ORDINARY APPEAL (c/a) num.: 42/2017
Speaker: Honourable Mr. César Tolosa Tribiño
lawyer of the administration of justice: Honourable. Mrs. María Jesús Pera Bajo

Contentious-Administrative Room
Fifth Section
Judgment no. 1203/2018

Honourable gentlemen:

Mr. José Manuel Sieira Míguez, President Mr. Rafael Fernández Valverde Mr. Octavio Juan Herrero Pina Mr. Juan Carlos Trillo Alonso Mr. Wenceslao Francisco Olea Godoy Mr. César Tolosa Tribiño

In Madrid, on July 12, 2018.

This Chamber has seen the present contentious-administrative appeal number 42/2017, formulated by the Attorney Enrique Álvarez Vicario, on behalf of the Asociación Instituto Internacional de Derecho y Medioambiente (IIDMA), under the legal direction of Ms. Ana Barreira López, against the Agreement of the Council of Ministers of November 25, 2016 approving the Transitional National Plan for large combustion plants; the Spanish Central Administration as defendant, duly represented and defended by the State Lawyer; Iberdrola España, S.A., Viesgo Generación, S.L., Asociación Española de la Industria (UNESA), Iberdrola Generación, S.A., Endesa Generación, S.A., EDP España, S.A.U. and Emplazamientos Radiales, S.L., mercantile companies represented and defended -respectively- by Mrs. Leticia Calderón Galán and Mr. Gerardo Codes Calatrava; Mrs. María-Jesús Gutiérrez Aceves and Doña Nuria Encinar Arroyo; Doña María Concepción Villaescusa Sanz and Mrs. Sonsoles García Delgado; Mrs. Nuria Munar Serrano; Mr. Carlos Piñeira Campos and Mr. Antonio Jesús Sánchez Rodríguez; Mr. Carlos Mairata Laviña and Mrs. Jorgelina Expósito Blanco; Mr. José-Carlos García Rodríguez and Mr. Jaime Rodríguez Díez.

Honourable Mr. César Tolosa Tribiño acted as reporting judge.

BACKGROUND FACTS

FIRST: The procedural representation of the Asociación Instituto Internacional de Derecho y Medioambiente presented, before this Third Chamber of the Supreme Court, a notice of contentious-administrative appeal against the Agreement of the Council of Ministers, of November 25, 2016, adopting the National Transitional Plan for large combustion plants.

SECOND: The appeal was filed by resolution of fourteenth of March of two thousand seventeen and, after receiving the administrative file, a deadline was granted to deduct demand.

The appellant presented the relevant document in which she defends that << the pollutants emitted by thermal power plants are causing environmental damages such as acidification of soils and water as well as damage to forest masses. These impacts are due to substances such as SO2 and NOx, which in combination with air oxygen and water vapour become acids that will precipitate to the earth's surface. Precisely, to address these effects,

in 1979 the Convention on long-distance transboundary air pollution, made in Geneva on 13 November 1979, was signed, being Spain a contracting party. This convention has been developed by different Protocols that cover pollutants emitted by thermal power plants >>.

After claiming the facts that the plaintiff deemed relevant, he considers that, in summary, << The Agreement of the Council of Ministers of 25 November 2016 that approved the Transitional National Plan for LCP, now appealed in accordance with the provisions of article 29.3 of Law 50/1997, of November 27, on the Government, is contrary to law for the following reasons:

A. A. The TNP was not submitted to Strategic Environmental Assessment (SEA), in accordance with the legislation related to this matter, despite being a plan capable of causing significant effects on the environment. The absence of SEA brings with it the lack of open transboundary consultations and consultations with the stakeholders.
B. B. The TNP was not subject to a public participation procedure under the terms of article 7 of the Convention on Access to information, public participation in decision-making and access to justice in environmental matters, made in Aarhus (Denmark), on 25 June 1998, Aarhus Convention, of which Spain is a Party.
C. The TNP does not meet the requirement set forth in article 46.2. of the REI, which transposes the provisions of the second point of the second paragraph of Article 32 of the IED, given that the ELVs contained in the integrated environmental permits (AAI) of the thermal power plants included in the plan do not comply with the provisions of the Directives 2001/80/CE and 2008/1/CE. Likewise, it has not been approved a legal provision to control and monitoring of the compliance of the TNP by the LCP in accordance with article 32.4 of the IED, article 46.4 of the Spanish Regulation on Industrial Emissions (REI) and 6 of the Implementing Decision 2012/115 / EU.

