

ENVIRONMENTAL LAW

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INDEX

1. MAIN LEGISLATIVE NOVELTIES

1.1 Order 143/2010 of the Ministry of the Environment, and Rural and Marine Affairs, of 25 January, on the establishment of an Integral Management Plan for the conservation of fishery resources in the Mediterranean

1.2 Law 8/2010, of 31 March, on the establishment of the disciplinary regulatory framework foreseen in the UE Regulations on registering, evaluating, authorising and placing restrictions on chemical substances and mixtures (REACH) and on classification, packaging and labelling of chemicals and their mixtures (CLP) that modifies it.

1.3. Law 6/2010, of 24 March, regarding the modification of the Law on Environmental Impact Assessment of projects

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1.4. Royal Decree 367/2010, of 26 March, on the modification of several environmental regulations for their adaptation to the Law 17/2009, on free access to and exercise of service activities, and the Law 25/2009, on modification of several laws for their adaptation to the Law on free access to and exercise of service activities

1.5. Law 13/2010, of 5 July, modifying the Law 1/2005, of 9 March, on regulatory framework of greenhouse gases emissions trading, as to improve it and extend it to aviation activities

1.6. Royal Decree 943/2010, of 23 July, which modifies the Royal Decree 106/2008, of 1st February¹, on batteries and accumulators and the environmental management of their waste

1.7. Law 40/2010, of 29 December, on geological storage of carbon dioxide

1.8. Law 41/2010, of 29 December, on protection of marine environment

2. RELEVANT JURISPRUDENCE

2.1 Noise pollution: Supreme Court Decision, of 3 February 2010 (appeal n.º 202/2007, reporting judge Rafael Fernández Valverde)

2.2 Waste: National High Court Judicial Order, of 17 February 2010

2.3 Environmental Impact Assessment: Supreme Court Decision of 27 October 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

2.4 Environmental Impact Assessment: Supreme Court Decision of 25 May 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

3. BIBLIOGRAPHICAL REVIEW ON ENVIRONMENTAL NOVELTIES

1. MAIN LEGISLATIVE NOVELTIES

1.1 Order 143/2010 of the Ministry of the Environment, and Rural and Marine Affairs, of 25 January, on the establishment of an Integral Management Plan for the conservation of fishery resources in the Mediterranean

The main aim of this Order is to establish an Integral Management Plan deemed to regularize the fishing activities in the Spanish Mediterranean area, such as trawling, purse seine fishing, fixed and small fishing equipments and longline fisheries, as to preserve and improve fishery resources. The Plan will be applied until the 31st of December 2012, with the possibility to be prolonged.

The described regulation has the meaning to preserve some concrete species. As the Order's "Statement of Motives" declares, "several scientific reports have confirmed the worrying situation of these fishing species, and taking into consideration their commercial value, it is a fact that the Mediterranean fisheries, in a medium term, are in a grate danger".

The regulatory actions contained in this Plan concern Spanish flag vessels that aspire to carry out fishery activities in the Mediterranean area. Some of those actions refer to: **(i)** the establishment of temporary restrains regarding longline fisheries; **(ii)** the total prohibition of the bottom trawl fisheries beyond 1000 metres, in all the exterior waters of Spanish Mediterranean coastline; **(iii)** the total prohibition of trawling activities, dredges and seines, over the layer of some protected marine species; **(iv)** the total prohibition of trawling activities in marine areas marked by concrete coordinates; **(v)** restrain the total amount of Spanish vessels daily catch when purse seine fishing activities are being carried out.

1.2. Law 8/2010, of 31 March, on the establishment of the disciplinary regulatory framework foreseen in the UE Regulations on registering, evaluating, authorising and placing restrictions on chemical substances and mixtures (REACH) and on classification, packaging and labelling of chemicals and their mixtures (CLP) that modifies it

The aim of this Law is to establish the disciplinary regulatory framework applicable in case of infringement of the abovementioned UE Regulations (1907/2006 and 1272/2008, respectively), according to their own provisions (as they demand to the Member States to adopt “effective, proportionate and dissuasive” sanctions in case of infringement of their stipulations).

The Law regularizes infringements and sanctions, and establishes the basic legal framework to be applied to the responsible subjects, prescriptive right, concurrency of sanctions, provisional measures and damage reparation and indemnification actions (in case of environmental damages, the reparation process is the established upon the Law 26/2007, of 23 October, on Environmental Responsibility).

