



Country Report: Spain

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Introduction

During the period covered in this report, the norm-setting activity of Spain in the field of environmental protection has been primarily based on administrative regulations. Only one law has been adopted. Rather than enacting a new law, it amends an existing one. Namely, we are speaking about *Law 13/2010*, which modifies *Law 1/2005*. It establishes the legal scheme for greenhouse gas emission allowance trading. Moreover, new case law has been established with respect to individual allocations of allowances under the *National Allocation Plans*. Some interesting administrative regulations have also been adopted in this period and will be reviewed in this report.

Developments in the scheme for greenhouse gas emission allowance trading

Amendment to Law 1/2005 (Regulation of trade of greenhouse gas emission allowances)

The scheme for greenhouse gas emission allowance trading in Spain has undergone significant changes through *Law 13/2010*, which amends *Law 1/2005*, as it improves and extends the general trading scheme to include the aviation sector. The adoption

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of this law was necessary to adapt the Spanish legal order to EU legislation in this field. Indeed, the adoption of two directives revising *EU Directive 2003/87/EC*¹ called for the amendment of *Law 1/2005*.

Law 13/2010 has a single article that modifies several provisions of *Law 1/2005*. Furthermore, it contains a transitional provision, a repealing clause and two final provisions. Its provisions are of a markedly environmental character, both in their purpose (to contribute to the reduction of greenhouse gas emissions) and in their origin (the commitments undertaken under the *Kyoto Protocol* and the *EU Directives*). Therefore, many of its provisions have been adopted on the basis of article 149.1.23 of the *Constitution* (in particular, those relating to emission allowances, to emission monitoring, reporting and verification). However, article 149.1.13, relating to bases and coordination of the overall planning of economic activity (i.e. for the modifications of the allowances market) may also be invoked.

This law introduces many changes into law. However, according to the second final provision, some of them will not take effect until 1 January 2012 or 1 January 2013. Given the volume of the changes introduced, only some of the most important ones will be highlighted.

First of all, the inclusion of the aviation sector in the emissions trading scheme has made it necessary to introduce appropriate updates, modifications and adaptations to different provisions of the *Law 1/2005*. Nevertheless, there are also other changes regarding the scope of application, given the fact that new industrial sectors have been included in Annex 1 and greenhouse gases other than carbon dioxide have also been introduced.

Secondly, the law introduces changes to the licensing system of greenhouse gas emissions. These include the need to review the license at least every five years, the

¹ These were: *EU Directives 2008/101/EC* (dated 19 November 2008); and *EU Directive 2009/29/CE* (dated 23 April 2009).

integration of the monitoring plan in the permit and the establishment of obligations on the use of automated systems and data exchange formats.

Thirdly, as of 1 January 2013, the *National Allocation Plan*, which has been the central element in the allocation of allowances in the first two periods of implementation of the emissions trading scheme, will disappear. From this date onwards, a community approach is adopted, both as regards the determination of total allowances, and in relation to the methodology for allocating allowances. Thus, the amount of allowances will be determined at EU level. Under *Directive 2009/29/EC*, the European Commission holds the power to calculate and publish the amount. In this new scheme, two basic formulas are established through which the allowances are to be allocated: the auction of allowances, which takes a central role as a method of allocation; and the transitional free allocation.

Fourthly, it newly introduces the concept of trading period, which replaces the period of validity of the *National Allocation Plan* under the current scheme. Allowances are only valid for a given trading period, but once the period has expired, the assets of the account holders must be exchanged for rights corresponding to the next period.

Fifthly, there are also significant changes in the operation of the emission rights registry (as of 1 January 2012 the allowances must be recorded in the single EU registry) and the sanctions regime (derived mainly from the inclusion aviation sector).

Finally, it also regulates all the specific features of the operation of the emissions trading scheme for aviation that differ from the operation of the general scheme.