These grounds are legally argued based in the following legal basis:

- The TNP has not undergone Strategic Environmental Assessment (SEA) despite being a plan that could cause significant effects on the environment.
- The adoption of a TNP for GIC is regulated under Article 32 of the IED as an option that the Spanish State could benefit from. Once it has been decided to take advantage of this derogation, the preparation and adoption of the plan does constitute an obligation required by a current regulatory provision: Article 46 of the REI.
- The TNP is a plan that establishes the framework for the future authorization of projects subject to environmental impact assessment.
- The assumption embodied in article 6.1.a) of Law 21/2013 applies to the TNP […]
- The TNP is a plan that can significantly affect the species or habitats from spaces of the Natura 2000 Network […], the provisions of article 6.1.b) of Law 21/2013 apply to it. This article provides, in accordance with the SEA Directive (art. 3.2.b), the obligation to submit to ordinary SEA those plans likely to affect spaces that are within the framework of protection of the Natura 2000 Network.

- Absence of consultations in accordance with the provisions of the environmental assessment legislation: transboundary consultations and public participation. Both article 7 of the SEA Directive, article 11 of the repealed Law 9/2006 and article 49 of Law 21/2013 require that transboundary consultations must be carried out when a plan can have significant effects on the environment of other Member State of the European Union.
- […] the absence of SEA resulted in the absence of a public participation procedure, in accordance with Law 21/2013, which reflects the provisions of the Aarhus Convention, thus avoiding its submission to the process of public participation, which is a democratic channel inherent to the ordinary SEA procedure regulated in Title II Chapter I, Section 1 of Law 21/2013.
- [...] as provided in article 26 of Law 21/2013, within 15 business days from the approval of a plan, the national authorities must proceed to the publication in the Spanish Official Journal (BOE) of the resolution that adopts the plan, together with an excerpt including, among others, the way in which the environmental study has been taken into consideration in the plan, as well as the results of public information and consultations, and the discrepancies that could have been arise in the process.

  Since the TNP has not been submitted to SEA, the TNP was not published in the Spanish Official Journal (BOE) after its approval by the Council of Ministers. Therefore, there is also no reference to the study of strategic environmental impact nor to the result of the information and participation process required by Law 21/2013.
- Absence of a public participation procedure in accordance with the Aarhus Convention. As it appears in the table that describes the process of elaboration and adoption of the TNP, included in the part of the facts of this demand, only the third version of the TNP was subject to a procedure of public participation for a period of 21 days from 4 to 21 December 2015. However, this public participation procedure does not comply with the law because it is contrary to the provisions of the Aarhus Convention.
- - Non-compliance of the TNP with the requirement regarding the ELVs of the integrated environmental permits (AAI) and the one regarding the control of emission ceilings. Both the IED in its article 32.2. as the REI in its article 46.2. require that the emission limit values reflected in the permits of the LCP that are included in the TNP comply with both the Directive 2001/80/EC, DLCP, and the Royal Decree 430/2004, of 12 March, which establishes new regulations on the limitation of emissions into the atmosphere of certain pollutants from large combustion plants, and set certain conditions for the control of emissions into the atmosphere of oil refineries. >>

He ends up asking this Court:

<< 1º.- Declare the full nullity of the Agreement of the Council of Ministers of 25 November 2016 and, therefore, of the Transitional National Plan for Large Combustion Plants since the Plan has not been submitted to Strategic Environmental Assessment in accordance with Law 21/2013 or a public participation procedure in accordance with the requirements of

article 7 of the Aarhus Convention and, consequently, withdraw the plan. This in accordance with article 62.1.e) of Law 30/1992 and article 47.1.e) of Law 39/2015.