The Law recognizes the environmental legislative powers attributed to the Autonomous Communities regarding monitoring, inspection and control actions to be carried out in their own territories, as to guarantee the due accomplishment of the stipulations contained in the both UE Regulations, as well as to produce complementary regional legislation, to establish, if needed, additional protection legislation (because the Constitutional Court has allowed to the Autonomous Communities to establish a more restrictive sanctions in case of infringements) and to exercise their legislative authority as to impose sanctions (the competence for that will correspond to the regional competent entity in which territory the infringement took place; if the infringement is committed in more than one Autonomous Communities, the competence will correspond to the one that has observed the infringement first).

An interesting observation is the fact that besides the traditional classification between serious, major and minor infringements (the sanctions may ascend to 1.200.000 Euros, by the way), the Law classifies the sanctions upon their nature, depending if they are related to chemical substances or their mixtures. As for the rest, is being maintained the traditional proceeding of temporally (not exceeding a five years period of time), total or partial, closure of the responsible plants or the faculty of the competent entities to publically publish the definitive sanctions, the concurrent facts and the identity of the offender (s).

Stands out the preventive purpose of the Law, materialized by the faculty of the Administration to adopt provisional measures before the judicial procedure, and to subsidiary execute the preventive and corrective measures, at the expense of the responsible subject, when an imminent danger or already occurred damaged have been produced, if the subject itself is not willing to act properly or its actions are not sufficient.

1.3. Law 6/2010, of 24 March, regarding the modification of the Law on Environmental Impact Assessment of projects

This partial modification of the consolidated version of the Law on Environmental Evaluation of Projects (known as TRLEIA) is foreseen with the purpose to simplify and speed up the existent bureaucratic procedure, which was delaying excessively the beginning of the activities, as well as to adapt its provisions upon the Law 17/2009, of 23 November, on free access to and exercise of service activities (known as “Umbrella Law”, in order to carry out a proper transposition of the Services Directive). The main novelties of this Law are the next ones:

1. The new regulatory framework specifies the actions to be implemented upon an Environmental Impact Assessment procedure (EIA in Spanish), composed by three phases: Phase 1: determination of the Study’s on Environmental Impact achievements (the project promoter makes a formal requirement to the competent environmental body and this one determines the achievements of the Study); Phase 2: Study on Environmental Impact (the Study, its submission to public information and consultations); Phase 3: Declaration on Environmental Impact (DIA in Spanish), granted by the competent environmental body.

2. The duration of EIAs, competence of the Central Administration, is considerable reduced: **(i)** all the actions to be implemented during the Phase 2 can not exceed the time limit of 18 months, considered from the day when the project promoter receives the formal notification on the Study’s on Environmental Impact achievements; **(ii)** the transfer of the file to the competent environmental body will have to be done in the same period of time, and once received, the body in charge will have a 3 month term for the granting of the Declaration on

Environmental Impact. This way, the total duration of the procedure is of 21 months; half as much the previous duration, of 43 months.

3.If in a maximum of 18 months term, considered from the day when the project promoter receives the formal notification on the Study's on Environmental Impact achievements, the competent environmental body did not receive from the prior competent body the Study on Environmental Impact, neither the technical documentation of the project nor the public opinion results, the file will be closed (which implies the need to reopen from the beginning the entire process of the EIA; this kind of legal solution is already foreseen in the TRLEIA, as to surpass the deadlines imposed by the Autonomous Communities).

To avoid that kind of legal unfair lapses, “when the delay is exclusively or partially attributable to the Administration, the competent environmental body will have to decide, by means of a reasoned decision, *ex officio* or at the request of the prior competent body, if there is a need to close the file or it is possible merely extend the deadline, to a maximum month term”. This is a manner to protect a diligent project promoter, avoiding the definitive closure of the file when the delay is not his fault.

4. The Law was adapted to the provisions contained in the “Umbrella Law”, in order to carry out a proper transposition of the Services Directive. This way, it introduces the obligation to submit a statement of responsibilities or a previous communication as to access to an activity or its development procedure and, eventually, the granting of the EIA; the statement of responsibilities or the previous communication can not be submitted until the EIA is not carried out, and, in any case, the need to provide the accrediting documentation. The Law also declares that the statement of responsibilities or the previous communication won't have any legal validity or efficiency if their content is not according with the DIA.