Case-law on the Allocation of Rights of Greenhouse Gas Emissions

The scheme for greenhouse gas emission allowance trading has led to numerous judicial decisions during 2010. These decisions dealt with the lawfulness of certain individual allocations of allowances made under the different national allocation plans (see for example the judgments of the administrative branch of the Supreme Court of

4 May, 11 June, 9 and 14 July, 28 September and 8 October), and that of the National Allocation Plans themselves. The Supreme Court's judgments of 4 and 9 March 2010 are particularly interesting, as they found some determinations under the *National Allocation Plan (2008-2012)* to be null and void. Its judgment of 25 February 2010 is also interesting, as it specified the legal status of the *National Allocation Plan (2008-2012)*, stating that 'it is a general provision', which 'constitutes a regulatory instrument in this field, which does not exhaust its effectiveness in itself, but is consolidated by its successive application to an indeterminate plurality of situations. It is therefore a complement to the regulation that has its origin in EU law and descends to the contested regulatory standard (...) completing the general legal regime of trade in allowances of greenhouse gases emissions, in which the total number of allowances to be allocated in each period is established, together with the procedure applicable to their allocation, becoming forthwith a general guide for subsequent implementations, in particular, with respect to specific allocations of allowances to be made by decisions Council of Ministers' (at paragraph 4).

Regulatory Changes for the Adaptation of Different Environmental Regulations to the New Regime of Free Access to Service Activities

In this period, the *Royal Decree 367/2010* was adopted. It amends various environmental regulations in order to bring them in conformity with: *Law 17/2009*, on the free access to and exercise of service activities; and *Law 25/2009*, to adapt various pieces of legislation to the aforementioned law. In this way, the process of adaptation of the Spanish environmental regulations to the principles underlying the services directive, initiated by *Law 25/2009*, is carried on. This law introduced modifications, among others, into nine pieces of legislation concerning the field of environmental protection, in order to bring them in conformity with the *Law 17/2009* on free access to and exercise of service activities. This adjustment process, which does not only involve legal rules, continues now with the *Royal Decree 367/2010* that amends 19 environmental regulations (on hunting, fishing, forestry, forest fires, internal waters, costs, disposal of wastes, etc) to adapt them to the new regime of free provision of services.

Some Organizational Innovations: The Modification of the Basic Organic Structure of the Ministerio de Medio Ambiente, y Medio Rural y Marino

From the organizational standpoint, we should emphasize the modification of the basic organic structure of the Ministerio de Medio Ambiente, y Medio Rural y Marino, and the change of the head of the Ministry (Elena Espinosa has been replaced by Rosa Aguilar).

Following the restructuring of ministerial departments conducted by the *Royal Decree 1313/2010* and the adoption of *Royal Decree 1366/2010* that approves the basic organic structure of ministerial departments, the *Royal Decree 1443/2010* was eventually adopted on 5 November 2010. It establishes the new basic organic structure of the Ministry of Environment and Rural and Marine Affairs. Following these changes, the Ministry continues to be responsible for the proposal and implementation of government policy in areas such as the fight against climate change; protection of the natural heritage; biodiversity and the sea; water; rural development; agricultural, livestock and fishing resources; and nutrition. Hence, the configuration of the policies and areas of responsibility of the aforementioned ministerial department has not suffered any significant alteration. It remains structured around two State Secretariats (the Secretary of State for Climate Change and the Secretary of State for Rural Affairs and Water) and the Sub-secretariat and the General Secretariat of the Sea. Nevertheless, as a result of the *Royal Decree 1366/2010*, establishing the basic organic structure of ministerial departments, a reorganization of roles and responsibilities between senior and policy bodies has been set in place, in order to further streamline their operation and improve the internal balance.

The New Flood Risks Assessment and Management Regime

The *Royal Decree 903/2010* integrates *EU Directive 2007/60/EC*, on the assessment and management flood risks, into the Spanish legal order. It introduces criteria for the management of such risks, which are to be implemented by the Member States of

the European Union. In this way, the Spanish regulatory framework in this area is completed.

The purpose of this *Royal Decree* is to regulate the procedures for preliminary risk assessment of floods, to draw up flood risk and hazard maps, and to implement flood risk management plans throughout the Spanish territory. Most parts of this normative framework have the nature of basic legislation issued under the powers conferred upon the State, in articles 149.1.13 and 23 of the *Constitution*, to lay down the foundations of economic activity and environmental protection. The main objectives are to obtain adequate knowledge and assessment of flood risks and to achieve coordinated action from all public authorities and society, in order to reduce the negative consequences of floods. In this way, the mandate of the *Directive* to reduce the negative consequences associated with floods, to human health, environment, cultural heritage, economic activity and infrastructure is complied with.

