, lays down common rules for both techniques, increases the interconnection between them and introduces several simplification and streamlining provisions. This legal initiative at national level has been followed by other initiatives at regional level.

(b) **What was the general justification?:** There were two main justifications: (a) the procedures were too complex; (b) they took two long: allegedly, a regular EIA procedure would last 22 months, according to the Cabinet

(c) **What types of projects does it apply to?:** All the projects included in the EIA, legislation. Apart from that, and after the transposition of the "Bolkenstein" directive, small economic activities (such as bars or restaurants) are not subject anymore to "permits", is it enough for the promoter to produce a "responsible declaration".

(d) **What key aspects of procedure are speeded up?** The main aspect is the maximum time limit in which the EIA should be carried out, which has been reduced to four months, but if the EIA is not completed in that time, it cannot be understood to be a "tacit, positive" EIA. There is also a bigger involvement of the "substantive" organ over the entire EIA procedure

(e) Have there been any legal challenges to the changes? (e.g. non-compliance with EU environmental law, Aarhus etc.) NO

(f) Has there been any evaluation of previous situations and/or the impact of speeding up?

What is your own assessment of integration and speeding up measures?

Integration, streamlining and speeding up has been a key approach in the Central Cabinet strategies during the last five years. Since 2011, the government launched a comprehensive agenda to speed up and simplify procedures, as a part of a broader program to alleviate "regulatory burdens", re-boost the Economy and create jobs. A special commission was put into place (the "CORA" commission), which has taken many measures to integrate, simplify and streamline (or simply eliminate) regulatory procedures hitting the industry.

According to the central government, those measures have allegedly produced thousands of million€ in savings, but those figures are hard to verify.

C. LOCUS STANDI FOR A LOCAL GOVERNMENT WITHIN THE PERMITTING PROCEDURE

Under what conditions (and whether at all) a local government may file a complaint against an environmental permit for an installation or infrastructure project.

Under general Administrative Law, a local government has full legal personality and procedural capacity, and can defend its competences and interests through different legal mechanisms. For instance, if it wants to challenge in the administrative appeals track an environmental permit issued by the region for an installation that is based in its territory and for which it issued an opinion, it can do so. On the other hand, if an industrial installation project received an environmental permit but does not comply with the local plans and regulations, the Mayor could in general stop the construction of the installation and impose different types of administrative sanctions on the operator. For what concerns the judicial appeal, the local government must meet the general criteria on local standi regulated in the Administrative Courts Act of 1998. This will be easy if the installation does not respect local ordinances and regulations and is placed in the municipal territory, and harder if the installation is placed in a neighbouring municipality.

In the case of infrastructures of national interest, as explained supra, a local government cannot, as a rule, oppose them. In the past, several municipalities declared the town/city "free" from certain potential infrastructures (military shooting camps, nuclear plants, etc.) but these declarations were invalidated or not considered opposable by the administrative courts.

D. FURTHER COMMENTS

Three conclusive comments about the impact of streamlining and simplification of procedures in the narrow field of environmental protection in Spain

First.- There is, indeed, a visible and general trend towards simplification and streamlining of procedures[4]. This trend has been favoured by two key driving forces:

-(a) by the legislative agenda of the political party (the "Popular Party") that has been in power at national level during the last five years (2011-2016). This is a conservative party, that favours mainly economic growth and is predominantly business-oriented. It perceives administrative permits and procedures mainly as a "regulatory burden" that hampers economic recovery and the creation of jobs.

-(b) by the normative changes occurred at EU level. Every time the national authorities have transposed the pertinent directives (inspired on streamlining and simplification), the domestic environmental system has incorporated those changes (like in the field of services provision). However, the Simplification and Streamlining agenda has not produced

[4] This pattern has triggered much attention and discussion from administrative scholars. See, for example, the proceedings of the 2014 general Conference of the Spanish Association of Administrative Law Professors: *La simplificación de los procedimientos administrativos. Actas del IX Congreso de la AEPDA.* Escola Galega de Admnistración Pública, 2014

revolutionary changes in Spanish environmental legislation (with noticeable changes only in the field of EIA).

Second.- The full implementation of a comprehensive agenda on streamlining/simplification/integration encounters serious obstacles: the country is very decentralised in three territorial levels (State-Regions-Local authorities) and the State has only the power to enact "basic" or baseline legislation that is applicable in all the country. Most "executive" powers in environmental protection belong to the regions or to the local authorities. That is, environmental permits are mostly granted by regions or local authorities, and the State has very limited competences in the field, except in areas such a permits for discharges into the aquatic environment (and only in the case of the "big" rivers) and in the field of coastal management. Therefore, IPPC and other environmental permits are awarded by the regions and local authorities.

On the other hand, the regions retain also full legislative competences to approve more detailed or precise legislation, which involves also the procedural aspects of environmental permitting. Therefore, the simplification agenda may present different situations and state of affairs, depending on the Autonomous Community under consideration

Third.- The integration of environmental permits has also experienced serious obstacles, due to the fact that each level of government has its "own" competences in environmental protection, and any legislative move at national level towards further integration faces the challenge or the opposition of regions/local authorities…or the reluctance of the State agencies to lose their own competences. The case of the IPPC permit is a very good example: the national statute that regulates the IPPC did recognise that the power to issue the IPPC permit belongs to the regions (in due respect with the constitutional principle of regional executive responsibilities). However, the issuance of an IPPC permit needs to collect different "opinions", "reports" and authorisations, which are issued by the State (water discharges) or by the local authority. Integration is in some cases more nominal than real.