

**Questionnaire on Air Pollution Law  
Spain  
(Faustino Gudín)**

**I. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe<sup>1</sup> and**

1. Have there been problems to fulfil the obligations, set out in these directives, *in practise*? Are there effective systems in place to ensure detection of possible non-compliance and relevant follow-up, including prosecution and adjudication?

First and foremost, as far I concern, without a doubt, that the progress generated in the integration of the environment in the decision-making process and in the realization of sectoral policies in this field they are relatively slow in Spain.

Secondly, we should point out the regulation with level or rank of law as an Act of Parliament. In this topic in Spain we rule the Law 34/2007 of 15 November On Air Quality And Atmospheric Protection which is previous at the Directive.

One of the main points of the mentioned law is the Chapter II which develops the foundations of quality assessment and management of air, based on three pillars: the pollutants to be evaluated and their quality objectives (article 9), the evaluation obligations (article 10), and the zoning of the territory (article 11).

As far as I concern, it is especially important in this regulation the Chapter IV of the Act which addresses the issues of planning in three areas: plans to improve air quality and meet objectives and obligations; public participation in the preparation of such plans and the integration of the protection of the atmosphere in the planning of sectorial policies. In particular this law mandates the government, with the participation of the autonomous communities, the development of those plans state level resulting from international and community commitments. Besides that, the Chapter V of the law is dedicated to the promotion of instruments to promote the protection of the atmosphere on the understanding that the fight against pollution requires the participation of multiple actions in many different areas. Moreover, the Chapter VI deals with issues relating to the control, inspection, surveillance and monitoring to ensure compliance with this law. On the one hand attributed to the autonomous communities and local entities under their jurisdiction, the responsibility for the adoption of the measures necessary inspection and officials conducting the inspection the nature of law enforcement. Finally, the Chapter VII is devoted to the sanctions regime. A regime that seeks to be consistent with the comprehensive and inclusive approach to this law, the principles that inspire, particularly the polluter pays and prevention of pollution at source and the particular fact that adverse effects air pollution on the atmospheric environment and are largely of occasions repairable or their causes are easily identifiable and quantifiable.

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<sup>1</sup> <http://data.europa.eu/eli/dir/2008/50/2015-09-18>

Returning to the main question, the Directive 2008/50/EC has been finally implemented in Spain by Royal Decree 102/2011, of January 28, concerning the improvement of air quality. This regulation has been amended by Royal Decree 39/2017, of 28 January, concerning the improvement of air quality. The main modifications involved in this Royal Decree refer to:

- Data quality objectives for benzo (a) pyrene, arsenic, cadmium, and nickel, polycyclic aromatic hydrocarbons (PAHs) other than benzo (a) pyrene, total gaseous mercury, and total deposits.
- Guarantee the adequate evaluation of the quality of the ambient air in relation to sulfur dioxide, nitrogen dioxide and nitrogen oxides, carbon monoxide, benzene, particles and lead, as well as the micro-implantation of the measurement points for said pollutants.

Furthermore, it is important to highlight Chapter IV of this Royal Decree, which establishes the approval of Air Quality Plans –work to be carried out by the Autonomous Communities- for areas or agglomerations where values are exceeded emission limit, targets or tolerance range of one or more substances, with the ultimate aim of reaching the limit values or objectives set by the legislation. In addition, special distinction is made in the so-called Short-term action, when it is expected that the defined threshold values will be exceeded in the Annex I.

On 12/15/2017, the Air Plan 2017-2019 (Air Plan 2) was approved by the Council of Ministers, which gives continuity to the Air Plan and sets a time horizon for 2017-2019 and will continue with the national program for the control of air pollution that must be prepared within the framework of Directive (EU) 2016/2284 of the European Parliament and of the Council of December 14, 2016 on the reduction of national emissions of certain air pollutants, which Directive 2003/35 / EC is amended and Directive 2001/81 / EC is repealed.

According to Spain's Ministry for Ecological Transition on Thursday released air-quality data for 2017 that shows a slight spike in nitrogen dioxide (NO<sub>2</sub>) and particulate matter (PM<sub>10</sub>), as you know, two of the most hazardous air pollutants for human health. The report also underscores that Spain is failing to make progress in the fight against pollution, a fact that has already drawn a warning from the European Union. In January, the European Commission demanded to see Spain's plans to revert the situation, and said that nine member states could face legal action over their failure to properly tackle air pollution. In January 2017, the European Commission demanded to see Spain's plans to revert the situation, and said that nine member states could face legal action over their failure to properly tackle air pollution.

As far as the government is concerned, the preliminary data on pollution levels from 2018 shows "a certain improvement," particularly with respect to NO<sub>2</sub>. The climate has helped, as there has been more wind and rain. "It makes us think that the measures taken by the authorities are working," says a government spokesman.