The need to obtain a statement of responsibilities or a previous communication, once the project has been submitted to the EIA, implies two important consequences: **(i)** the need to redefine the status of the “prior competent body”, which will assume powers regarding the granting of the EIA; it will be “a Central Administration, regional or local body in charge

empowered with enough competences to authorize, adopt or control the promoter's activity upon the statements of responsibilities or previous communications, submitted to an environmental impact assessment procedure"; (ii) a subsequent consequence not foreseen by the Law, but obvious enough to be announced: the need to revise the jurisprudence that considers the Declaration on Environmental Impact as a mere preparatory act, and, therefore, not able to be appealed by itself, but only once the authorization is granted. So, when the project will only require a previous communication or a statement of responsibilities, the granting of the DIA will imply the ending of the proceeding and, consequently, the possibility to apply its results directly.

5. It is established the need to identify the author(s) of the Study on Environmental Impact or of the required documentation regarding those types of projects contained in the Annexe II and for those ones that, without being included in the Annexe I, may affect directly or indirectly the spaces of the "Nature Network 2000" (known as "Red Natura 2010"). Even so, the Law did not consider necessary to demand from the subscriber of those documents to possess a high professional education or a sufficient capacity and experience in the field, as have already done some other Autonomous Communities (Castilla and León, Castilla la Mancha and the Balearic Islands).

1.4. Royal Decree 367/2010, of 26 March, on the modification of several environmental regulations for their adaptation to the Law 17/2009, on free access to and exercise of service activities, and the Law 25/2009, on modification of several laws for their adaptation to the Law on free access to and exercise of service activities

The purpose of this Law is to complement the transposition into the national legislation of the UE Services Directive, regarding environmental activities. To that end, several regulations have been modified (on prevention and integral control of contamination matters, air quality, waters, coasts, natural environment and genetically modified organisms), as to their adaptation to the prescriptions contained in the referred UE Directive and its transposition laws, deemed to achieve an easier proceeding scheme; to introduce the publicity, impartiality, transparency and competitive concurrency principles into the service

activities; and the substitution in some cases of the authorizations by statements of responsibilities or previous communications.

1.5. Law 13/2010, of 5 July, modifying the Law 1/2005, of 9 March, on regulatory framework of greenhouse gases emissions trading, as to improve it and extend it to aviation activities

As the title itself indicates, the purpose of this Law is to modify the Law 1/2005, transposing into the national legislation the modifications introduced by the recent two UE Directives, after revising the UE Directive 2003/87/CE, on the communitarian greenhouse gases emissions trading system (UE Directive 2008/101/CE, which includes the emissions produced by aviation activities into the trading system, and the UE Directive 2009/29/CE, which carries out a profound revision of that system). This legislative initiative is due to the gained experience upon all these years (to be more specific, from the 1st of January 2005, when the greenhouse gases emissions trading system began).

The main novelty of it consists in the fact that, from 2013 to 2020, the allocation of emission rights will be realized by means of auction sales. The ambition of the legislative power was to offer a real and effective opportunity to the small and medium companies a “full, fair and equitable” access to the emissions trading market, avoiding this way the production of “undesirable distributional effects”, as the ones occurred in the electricity sector. The Climate Change Secretary of State will be the responsible body in charge to publish a detailed report, after each auction sale, including the price of each auction period.

Nevertheless, the Law foresees a transitional free allocation period of emission rights until 2020, benefiting those sector/subsectors exposed to a considerable risk of carbon leakage¹,

¹ Those ones for whom the appliance of the greenhouse gases emissions trading system may cause an increase of emissions produced in third countries that haven't imposed in their industries similar reduction obligations.

and also the urban heating and high-efficiency cogeneration systems. In general terms, are excluded from this free allocation system the producers of electricity, the capture facilities, the pipelines for transport and storage emplacements for carbon dioxide.

As for the *new entrants*, a 5% of the total communitarian amount of emission rights has been reserved for them, for the period 2013 – 2020. The rules on the free allocation system to be applied to new entrants will be established upon future communitarian regulations and, if necessary, national regulations implementing this Law (please bear in mind that it is completely prohibited the free allocation of emission rights to new entrants that produce electricity). In case that some of the reserved emission rights would remain undelivered, they would be auctioned as regular ones.

Because of the disappearing from 2013 of the National Allocation Plans (the European Commission will be the body enabled to calculate and publish the amount of emission rights to be conceded to each Member State), has been introduced a new concept, the one of *trading period*, who's duration was established in a 8 years period of time.

The allocation system is introduced by means of the Cabinet of Ministers' agreement and creates the legal figure of *automatic lapsing of emission rights*, in case that those rights wont be used during their trading period (or emission production).