With these objectives, a set of tools is introduced in order to make prevention and protection against flood hazards effective. These are the preliminary risk assessment of flood hazard, the flood hazard maps, and the flood risk management plans. It also includes some additional provisions regarding sectoral coordination, public participation and coordination between various public authorities, which are deemed to be necessary to achieve the envisaged objectives.

As stated in its preamble, the benefits of the implementation of this *Royal Decree* are twofold: 'On one hand, the introduction of new management tools will contribute to streamline the implementation of mechanisms for the protection of riverbeds and floodplains, which will result in avoiding or reducing environmental damage and the damage on the protected people and properties. On the other hand, the set of provisions introduced by the Royal Decree allows to react more effectively to the strong pressure of occupation of the areas bordering the riverbeds, which will result in reduced damage from flooding'.

Other Rules of Interest

Besides the aforementioned normative developments, several administrative regulations (royal decrees and ministerial orders) have been adopted in this period, both in environmental matters and in areas directly or indirectly related to the environment. Due to the limited scope of this report, not all of them will be reviewed. They include the following:

- Water management - *Royal Decree 1161/2010* amends *Royal Decree 907/2007*, which approves the regulation of hydrological planning, in order to provide a temporary solution to a specific problem posed in the process of developing new management plans, such as the lack of effective constitution of the Water Councils.
- Health protection against ionizing radiation - *Royal Decree 1439/2010* amends the Regulation on health protection against ionizing radiation, approved by *Royal Decree 783/2001*.
- Waste - *Royal Decree 943/2010* amends the *Royal Decree 106/2008*, which regulates batteries and accumulators and environmental management of wastes.
- Substances and mixtures - *Royal Decree 717/2010* amends the *Royal Decree 363/1995* (approving the Regulation on classification, packaging and labelling of dangerous substances); *Royal Decree 255/2003* (which approves the Regulation on classification, packaging and labelling of dangerous preparations; and *Royal Decree, 1436/2010* (which incorporates *Directive 2008/112/EC* into Spanish law).
- Sustainable development in rural areas - *Royal Decree 752/2010* approves the first *Sustainable Rural Development Programme (2010-2014)* pursuant to *Law 45/2007* (which provides sustainable development in rural areas).
- Civil protection - *Royal Decree 1564/2010* approves the basic guideline of civil protection planning at radiological risk.

Moreover, from an international perspective, Spain has ratified the *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact*

Assessment in a Transboundary Context (2003). This *Protocol* entered into force generally and for Spain on 11 July 2010.

Considerations of the Recent Developments

In the light of the developments in environmental regulation in the period under review, we would like to highlight two significant aspects. On one hand, the most significant regulatory changes, such as the reform of the greenhouse gas emissions trading scheme, the adoption of a new flood risk assessment and management regime and the adaptation of many environmental standards to the new regime on free provision of services, have their origin in EU law. It shows once again that EU law is one of the main drivers of innovation for Spanish environmental legislation.

In addition, the extensive process of regulatory change that is occurring in Spain, among other sectors, is the environmental adaptation of existing legislation with *EU Directive 2006/123/EC* on services in the domestic market. It was transposed into Spanish law by *Law 17/2009* and *Law 25/2009*. In this context, the impact that the new Spanish legal framework governing the freedom to provide services in the internal market has on environmental law has to be stressed. First, the importance of environmental protection in this new regime will be remarkable, as it is enshrined as an 'overriding reasons relating to the public interest' that will allow for derogations from the authorization system, or the adoption of temporary and territorial limitations of the securities of action (approval, communication or statement of responsibility). Secondly, the impact the new regulations governing the provision of services have on the various sets of sectoral environmental legislation cannot be overseen. This is illustrated by the amendments affected to various sectoral laws and regulations during recent months. Even further legislative amendments are needed to complete this process. Thirdly, in addition to these radical normative developments, major administrative changes will also occur in the field of environmental law, in particular with respect to the current administrative intervention schemes regulating activities with environmental impacts. Finally, it should also be noted that the newly assumed supervisory functions will also demand major organizational changes in the environmental administration. The profound changes to which preventive control of activities is subjected makes it necessary not only to redefine the legal regime

regulating the supervision of these activities, but also to significantly reinforce the apparatus for verification. Ultimately, the Spanish environmental law and administration is facing major challenges in the coming years.