On July 25, 2019 the European Commission has decided to take Spain to the EU Court of Justice in Luxembourg for poor air quality in its two large urban areas, where the limit values for nitrogen dioxide (NO<sub>2</sub>) are not respected. This pollutant originates mainly from human activities such as road traffic; and "in particular for diesel vehicles, and industry,"

recalls the Commission. European legislation establishes a limit on NO<sub>2</sub> concentrations since 2010, which -according to the Commission- Spain has been violating systematically this directive.

To sum up, from my point of view, Spain has failed to comply year after year with European regulations since enforcement began in 2010. According to "El País" the main newspaper in Spain, around fifteen million Spanish are breathing air the EU considers polluted. More than half of Spain is wreathed in air containing excessive levels of particulate matter, nitrogen dioxide and ozone. Spain is plagued by three main pollutants: nitrogen dioxide (NO<sub>2</sub>), caused by traffic and predominantly a problem in big cities; PM<sub>10</sub> particulate matter, consisting of dust, ash, soot and similar substances produced by traffic as well as central heating systems, industry and construction; and finally ozone, a pollutant linked to the others, which is prevalent during hot weather and can spread long distances.

In accordance with the environmental organization Ecologists in Action (NGO), using its own methodology, puts the number of people in Spain affected by poor air quality in 2018 at 17.5 million. Meanwhile, the Ministry for Ecological Transition insists it is impossible to measure the effects on health with any precision. It does say, however, that it would produce data relating to health if it had population figures for the areas covered by each station, but this information is in the hands of each region.

As far as the Ministry for Ecological Transition is concerned, the preliminary data on pollution levels from 2018 shows "a certain improvement," particularly with respect to NO<sub>2</sub>.

**Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air<sup>2</sup>**

This Directive has been transposed in Spain by Royal Decree 812/2007, of June 22, on assessment and management of ambient air quality in relation to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons, a standard in turn repealed by the above mentioned Royal Decree 102/2011, of January 28, regarding the improvement of air quality.

In August 2014, Royal Decree 678/2014 of August 1 was published, which modifies RD 102/2011 regarding the improvement of air quality in relation to the reference value of Carbon Sulfide (CS<sub>2</sub>).

Afterwards, in January 2017, Royal Decree 39/2017 was published, which modifies RD 102/2011, of January 28, regarding the improvement of air quality. The main changes involved in this royal decree refer to the data quality objectives for benzo (a) pyrene, arsenic, cadmium and nickel, polycyclic aromatic hydrocarbons (PAHs) other than benzo (a) pyrene, total gaseous mercury and total deposits. Likewise, it is intended to guarantee the adequate evaluation of the quality of the ambient air in relation to sulfur dioxide, nitrogen dioxide and nitrogen oxides, carbon monoxide, benzene, particles and lead, as well as the micro-implantation of the measurement points of said pollutants, and regulate the requirements for documentation and reevaluation of the choice of sites. On the other hand, the modifications also refer to the reference methods for evaluating the concentrations of sulfur dioxide, nitrogen dioxide and nitrogen oxides, particles (PM<sub>10</sub> and PM<sub>2.5</sub>), lead, benzene, carbon

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<sup>2</sup> <http://data.europa.eu/eli/dir/2004/107/2015-09-18>

monoxide and ozone, arsenic, cadmium, mercury, nickel, and PAH; standardization and test reports, the criteria for determining the minimum number of points for the fixed measurement of ozone concentrations, rectification of the need for determination of particulate mercury and divalent gaseous mercury and establishing the basis for future development regulation of a national air quality index.

In March 2019, Order TEC / 351/2019, of March 18, was published, approving the National Air Quality Index. This Order approves the National Air Quality Index, following the guidelines of the European Index («Air Quality Index»), which was launched in November 2017 by the European Environment Agency (EEA) and the European Commission, and which enables the population to be informed of the current air quality in cities and regions across Europe.

*Please give examples.*

To start with, I think the most important case is Madrid and Barcelona, both of them are paradigmatic cases. According Antonio Vercher, the Chief Prosecutor of Environment, the city has registered 62 micrograms were registered in 2018 – 55% over the limit; and in Barcelona, the figure was 59 micrograms – 47.5% over. It's important to note, the EU stipulates that the annual average of NO<sub>2</sub> should not exceed 40 micrograms per cubic meter. Furthermore, There is a second emergency limit linked to spikes of NO<sub>2</sub> which are common in Madrid and which happen when the air is stagnant. The capital was the only place in Spain that exceeded this emergency limit last year, which is set at 200 micrograms per cubic meter an hour, no more than ten times during the year. Madrid was six times over the limit on 62 occasions in 2018.

2. Are those directives properly implemented in your Member State? Have stricter or complementary air quality standards been introduced?

Formally the regulation has been implemented but it is important to put forward not only the formal aspects, but it is just as important to face up to the practical implications of these set of laws. The report Air Quality in the Spanish State during 2018 presented on 23 of June 2019 by the prestigious NGO "Ecologistas en Acción" reveals that the population that breathed polluted air reached 14.9 million people, that is to say, around 31.8% of the entire population.