Upon this Law, transposing the UE Directive 2008/101/CE, the aviation sector is being introduced in the communitarian greenhouse gases emissions trading system. The Law regulates all the aspects applicable to the greenhouse gases emissions trading system in the aviation sector, some of them different from the general trading system (for example, the non existence of the emission authorization legal figure, replaced by monitoring plans). The Law previews that from the 1st of January 2013, the 15% of the total amount of emissions rights will be auctioned in benefice of the aviation sector.

Another important matter is the relative to the Annex I of the Law (where have been included the aviation activities), which regulates the applicable regime, but also incorporates into the greenhouse gases emissions trading system all the new industrial sectors contained in the UE Directive 2009/29/CE, such as the petrochemical, ammonia and

aluminium sectors. The regulatory framework is extended also to other two greenhouse gases kinds, easily measured and monitored with sufficient precision (nitrous oxide emissions produced by some chemical mixtures and perfluorocarbons emissions produced by the aluminium sector).

Last but not least is the content of the Fifth Additional Provision of the Law, including the possibility to grant emission rights or credits to projects located in national territory not submitted to the greenhouse gases emissions trading system.

1.6. Royal Decree 943/2010, of 23 July, which modifies the Royal Decree 106/2008, of 1st February⁴, on batteries and accumulators and the environmental management of their waste

The importance of this Decree is the possibility given to the producers of batteries and portable accumulators generating hazardous waste, as to comply with their legal obligation, to collect and duly manage the generated waste not only, as so far, by the means of **(i)** a deposit and return system or **(ii)** an integral management system, but also using a **(iii)** public management system; this last option, of new creation, extends considerable the legal options to be applied by the producers of batteries and portable accumulators.

1.7. Law 40/2010, of 29 December, on geological storage of carbon dioxide

This Law has the meaning to introduce in the national legislation the provisions established upon the UE Directive 2009/31/CE. The legislative strategy is to capture, transport to specific emplacements by means of tubes or tanks and, finally, inject into an adequate underground geological structure the carbon produced by industrial activities, in order to achieve its permanent storage.

The two administrative tools designed by the new regulatory framework of CO₂ are the *investigation license* and the *storage concession*, granted both of them by the Ministry of Industry, Tourism and Commerce, previous favourable reports from the Ministry of the

Environment, and Rural and Marine Affairs and the competent Autonomous Community where the storage emplacement is located.

The *investigation license* is granted as to determine the storage capacity of a land, allowing to its owner to investigate for a period of time of 6 years (extendible to 3 more). The Geological and Mining Institute has already designed a map including the CO₂ storage areas, for more than 20.000 millions tones (20 Gt). And as regards the *storage concession*, this one will offer to its owner the possibility to storage the gas for a 30 years period of time, extendible for two more consecutive periods of 10 years.

Both of them may be transmitted, having obtained previously the authorization from the Ministry of Industry, Tourism and Commerce. After the definitive closure of the activity, the Central Administration will assume the ownership and control of the storage emplacement, as well as the responsibility charge.

Regarding the transportation of the CO₂, it will be the Ministry of Industry, Tourism and Commerce the competent body who will adopt in the future an appropriate regulatory framework.

The Law also establishes a hard disciplinary regime, composed by sanctions from 500.000 Euros (minor infringements) to 5.000.000 Euros (serious infringements).

1.8. Law 41/2010, of 29 December, on protection of marine environment

This Law has transposed to the national legislation the UE Directive 2008/56/CE, of 17 June 2008, establishing a regulatory framework in the field of the communitarian marine environmental policy (Marine Strategy Framework Directive). This Law will be applicable to the territorial sea, to the Atlantic and Cantabrian exclusive economic zones, to the Mediterranean fisheries protection zone and to the continental platform (that's: all the marine waters, including the seabed, subsoil and natural resources). The Law also regulates the waste poured by Spanish ships and aircrafts into the marine waters, the incineration activities carried out in the sea area and the collocation of equipments upon the sea ground.

The administrative tool to be applied is the "*marine strategies*", containing rules regarding the protection and preservation of the marine environment, the prevention and reduction of waste, and also the preservation of the biodiversity. The Ministry of the Environment, and Rural and Marine Affairs will define for each marine coastal demarcation, previously consulting the Autonomous Communities, the characteristics of a good environmental status, elaborating afterwards a Measures Programme (for a 6 years period of time), as to achieve or maintain a good environmental status of the national waters.

Regarding the waste poured by Spanish ships and aircrafts into the marine waters, it will be regulated upon specific applicable legislation and other regional agreements, if any.