2º.- Declare null and withdraw the conditions relative to the ELVs included in the AAI of thermal power plants that do not comply with the requirements of Article 32.2. of the IED and 46.2. of the REI as set in the Fifteenth Legal Basis of this lawsuit, and accordingly order the review of these conditions. Also, order the control of the compliance with the emission ceilings of the LCP covered by the TNP in accordance with article 32.4 and 46.4 of the IED.

3º.- Order that an evaluation of the possible damages caused to the protected spaces by the TNP must be carried out and, if those damages exist, consequently their reparation, in accordance with the provisions of Title VI of Law 42/2007, of 13 December, on Natural Heritage and Biodiversity.

All this in accordance with the provisions of article 71.1.a) and d) of Law 29/1998, of July 13, regulating the Spanish Contentious-Administrative Jurisdiction (LJCA). >>

THIRD: For its part, the Central Administration of the State under appeal requests the dismissal of the appeal, with the following conclusions:

- << The Transitional National Plan for large combustion plants (TNP) has been approved in accordance with the provisions of the REI and the Industrial Emissions Directive.
- Considering the TNP is destined to apply one of the flexibility mechanisms granted by the Industrial Emissions Directive, for those Combustion plants that meet the requirements established by it, it would not meet the minimum requirements for being considered as a "plan or program" according to the Environmental Assessment Law and for submissing to strategic environmental assessment in accordance with the mentioned law, since it does not constitute the framework for the future authorization of projects subject to environmental impact assessment.
- Since the TNP has been developed with the objective of reducing emissions from the plants under the plan, the Natura 2000 Network spaces wouldn’t be significantly affected either, since the emissions in any case would be reduced with respect to current values and not vice versa, as the applicant states.
- - The TNP was submitted to a public participation procedure, in accordance with the provisions of the Aahrus Convention, in addition to all other procedures provided for in Law 27/2006, of July 18, which transposes the Convention into our legal system, and of the Industrial Emissions Directive.
- There is no contradiction between what is established in article 32.2 of the Industrial Emissions Directive (article 46.2.2 of the REI) and that the LCP have ELV higher than those permitted both by Directive 2001 180 / EC and by Royal Decree 430 / 2004.
- The legal provisions to control compliance with emission ceilings by LCP have already been approved or are in a very advanced stage of their approval.
- The annulment of the TNP could lead to significant economic damages for the plants under the TNP and for Spain, since if the installations as a whole exceed the annual emission ceilings, this could lead to a sanctioning file against the Kingdom of Spain

by way of infringement proceedings under Article 258 of the Treaty on the Functioning of the EU. >>

The procedural representation of Emplazamientos Radiales, S, L, replies to the demand requesting the << NON ADMISSION or, in a subsidiary manner, the dismissal of the contentious-administrative appeal >> otherwise; UNESA asks that << judgment must be given dismissing entirely the appeal >>; and EDP España, S.A.U. request that this Chamber << dismisses the contentious-administrative appeal filed by the Instituto Internacional de Derecho y Medioambiente […] >>.

On February 20 of this year, the right to reply of Iberdrola España SA, Viesgo Generación SL, Iberdrola Generación SA and Endesa Generación SA became ineffective; and on the following 2nd of March Decree was issued to fix the amount indeterminated and the following 7th it was agreed that << there is no place for the receipt of evidence requested by the appellant and by the co-defendant EDP España, SA, agreeing to grant the recurring party the term of ten days to present written conclusions [...] >>.