Following what the European Commission has pointed out, it can be said that the high levels of pollution in the urban areas of Madrid, Barcelona and Vallès-Baix Llobregat, among other localities. According to data from the European Environment Agency, in Spain almost 9,000 premature deaths per year are attributable to nitrogen dioxide. From my point of view, the fundamental problem centers on nitrogen dioxide (NO<sub>2</sub>), which in the Spanish case comes mainly from human activities, such as road traffic, especially diesel vehicles, and industry.

As I have referred before, in Spain, the biggest problems are in the two main cities (Madrid and Barcelona) where the traffic generates high NO<sub>2</sub> levels. The newest figures of the Environmental Ministry show seven urban agglomerations where NO<sub>2</sub> is above the annual threshold, up from six in 2016. These include the Barcelona metropolitan area, Madrid, the Corredor del Henares industrial and residential axis, the southern Madrid area, the Bajo Nervión in the Basque Country, and the city of Granada and its outlying area in Andalusia.

As a palliative to this critical situation, the Ministry of the Environment has prepared the National Program for the Control of Atmospheric Pollution, with the aim of "reducing emissions of the main pollutants in two phases by 2020 and by 2030", which are carbon dioxide, sulfur (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), non-methane volatile organic compounds (NMVOCs), ammonia (NH<sub>3</sub>) and fine particles (PM<sub>2.5</sub>).

As for particulate matter, the number of affected areas has gone from three to five: the Granada metropolitan area, Málaga on the Costa del Sol, Villanueva del Arzobispo in Jaén province, Plana de Vic in Barcelona, and Avilés in Asturias.

*Please provide references to the implementing legislation.*

3. Have EU infringement proceedings in relation to these directives been brought against your Member State?

*Please provide references to these proceedings and their outcomes.*

In May 2018, the Commission brought six of these countries to the Luxembourg Court, but the other three were saved, including Spain (along with the Czech Republic and Slovakia). The reasons put forward by the Commissioner were that "the announced measures, still in the preparation phase, could adequately cope with the existing deficiencies, if they were applied properly and on time.". Nevertheless, the Commission announced that Spain would continue to be under strict surveillance. in the application of said measures.

The procedure could end imposing to Spain a fine of up to 1,600 million euros, at the rate of 200 millions per year of non-compliance.

All in all, we should consider that Spain is currently the second EU country with the most open environmental offenses. Ahead, only Greece is found, with 25 active files, a position that Spain has occupied for three years in a row, reaching accumulate up to 32 cases opened in 2018. One of the main factors, is the "poor air quality" in Spain, by exceeding the limit values of nitrogen dioxide (NO<sub>2</sub>) in the urban areas of Madrid, Barcelona and Vallès-Baix Llobregat (Catalonia). Despite the fact that the European Environment Agency indicates that in Spain between 10,000 and 9,000 premature deaths per year are attributable to NO<sub>2</sub>, this cause, opened in 2015, and that attempts are being made to remedy low-emission areas such as Central Madrid - replaced later by Madrid 360°- or the ZBE in Barcelona, above mentioned.

4. Is there national case law in which these directives are relied upon and what are the most relevant subject areas (e.g. concerning adoption and content of air quality plans, access to relevant environmental information and public participation, etc.)?

There is a few cases in this filed, because I don't know the concrete reason in Spain this regulation is not highly conflictive. There are some judgements in a low el regarding "Volkswagen Affaire". On the criminal side, it is important to note the Judgment of Supreme Administrative Court on 02/27/2020 declared in accordance with the law of Royal Decree 617/2017, of June 16, which regulates the direct concession aid for the acquisition of

alternative energy vehicles, and for the implementation of points of electric vehicle recharging in 2017 (MOVEA Plan 2017)

a) Are there specific difficulties to enforce judgements in these cases? If yes, please explain in more detail.

In my view, there is not particular difficulties owing to there are not too many cases in this field. On the whole, the main point are the law administrative fines which Administration impose to the citizens to breach the law when they introduce in parts of the big cities breaching the law.

b) Who are the claimants in the different categories of cases (e.g. local authorities, non-governmental organisations, private persons)?

It's just the same, even though environmental NGOs use to be very active and they are complaining time after time in the media related to this topic, as a matter of fact, you could see only a few judgments concerning this issue. Maybe the Councils in the big cities develops a proactive role in this point. For instance, on July 2019, two different courts confirmed the suspension of the moratorium on the Madrid Central fines. And in both cases, the judges allege health and environmental reasons for not allowing - although only temporarily - the area of low limitations of the capital to be eliminated.

c) Is there case law, in which claimants demand the withdrawal of measures aimed at improving the air quality (e.g. annulment of ban of certain cars)?

Maybe I should return to bring up the aforementioned case, "Madrid Central", the Madrid Council tries not to impose fines for approaching by car in a protected area (the core of Madrid) during a period but two low Courts alleged health reasons in order to protect the citizens and overruled this decision maintaining the fines.