And as to the legal responsibilities for environmental damages caused to the marine environment, the applicable framework is the Law 26/2007, of 23 October, on Environmental Responsibility.

2. RELEVANT JURISPRUDENCE

2.1 Noise pollution: Supreme Court Decision, of 3 February 2010 (appeal n.º 202/2007, reporting judge Rafael Fernández Valverde)

This Court Decision resolves an administrative - contentious proceeding submitted by an Owners Association of cottages and plots against some specific aspects of the Royal Decree 1367/2007, which develops the Law 37/2003, on Noise, regarding the acoustic zoning, quality objectives and acoustic emissions, and also declares the cancelation of a provision contained in this Regulation.

Upon the article 8.1 of the Noise Law, "*the Central Government will define the objectives of the acoustic quality applicable to different types of acoustic areas, for already existing or future situation*".

The Court Decision declares, admitting the appellants' claims regarding this point, the non-compliance of the above mentioned regulatory provision, contained in the Table A of the Annex II of the Regulation, referred to the "Acoustic quality objectives", in its paragraph f), on "territorial sectors related to general systems of transport infrastructures or other public facilities in need of those infrastructures."

The main cause of this claim was because, meanwhile in other five Sectors foreseen in the Table A the acoustic quality objectives are established upon concrete noise rates, expressed in decibels, in the Sectors described in the paragraph f) the acoustic quality objectives are "undetermined", containing a footnote simply declaring that "in these territorial sectors will be adopted adequate preventive measures on acoustic contamination, in particular, applying the technologies with a minor acoustic impact, chosen between the best available techniques".

The Court declares that this kind of regulatory ambiguity can not be accepted, bearing in mind that is not the same establish, as an acoustic quality objective, a concrete noise rate than disposing that an adequate preventive measures is foreseen to be adopted, because the preventive measures are tools to be applied for the achievement of the final objective and if this objective hasn't have been properly defined, all the remaining mechanisms included in the Law loss their meaning. The Decision also declares that this kind of ambiguity may only lead to a serious lack of defence, which impedes the citizens to defend their legal interests before the competent public authorities.

This way, the Court Decision cancels the former expression "undetermined" contained in the Table A, where are established the "acoustic quality objectives for noise applicable to existing urbanized areas", of the Annex II of the Regulation, regulating the "acoustic quality objectives". Nowadays, they are working on a Draft Amendment of the Royal Decree 1367/2007, as to replace the expression "undetermined" by a footnote expressing that, regarding the limits of those territorial sectors, will not be exceeded the acoustic quality objectives for noise applicable to other acoustic areas adjacent to the first ones".

2.2 Waste: National High Court Judicial Order, of 17 February 2010

This Judicial Order was highly acclaimed by ecological organizations, because of the immediate cessation of the fosto-plaster waste discharges carried out by the companies FERTIBERIA and FMC FORET into the Huelva's marshes. The background of the case is the following:

- In 1965, a factory producing phosphoric acid was implanted in the city of Huelva, purchased afterwards by the company FERTIBERIA, S.A. The evacuation of that acid implied the production of other by-product called fosto-plaster, a toxic and hazardous industrial waste, which was poured into the Huelva's marshes.
- The company was sanctioned for illegal waste discharges in 1998; even the natural persons responsible of the factory were condemned for crimes against the natural resources and the environment (2002).
- On November 27th of 2003, the Ministry of Environment emits an Order declaring the extinction of the concession granted to FERTIBERIA. The company applies the Order, but the National High Court dismisses the claim by the Decision from June 27th, 2007, and ordains the cessation of the waste discharges.
- After the publication of this last Court Decision, declaring the extinction of the concession, between the time period of October 2007 and February 2009, the General Directorate for Coasts has requested seven times to FERTIBERIA to comply with the extinction order, and to cease consequently the waste discharges.
- By the Judicial Order of 14 December 2009, the National High Court disposes the execution of the Decision and imposes the immediate cessation of the waste discharges starting from December 31st of 2010 and not from 2012, as was pretended by the company and other administrations, taking into consideration "all the involved interests, as to allow the accomplishment of an orderly transition and properly environmental protection".

Against this Judicial Order, the involved companies have presented an application for reconsideration before the same judicial body, pleading the damages that the provisional execution of the order would cause to the workers, other companies and installations, but the Judicial Order from February 17th declares the prevalence of the environmental general interest over the private interest of the appellants and, there for, the cessation of the waste discharges as scheduled. The company already has ceased the discharges and now foresees to carry out soil remediation works, because it has been poured more than a hundred million of tons of fosto-plaster on 1.200 acres of marsh.