FOURTH : The appellant completed the procedure conferred, considering reproduced the facts described in the application to request what was already stated in the Supplication, after concluding that:

1. << The contentious-administrative appeal filed by the Instituto Internacional de Derecho y Medioambiente (IIDMA) does not incur in cause of inadmissibility provided for in article 69, section b) of Law 29/1998, of July 13, regulating the Contentious-administrative Jurisdiction.
2. The TNP falls within the scope of Directive 2001/42 / EC of strategic environmental assessment (SEA Directive) as it conforms to the definition of “plan” provided for in Article 2, paragraph a). This definition prevails over the one in article 5.2.b) of Law 21/2013.
3. The TNP complies with two of the legal requirements provided for its submission to an ordinary SEA procedure in accordance with article 6.1, sections a) and b) of Law 21/2013 that transposes the provisions of article 3.2 , a) and b) of the SEA Directive.
4. The process of drafting and adopting of the TNP was carried out in breach of the provisions of Article 7 of the Aarhus Convention, in relation to article 6, paragraphs 3, 4 and 8.
5. The TNP does not comply with the provisions of article 46.2 second paragraph of Royal Decree 815/2013 on Industrial Emissions (REI) given that the ELV of the Integrated Environmental Permits (AAI) of combustion plants included in the plan has not been established in accordance with section A, Annexes III to VII of Royal Decree 430/2004. >>

And the Central Administration, Emplazamientos Radiales, S.L., Asociación Española de la Industria Eléctrica y EDP, España, S.A.U. insisted on what was requested in their respective replies.

Once the appeal was processed, it was set for deliberation, voting and ruling on 11 July of 2018, the date on which it was held in compliance with the essential legal formalities.

LEGAL BASIS

FIRST: The present appeal is filed by the Asociación Instituto Internacional de Derecho y Medioambiente (IIDMA) against the Agreement of the Council of Ministers of 25 November 2016 approving the Transitional National Plan for large combustion plants

SECOND: It is formulated by the co-defendant, Emplazamientos Radiales S.L, as a cause of inadmissibility of this contentious-administrative appeal, the one provided for in article 69.b), in relation to articles 19.1.a) and 45.2.d) of the LJCA , since it has not been provided, according to its criteria, certification of the explicit and specific agreement of the statutory competent body of the appealing entity for the objection of the resolution object of this appeal, nor statutes of the association, in order to determine which is the body competent to exercise the action substantiated in these legal proceedings.

The current Article 45 of the LJCA, refers to the application initiating the contentious-administrative appeal processed by means of an ordinary procedure. Section 1 of the precept regulates the content of that written document, while section 2 lists the documentation that must accompany it on a mandatory basis so that the file is admissible.

Among this documentation to be attached to the initial written of the process is, on the one hand, the << document that proves the representation of the appearing party ... >>, that is, the general power for lawsuits (art. 45.2.a) ; And, on the other hand, and additionally, << the document or documents that prove compliance with the requirements needed to take legal actions the legal entities under the rules or statutes that apply to them, unless they had been incorporated or inserted relevantly within the body of the mentioned in letter a) of this same section >> (art. 45.2.d) of the LJCA).

In this regard, we have indicated in Judgment of October 28, 2011 (cassation 2716/2009), that << For the purposes of complying with this procedural burden, it must be taken into account that one thing is the power of representation, which only accredits and emphasizes that the representative is empowered to act validly and effectively on behalf and of the represented; and a different one is the decision to litigate, to exercise the action, which must be taken by the body of the legal entity to whom its regulatory norms attribute such power. Obvious is that the maximum importance must be given to the accreditation of the latter for the valid constitution of the legal-procedural relationship, since justice in the field of contentious-administrative jurisdiction is requested, the first thing to be verified is that the legal entity concerned has really requested judicial protection, which requires at the same time that the corresponding agreement directed to that end has been taken, and not taken by anybody, not any of its bodies, but the one to which the legal person has attributed such decision, otherwise the possibility opens up, the risk, of initiation of an unwanted litigation, or that legally does not fit to affirm as wanted, by the entity that appears as recurring. >>

This being so, in the present case they appear accompanying the initial document, all the documents required to justify the procedural capacity of the appellant.