*Please provide a concise overview of cases of particular interest.*

The Spanish Criminal Supreme Court, in a sentence on October 29, 2015, stresses that there is a crime against the environment and natural resources due to atmospheric emissions that give ozone capacity, with serious risk for the ecosystem derived from the persistence of emissions over time (from 2007 to 2010) and its global volume. The court sentenced two businessmen from Madrid to two and a half years in prison for a crime against the environment for illegally shredding 2,236 refrigerators, which released 3,378 tons of CO<sub>2</sub> into the atmosphere, creating a great risk for the environment and people. They failed to comply with the regulations on WEEE, as they lacked authorization for the treatment of hazardous waste.

d) With a view to the penalty clauses of Article 30 Directive 2008/50/EC and Article 9 of Directive 2004/107/EC:

- What type of penalties are applicable in your country to breaches of obligations deriving from these two directives? More specifically:

According to the art. 5 of the cited Law 34/2007 the regions have competence to implement the level of emissions and to impose the sanctions. Therefore, it depends on the 17 regions to implement this topic.

- Are the sanctions specifically stipulated in the transposing national legislation or are there sanctions of a general kind established in other legislation and applicable more widely?

It can be easily noticed that it is extremely difficult to give a whole picture of the administrative legal situation in this specific point.

- Are the sanctions directed explicitly or implicitly against competent authorities? Are the sanctions addressed to private natural and legal persons and/or economic operators?

There is not a great deal to be said on this matter because in fact these type of crimes are very rarely prosecuted in Spain, the statistics of these type of crimes are extremely scarce.

By means of Organic Law 5/2010 of 22 June 2010 — which entered into force on 23 December 2010 — the Spanish Penal Code introduced, for the first time, corporate criminal liability in Articles 31 bis and 328 of the Penal Code. As a result, there is autonomous criminal liability for corporations and collective entities, allowing them to be sanctioned even when it is not possible to single out the criminal liability of a physical person. It must be highlighted that the reform of the Penal Code of 2010 has excluded local public administrations and institutional government even though they also play an important role in pollution offences as authors or participants.

There are no relevant differentiating factors in the substantive and procedural aspects referring specifically to the environment in the fight against organized crime. The general rules apply. There is no definition of organised environmental crime. In Spain the main form of organized crime in these areas are identified with organized forms of corruption. There is a criminal liability of officials for illicit favourable reports, remaining silent on infringement of laws following inspections, omitted inspections, resolutions or votes in favour of granting illegal licences.

Further, on 30 March 2015, a new amendment to the Penal Code entered into force, introducing some changes to the first version of Article 31 bis. In accordance with Article 31 ter of the Spanish Penal Code, legal entities will be criminally liable for crimes committed by their representatives, directors, managers and employees even if the offender cannot be determined or criminal proceedings have not been initiated against them. Moreover, personal circumstances of the individuals who committed the crime that mitigate, aggravate or modify their criminal liability will not affect the criminal liability of legal entities. The Environmental offenses (Articles 325 to 331) are included in the list of offences which could be committed by legal entities.

The penalties that may be imposed on legal entities held criminally liable for the crimes committed by their legal proxies, managers, directors or employees are as follows:

Per diem fines (a daily amount from EUR 30 to EUR 5,000) or proportional fines (eg, with regard to the amount defrauded or the benefit obtained by the legal entity)  
Dissolution of the legal entity

Suspension of the activities of the legal entity for a maximum period of 5 years  
Closure of all or some of the premises and establishments of the legal entity for a maximum period of 5 years  
Prohibition on engaging in activities through which the crime was committed, favored or concealed; this measure may be definitive or temporary (for a maximum period of 15 years)  
Barring from obtaining public subsidies and aids, from entering into contracts with the Public Administration, and from enjoying tax or Social Security benefits and incentives for a maximum period of 15 years  
Court intervention for a maximum period of 5 years to protect employees' and creditors' rights.  
These penalties are not applicable in all cases. It will depend on the penalty expressly provided for each crime for which legal entities may be held criminally liable and on the seriousness of the offense.

Furthermore, the Article 129 of the Penal Code also contains a list of ancillary consequences when some crime has been committed through entities that do not have legal status. In such cases, the penalties described in the above letters c) to g) and the definitive prohibition on engaging any activity, even if it is a legal activity, may be applied to these entities.

- Are the sanctions of administrative or criminal nature or both? What is their range?

In Spanish Criminal Environmental Law is set up as blanket law. The blanket law is a criminal law which define basically the behaviour but it need an infralegal provision usually an administrative infringement. The problem is the environmental administrative law is very complex, and it is very common that Criminal Judges are not on familiar terms with this matter. The Administration prefer to impose fines to the Companies because it is more simple and lucrative but it hasn't a deterrent effect and the level of impact as a dissuasive measure is very low.

Therefore, in order to be criminal liability, it is necessary that the activities of the companies constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

The Criminal Code foresee this type of activities as Environmental crimes: Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 Penal Code).

- Are the sanctions established as a function of obligations stemming from sources legislation? If so, how is that articulated in national law?