2.3 Environmental Impact Assessment: Supreme Court Decision of 27 October 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

The Court Decision resolves a contentious proceeding submitted by an Ecological Association against the Council's of Ministries Agreement from May 25, 2007, on public utility and project implementation approval of Penagos-Güeñes air power line, in the Cantabrian and Vizcayan provinces.

The Supreme Court cancels this tracing, justifying that the “power line doesn't pass along the edge, as it's foreseen in the Environmental Impact Declaration (DIA), but within the Triano and Galdames forestall Biotope, which is a protected area; this why, consequently, the authorization violates the conditions established in the DIA and has been issued by an improper use of the technical discretionally power of the Administration.

The Court Decision declares null the appealed agreement, regarding the tracing of the project's implementation, and announces that the Electrical Network of Spain (REDESA or “Red Eléctrica de España) has to draft a new power line project, avoiding this time the Triano and Galdames forestall Biotope.

2.4 Environmental Impact Assessment: Supreme Court Decision of 25 May 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

In this relevant Court Decision, the Supreme Court rejects the cassation appeal submitted by the Regional Community of Madrid and entirely confirms the High Court of Justice of Madrid Decision annulling the Decree 131/2001, of the Executive Government of the Autonomous Community, which has declared the prevalence of the general interest of the granite mining exploitation activity of the mountain “Pinar del Consejo”, included in the Catalogue of Public Utility Mountains, property of the City Council of Cadalso de los Vidrios.

The Environmental Impact Declaration (DIA) granted for the mining exploitation project was negative, because of its harmful effects on the environmental values of the mountain. These environmental values included in the DIA receive a high legislative protection, because this area is included in the Special Protection Area for Birds (ZEPA), upon the UE Directive 79/409/CEE, including species listed in the national and regional catalogue of threatened species, two of them as endangered species, and as part of the Draft of the Regional List of Communitarian Importance Places.

The confrontation created between the negative DIA and the competent Regional Ministry regarding the implementation of the project was finally resolved by the Executive Government of the Regional Community of Madrid, deciding the definitive execution of the project and imposing to the responsible company the obligation to reforest the quadruple of the eventually occupied area and to promote the declaration of prevalence of the new use of the mountain prior its public utility, as to proceed in the future to its elimination from the mentioned Catalogue (required by the Regional Community of Madrid Law 16/1995, on Forest and Nature Conservation).

The declaration as null of the decree that foresees the prevalence of the new use of the mountain prior its public utility is confirmed by the Supreme Court. The Court Decision states that the Court is not judging neither replaces "the deliberation power of the Regional

Community of Madrid, by giving its approval to the quarry activity”, but the Court states openly that during the proceeding has occurred “a clear and evident infringement of the national and European environmental legislation”, because of the following reasons:

- The obvious insufficiency and inadequacy of the adopted compensatory measures (consisting, mainly, to carry out reforestation actions), as they are mere legal obligations already included in the Regional Community of Madrid Law on Forest and Nature Conservation, for un-cataloguing cases or transformation of public utility use of mountains.

The mining exploitation is located in a place of "priority natural habitat and/or species", upon the UE Habitats Directive, and, from this point of view, have been violated the provisions contained in its article 6.4, second paragraph, as "for a situation of these characteristics, there has to be a much more intense conditioning"; in particular, it provides that "it would only be possible to present pleadings –as motivation for the project’s approval- if they consist in considerations related to human health and public safety, or prior positive effects for the environment, or other imperative reasons of general public interest”.

In this concrete case, the Court hasn’t appreciate “imperative reasons of general public interest” that would allow the execution of the project, because, even if the mentioned Decree have been enumerated serious labour, economic and social problems of the municipality and of the mining company itself, in case that the works are eventually paralyzed, from the presented documents is impossible to perceived a real “labour and social situation in Cadalso de los Vidrios that may conduct to an imperative situation of general public interest; nor a special labour situation different of other neighbouring municipalities”.

- Finally, because "was also infringed the same article 6.4, in its second paragraph, as it demands, beside of a specific motivation, the previous consultation of the European Commission; in particular, it says that “in this last case, using appropriate legal channels, it will be necessary to consult previously the European

Commission”; reality that didn’t happened either in this case”. The absence of this previous consultation "also implies the invalidity of the Agreement, because of the substantial nature of the fault, mainly because it makes impossible the control carried out eventually by the Commission in this material environmental field”.

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