THIRD: In synthesis the appellant alleges the following objection arguments:

1st) The TNP was not submitted to Strategic Environmental Assessment (SEA), in accordance with the legislation related to this matter, despite being a plan that could cause significant effects on the environment. The absence of SEA brought the lack of opening of transboundary consultations and consultations with the stakeholders.

2nd) The TNP was not subject to a public participation procedure under the terms of article 7 of the Convention on Access to information, public participation in decision-making and access to justice in environmental matters, made in Aarhus (Denmark), on June 25, 1998, Aarhus Convention, of which Spain is a Party.

3rd) The TNP does not meet the requirement set in article 46.2. of the Industrial Emissions Regulation (REI) that transposes the provisions of the second point of the second paragraph of Article 32 of the Industrial Emissions Directive (IED), given that the emission limit values (ELVs) contained in the integrated environmental permits (AAI) of the thermal power plants included in this plan do not comply with the provisions of Directives 2001/80/CE and 2008/1/CE. Likewise, a legal provision has not been approved to control and monitor compliance with the TNP by the Large Combustion plants (LCP) in accordance with article 32.4 of the IED, article 46.4 of the REI and 6 of Implementing Decision 2012/115/EU.

FOURTH: The Transitional National Plan (TNP) has its origin in Directive 2010/75/EU, of November 24, 2010, of the European Parliament and of the Council, on industrial emissions (integrated pollution prevention and control), whose object is the integrated prevention and control of pollution from industrial activities.

The Directive contains a special chapter to "combustion plants" whose total nominal thermal power is equal to or greater than 50 MW, whatever type of fuel they use (large combustion plants) '. These must comply with the so-called "emission limit values" (ELV) of waste gases into the atmosphere, in the manner established in Article 30 and Annex V of the IED itself.

In response to the level of requirement of the ELV, the Directive allows Member States to apply a series of derogations to comply with these ELV. Member States can thus benefit from any of the flexibilities provided for in the Directive and which are specified in the following:

- - Adoption of a Transitional National Plan (TNP) (art. 32),
- - The limited lifetime derogation (art. 33) or
- - Flexibility for small isolated systems(art. 34).

With regard to the possibility of developing a Transitional National Plan, the Commission approved the Implementing Decision 2012/115/EU of 10 February 2012, establishing the rules related to the transitional national plans, which member states using this flexibility mechanism must comply with.

In the Spanish law, combustion plants are subject to Law 16/2002, of July 1, on prevention and integrated pollution control (IPPC).

The transposition of Directive 2010/75/EU, as regards large combustion plants, was carried out through Royal Decree 815/2013, of 18 October, which approves the Industrial

Emissions Regulation and development of the aforementioned Law 16/2002. This Royal Decree regulates in Chapter V the special provisions for large combustion plants, in a similar manner to Directive 2010/75/EU, determining that they must comply with the ELV as of January 1, 2016.

Under Article 46 of the aforementioned Regulation, Spain has opted for the development of a TNP, in the sense of Article 32 of the Directive. The Plan has been prepared based on the aforementioned Commission Implementing Decision 2012/115/EU.

FIFTH: In the first ground of the objection, it is held by the appellant that << The TNP is a plan that falls under the regime of the so-called strategic environmental assessment or evaluation of plans and programs provided for in the mentioned laws and Directive >>.

As it is reasoned, in view of the content of the Plan, it can be concluded.

1st) << The TNP meets the requirements of what should be understood by a plan", for the following reasons:

"The obligation to submit the Spanish TNP to SEA is based on the requirement provided in Article 6 of Law 21/2013. In light of section 1 of that article, which reflects the provisions of Article 3.2 of the SEA Directive, we can say that the TNP should have been subject to SEA because:

a) Was prepared by MAPAMA and MINETAD (Ministry of Energy, Tourism and Digital Diary)
b) Was adopted by the Council of Ministers, and
c) Its preparation and approval are included in a regulatory provision.

This same section of Article 6 also requires the modifications of the plans to be submitted to SEA.