As I told you, most of the criminal environmental law depend on an administrative infringement but the criminal law precise a plus in terms of significance. Moreover, I deem indeed that the classical main penalties – deprivation of freedom and fines – are not sufficient to fight environmental criminality. The penalties should not only have a repressive and preventive effect, but should also restore the reduced quality of the ecological rights. It should be noted that trespassers pay the imposed fines with a smile, but next continue to interfere with the environment. There is a need for an adapted arsenal of penalties. Special penalties and measures are henceforth of great importance for environmental law.

In Spain we have the art.339 of Penal Code which permit to the Judges to restore the initial situation. In my view it should be considered an excellent tool in order to repair the potential damages but the problem is that only a few cases finished in the Criminal Courts. As a result, as a matter of fact, the Criminal Courts are no get used to using the useful legal instrument and it has not effectiveness in the real life.

- Are there any case law statistics available? Or statistics on the application of penalties outside of court proceedings?

The General Council of Judiciary does not proportionate a very accurate statistics. The Prosecutor Office has a more sophisticate system but it only cover the environmental crime. This makes it difficult to draw a picture of the application of environmental criminal law. The creation of a national agency to structure these data would be recommended or reinforcing the statistics systems of the Environmental Prosecutor's office.

On the whole, the Evolution of Prosecution of Environmental Crime shows that a large part of the trials and sentencing focuses on urban problems (They represented 29,4% of all the trials on environment in 2018). The conviction rate is very low in the strictly environmental crime around 472 convictions in 892 trials. For example for 2018 the rate for especific environmental crimes is at 8.5%. Regard to crimes against wildlife is double at 17%. The rate for both sectors shows a rate of convictions for urban planning, which is 52.9% . It should be noted how such fact may be influenced by the existence of authorization and test problems mainly related to the lack of inspections and technical personnel (experts).

As far as I concerned it is quite impossible to fix the specific number of crimes regarding illegal emissions to the atmosphere.

*If possible, please provide an overview of cases of particular interest.*

## **II. Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants<sup>3</sup>**

1. Is this directive properly implemented in your Member State? Have stricter emission reduction commitments been introduced? Has national legislation been adapted to meet the emission reduction commitments?

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<sup>3</sup> <http://data.europa.eu/eli/dir/2016/2284/oj>

This Directive was implemented by the Royal Decree 818/2018, of July 6, on measures to reduce national emissions of air pollutant specifications. The royal decree consists of an expository part and an operative part made up of 13 articles, structured in five chapters, two additional provisions, four final provisions and four annexes.

First of all, Chapter I regulates the general provisions relating to the object, scope and definitions of the royal decree. Chapter II establishes the national emission commitments that Spain assumes, as a consequence of its obligations derived from the European directive, referring to Annex I for the specific list of polluting substances to which these reductions are applicable and establishing quantitatively in annex II, the objectives to be achieved for each of them in the period considered.

Chapter III establishes the obligation to approve a national Air Pollution Control Program, regulate its minimum content as specific measures, which, in accordance with the directive, must contain said Program.

The national program should contain necessary measures for all relevant sectors such as agriculture, power generation, industry, road transport, inland waterway transport, domestic heating, the use of non-road mobile machines and the use and manufacture of solvents. The requirements regarding the preparation, transmission and approval of the national air pollution control program are specifically regulated in this chapter.

Moreover, the Chapter IV establishes various mechanisms for monitoring the objectives of the national storytelling program, such as establishing a territorial network to measure emissions and the effects of air pollution on terrestrial and aquatic ecosystems. In addition, the regulation of the Spanish Inventory System and Projections of Emissions to the Atmosphere (SEI) and the obligation to prepare the reports of inventories and projections of emissions of atmospheric pollutants and send them to the European Commission are reviewed and updated. For this, Annex I specifies the pollutants and the frequency with which they must prepare short stories, and Annex III specifies the methodology that they must specify in their preparation as well as the format in which they must send the reports. Article 12 also establishes a general obligation to inform the public about the National Program for the Control of Atmospheric Pollution and the results of its monitoring and about the information prepared by the Spanish System of Inventory and Projections of emissions into the atmosphere. through the website of the Ministry for Ecological Transition. Annex IV sets out the optional indicators that can be used to track the effects of air pollution on ecosystems.

Finally the Chapter V regulates the sanctioning regime applicable to cases of non-compliance with the prescriptions of this royal decree, which will be as provided in Law 34/2007, of November 15.

According to this regulation, the Ministry for the Ecological Transition and the Demographic Challenge has established, through a Ministerial Order, the remuneration parameters for the second regulatory period, between January 1, 2020 and December 31, 2025, as well as the estimated market price for each year of the regulatory semi-period between January 1, 2020 and December 31, 2022. And this without prejudice to the reviews provided for in each regulatory semi-period and the reviews of remuneration to the operation that will be carried out every six months on the remuneration of standard facilities whose operating costs depend essentially on the price of fuel.

Finally, through the Order TED / 171/2020, of February 24, which updates the remuneration parameters of the standard facilities applicable to certain facilities for the production of electrical energy from renewable energy sources, cogeneration and waste, for the purposes of its application to the regulatory period that begins on January 1, 2020.

In my view, nowadays it is too soon in order to make a complete assessment of this regulation, we need more time to evaluate the practical consequences of the normative.

*Please provide references to the implementing legislation.*

The Spanish legislation on air quality currently in force is represented by the following regulation:

- Law 34/2007, of November 15, on air quality and protection of the atmosphere.
- Royal Decree 102/2011, of January 28, regarding the improvement of air quality, which was amended by Royal Decree 678/2014 of August 1st and Royal Decree 39/2017, of January 27.
- Order TEC / 351/2019, of March 18, which approves the National Air Quality Index.

2. Have EU infringement proceedings in relation to this directive been brought against your Member State?

*Please provide references to these proceedings and their outcomes.*

3. Is there national case law in which this directive is relied upon?

*Please provide a concise overview of cases of particular interest.*

The Council of Madrid has developed a substantial role in this filed as a plaintiff. At this point, it's worthy to mention the resources filed by the City Councils of Paris, Madrid. and Brussels to the General Court of the EU, which in judgment in joined cases (T-339/16 Paris City Council / Commission, T-352/16 Brussels City Council / Commission, T-391/16 Madrid City Council / Commission), estimates and partially cancels the Commission Regulation that set limits on nitrogen oxide emissions too high for the testing of new passenger cars and light commercial vehicles

**III. Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles<sup>4</sup> and Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information<sup>5</sup>**

1. How has your Member State implemented these EU vehicle type approval rules?

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<sup>4</sup> <http://data.europa.eu/eli/dir/2007/46/2019-09-01>

<sup>5</sup> <http://data.europa.eu/eli/reg/2007/715/2012-06-04>

First of all, as far as I know, the Directive 2007/46/EC has been repealed by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 which also amended Regulations (EC) No 715/2007 and (EC) No 595/2009.

The Directive 2007/46 was transposed into Spanish internal law through Order ITC / 1620/2008, of June 5, by which updates Annexes I and II of Royal Decree 2028/1986, of June 6, on the standards for the application of certain EC directives, relating to the type approval of motor vehicles, trailers, semi-trailers, motorcycles, mopeds and vehicles agricultural, as well as parts and pieces of such vehicles. Subsequently, the Spanish Government issues Royal Decree 866/2010, of July 2, which regulates the processing of vehicle reforms, aims to unify criteria of Spanish legislation in the matter and that issued by the European Union.

## 2. Treatment of diesel vehicles when using illegal shutdown devices:

a) Are there national regulations or jurisprudence according to which an issued EC type approval (Directive 2007/46/EC) loses its legal effect if an (impermissible) shutdown (defeat) device is discovered, which was already installed, when approval was granted? (A shutdown device - usually a cheat software - manipulates gas measurements.).

As I aforementioned, there are only a few judicial cases regarding to this topic.

*Please give examples.*

As discussed above, in Spain, the biggest problems are in the cities of Madrid and Barcelona, where traffic causes high NO<sub>2</sub> levels. The newest figures show seven urban agglomerations where NO<sub>2</sub> is above the annual threshold, up from six in 2016. These include the Barcelona metropolitan area, Madrid, the Corredor del Henares industrial and residential axis, the southern Madrid area, the Bajo Nervión in the Basque Country, and the city of Granada and its outlying area in Andalusia.

Regarding this question, as far as I concern, the best is Madrid Central. The Madrid Central was introduced under the former administration of Mayor Manuela Carmena at the end of 2018. This plan was not too much popular among the people and it was one of the reason the former Mayor lose the elections. After the elections in 2019, the current mayor of Madrid, José Luis Martínez-Almeida tried to suspend the plan when he took office in June, but was blocked by the courts, which argued that the measure was needed to stop pollution from rising “without any kind of control.” The plan remains in place and drivers who enter low-emissions zones without the proper permissions are fined €90, or €45 if the amount is paid immediately.

Be that as it may, with the new local government fines for entering Madrid Central without authorization soared from 13,361 in May – when municipal elections were held – to 79,908 in June, according to local registers.

From a technical point of view, the Madrid Central low-emissions zone has been considered as one of the most effective plans in the European Union for the reduction of nitrogen dioxide. That’s according to a new report from the European federation of environmental associations, Transport & Environment (T&E). According to the study, emissions of the greenhouse gas have fallen 32% thanks to the initiative, which made 4.7 square kilometres of the city centre off-limits to traffic, except for local residents and public transportation. This figure, however, is taken from the only measuring station within the low-emissions zone.

The reason why Madrid Central seems to be so effective is that only cars with a zero-emission tag can enter the low-emissions zone. All other vehicles (with some exceptions) must stay outside the area, which dissuades drivers from taking to the most central roads.

b) What legal measures have been taken in your Member State (if any) against car manufacturers, which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

I only know three cases regarding the "Volkswagen or Diesel affaire", in this three cases the Courts has condemned the German Company to pay an compensation which is around the 10% of the value of the vehicle.

*Please give examples.*

The European Commission has planned to reactivate on June of this year the infringement procedure for Spain opened since 2015 for not complying with air quality standards. According to the Commission since 2010, Spain has failed to comply with the European regulations on nitrogen dioxide (NO<sub>2</sub>) and until January 2018 it was part of a group of nine countries that were about to be brought before the European Court for their lack of action on the matter.

c) Which requirements will be imposed on the request to retrofit a vehicle in your Member State?

These requirements are implemented in the Royal Decree 750/2010, of June 4, which regulates the motor vehicle approval procedures and their trailers, self-propelled or towed machines, vehicles agricultural, as well as systems, parts and pieces of such vehicles and the Royal Decree 920/2017, of October 23, which regulates the technical inspection of vehicles.

According this regulation the General Directorate of Traffic divided the Spanish car park into four categories according to the level of polluting emissions of each vehicle. Currently, Spain has a system of round stickers or badges that serve to identify vehicles based on their energy efficiency on roads or in cities using four different categories. Thus, there are a total of 16 million cars classified as 0 (blue sticker), ECO (green and blue sticker), C (green sticker) and B (yellow sticker). This is a classification aimed at favoring the drivers of the greenest vehicles in the face of pollution episodes that force restricting traffic, as well as tax or mobility benefits, since they can circulate in special lanes such as the VAO even if they do not comply with requirements for it. As I told you, this use is not mandatory at the moment, except Madrid and Barcelona, where they have approved to require it, so that in these cities the DGT sticker is mandatory and drivers who do not carry it will be penalized.

At the same time, the Spanish Administration offers tax breaks to buyers of low-emission vehicles. Taxes such as registration or circulation are lower, so that, in the medium and long term, it pays to buy a low-emission car.

*Please provide a concise overview of cases of particular interest.*

Since December 2017, Spanish drivers entering the LEZ environmental zones during air pollution peaks must have a Distintivo Ambiental (environmental badge) affixed to their

vehicle. In addition to low emission zones, there is a ZEZ (Zero Emission Zone) zone, such as in Madrid, with more stringent restrictions.

The Distintivo Ambiental aims at distinguishing older vehicles from new ones in 4 categories and banning EURO classes 0 to 3 – initially – from entering cities such as Barcelona, Madrid and other region.

The environmental badges introduced and issued by the Spanish National Traffic Authority (Dirección General de Tráfico /DGT) aim at distinguishing environmentally friendly vehicles from polluting ones. With this system and the Spanish environmental zones introduced at the same time, the emissions of nitrogen oxides (NOx) and particulate matter will be reduced in Spanish cities.

The above mentioned environmental badges or stickers printed by the National Printing House (Fábrica Nacional de Moneda y Timbre) and issued by the DGT, are officially called "Distintivo Ambiental" and are divided into the 4 different categories 0, ECO, C and B. Category A, for which there is no badge, includes all vehicles and EURO classes that have not been classified in any of the other 4 categories. According to the DGT, which manages all vehicles registered in Spain and their emission classes, category A includes around 19.9 million vehicles, which do not receive a badge. This represents 58.3 % of the total Spanish vehicle fleet in October 2016.

Of the 14.23 million vehicles that receive an environmental badge, around 21,350 belong to category 0, 110,750 to category ECO, 9,987,000 to category B and 4,110,000 to category C. An overview of the vehicle types can be found in the table here showing all the EURO classes and the years of registration that receive a *Distintivo Ambiental*.

Regarding the city of Barcelona, it has already introduced a temporary environmental zone, other zones are planned in which the EURO classes 0-3 will be banned from traffic in case of an air pollution peak, and Madrid now follows with three environmental zones. In December 2017, a temporary LEZ environmental zone was established in the city of Barcelona in agreement with the Barcelona Metropolitan Region (AMB) and the Government of Catalonia. This urban LEZ (Low Emission Zone) is called ZBE (Zona Baixes Emissions) in Catalonia. The LEZ came into force on 01.12.2017 and bans many vehicle types for passenger and freight transport with EURO 0-3 standards from traffic in the event of high nitrogen dioxide levels.

From 2020, the rules have been rapidly tightened up, as the environmental zone is now always in force, making the Distintivo Ambiental sticker a general and permanent obligation. In these Green-Zones app you can find on which days of the week and at what times exemptions apply.

Finally, as stated above, in Madrid, two LEZ (Low Emission Zones) zones had already been established in the central and outer areas, whose rules were tightened in October 2018.

d) How does the authority get information about the lack of implementation of any software updates in your Member State?

*Please provide a concise overview of cases of particular interest.*

e) Are there less onerous measures under the law of the Member State than imposing a driving ban on a vehicle? Have such less burdensome measures possibly been developed by case law?

In Spain, the government's announcement in 2040 of the sale and registration of passenger cars and light commercial vehicles that emit carbon dioxide - diesel, gasoline, CNG, LPG and even hybrids - last November, has reached a target with the Strategic Plan for Comprehensive Support to the Automotive Sector 2019-2025, presented in March by the Government, where technological neutrality is supported to achieve an orderly adaptation of supply and demand towards more sustainable models.

Making an additional step, the Balearic Community has become unmarked and has already approved the Climate Change Law that prohibits the circulation of new diesel vehicles from 2025 and all combustion vehicles from 2035.

*Please give examples.*

#### **IV. Domestic Law**

Please provide information, including case law, on additional domestic air protection law that could be interesting for other Member States.

Article 45 1. Spanish Constitution. Environment. Quality of life. Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. 2. The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity. 3. Criminal or, where applicable, administrative sanctions, as well as the obligation to make good the damage, shall be imposed, under the terms established by the law, against those who violate the provisions contained in the previous clause.

art.325 Spanish Penal Code. Whoever, breaking the laws or other provisions of a general nature that protect the environment, directly or indirectly, makes or causes emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 Penal Code).

Article 326 Penal Code

1. They will be punished with the penalties provided for in the previous article, in their respective cases, who, in contravention of the laws or other provisions of a general nature, collect, transport, value, transform, eliminate or take advantage of waste, or do not adequately control or monitor such activities, so as to cause or may cause substantial damage to the quality of the air, soil or water, or to animals or plants, death or serious injury to people, or may seriously harm the balance of natural systems.

2. Who, outside the case referred to in the previous section, transfers a non-negligible amount of waste, both in the case of one and in the case of several transfers that appear linked, in any of the cases referred to in the Law of the European Union regarding shipments of waste, will be punished with a sentence of three months to one year in prison, or a fine of six to eighteen months and special disqualification for profession or trade for a period of three months to one year.

Article 326 drafted by number one hundred and seventy-four of the sole article of the L.O. 1/2015, of March 30, by which the L.O. 10/1995, of November 23, of the Penal Code ("B.O.E." March 31). Validity from July 1, 2015.

#### Article 326 bis Penal Code

They will be punished with the penalties provided for in article 325, in their respective cases, who, in contravention of the laws or other provisions of a general nature, carry out the exploitation of facilities in which a dangerous activity is carried out or in which they are stored or use dangerous substances or preparations in a way that causes or could cause substantial damage to the quality of the air, soil or water, animals or plants, death or serious injury to people, or could seriously harm the balance of natural systems.

The article 326 bis Penal Code was introduced by number one hundred and seventy-five of the sole article of the L.O. 1/2015, of March 30, by which the L.O. 10/1995, of November 23, of the Penal Code ("B.O.E." March 31; Correction of errors "B.O.E." June 11). Valid from July 1, 2015.

#### Article 327 Penal Code

The acts referred to in the three previous articles will be punished with the higher degree penalty, without prejudice to those that may correspond under other provisions of this Code, when in the commission of any of the acts described in the previous article any of the following circumstances apply:

- a) That the industry or activity runs clandestinely, without having obtained the required administrative authorization or approval of its facilities.
- b) That the express orders of the administrative authority to correct or suspend the activities typified in the previous article have been disobeyed.
- c) That information about its environmental aspects has been falsified or hidden.
- d) That the inspection activity of the Administration has been hindered.
- e) That there has been a risk of irreversible or catastrophic deterioration.
- f) That there is an illegal extraction of water in a period of restrictions.

Article 327 drafted by number one hundred and seventy-six of the sole article of the L.O. 1/2015, of March 30, by which the L.O. 10/1995, of November 23, of the Penal Code ("B.O.E." March 31). Validity: July 1, 2015

Article 328 Penal Code.

When, in accordance with the provisions of article 31 bis, a legal entity is responsible for the crimes included in this Chapter, the following penalties will be imposed:

a) A fine of one to three years, or double to four times the damage caused when the resulting amount is higher, if the crime committed by the natural person has a penalty of more than two years of deprivation of liberty.

b) A fine of six months to two years, or double to triple the damage caused if the resulting amount were higher, in the rest of the cases.

Considering the rules established in article 66 bis, judges and courts may also impose the penalties set forth in letters b) to g) of section 7 of article 33.

Article 339 Penal Code.

The judges or courts shall order the adoption, by the author of the act, of the necessary measures aimed at restoring the disturbed ecological balance, as well as any other precautionary measure necessary for the protection of the assets protected in this Title.

(Article 339 Penal Code drafted by the hundredth section of the sole article of the L.O. 5/2010, of June 22, by which the L.O. 10/1995, of November 23, of the Penal Code ("B.O.E." June 23). Validity: December 23, 2010).

- Law 34/2007, of November 15, on air quality and protection of the atmosphere.
- Royal Decree 102/2011, of January 28, regarding the improvement of air quality, which was amended by Royal Decree 678/2014 of August 1st and Royal Decree 39/2017, of January 27.
- Order TEC / 351/2019, of March 18, which approves the National Air Quality Index.
- Royal Decree 920/2017, of October 23, which regulates the technical inspection of vehicles

Important to note: I have not included the regional legislation (Comunidades Autonomas) because there seventeen of them, nevertheless this normative is extremely important remarkably in relation to administrative infractions and sanctions.