As explained below, the Spanish TNP meets two of the requirements set forth in Law 21/2013 for the activation of the environmental assessment instrument and, consequently, should have been subject to an SEA >>.

2nd) << The TNP is a plan that establishes the framework for the future authorization of projects subject to environmental impact assessment >>.

It is indicated by the appellant that << The TNP falls within the scope of article 3.2 paragraph a) of the SEA Directive and article 6.1.a) of Law 21/2013, by constituting a plan that essentially refers to the energy sector and, in addition, it establishes the framework for the future authorization of projects that involve the modification of the characteristics of the thermal power plants included in it and, therefore, subject to environmental impact assessment (EIA), in accordance with provided in article 7.2.c) of Law 21/2013.

3º) "The TNP is a plan that can significantly or significantly affect the species or habitats that make up Natura 2000 Network spaces >>.

It is reasoned that << The TNP is within the scope of application of the provisions of article 6.1.b) of Law 21/2013 which provides, in accordance with the SEA Directive

(art. 3.2.b), the obligation to submit to ordinary SEA those plans likely to affect spaces that are included in the framework of protection of the Natura 2000 Network.

That is, those spaces declared as Special Conservation Areas (SCAs), Sites of Community Importance (SCIs) and Special Protection Areas for Birds (SPAs) >>, adding that << 9 out of 29 combustion plants that are hosted Since 1 January 2016, under the TNP exemption regime, are located either within the Natura 2000 Network or nearby, operating at a distance of no more than 5 kilometres. This immediately generates the possibility that the contested plan may significantly or significantly affect the integrity of the species and / or habitats of these spaces. >>

SIXTH: To solve this issue, we must begin by pointing out that the prevention of damage to the environment requires knowing the effects that human activities can have on it in order to avoid or mitigate at least, its negative impact on the environment.

The legislation introduces mechanisms of a preventive and prior nature, which allow to evaluate, analyse and diagnose the environmental effects of certain actions, public or private, before they are carried out, in order to adopt the decisions or introduce the measures that allow eliminating or, at least alleviating, the possible adverse effects on the environment.

Consequently, both the environmental evaluation of projects, and the environmental evaluation of plans and programs, also known as strategic environmental evaluation, are two procedures aimed at the realization of the corresponding technical studies, which allow to evaluate and suppress as far as possible the adverse effects, before projects or plans or programs are authorized or approved.

As stated in the Statement of Reasons of Law 21/2013 << Environmental assessment is essential for the protection of the environment. It facilitates the incorporation of sustainability criteria in strategic decision making, through the evaluation of plans and programs. And through the evaluation of projects, it guarantees an adequate prevention of the concrete environmental impacts that may be generated, while establishing effective correction or compensation mechanisms >>.

SEVENTH: The Strategic Environmental Assessment is an inter-administrative procedure that integrates environmental aspects into plans and programs that are adopted or approved by a public Administration and whose preparation and approval is required by a legal or regulatory provision or by agreement of the Council of Ministers or of the Government of an Autonomous Community when a series of circumstances is met.

The strategic environmental assessment applies to "plans and programs", understood as such << the set of strategies, guidelines and proposals aimed at satisfying social needs, not directly executable, but through their development by means of one or several projects >> (art. 5.2.b).

As can be seen, the Law has incorporated a material and non-formal concept of plans and programs since, according to this definition, the fundamental note that differentiates the plans and programs of the projects submitted to EIA is the fact that they are not enforceable directly, since they need their subsequent development through concrete projects.

The SEA applies only to public plans and programs, provided they are prepared or approved by an Administration, and their preparation or approval is required by a legal or regulatory provision or by agreement of the Council of Ministers or the Council of Government of a Community Autonomous

On the other hand, plans and programs considered in any case subject to ordinary strategic environmental assessment are:

1) Those who establish the framework for the future authorization of projects legally subject to environmental impact assessment and refer to certain sectors listed (<< agriculture, livestock, forestry, aquaculture, fisheries, energy, mining, industry, transportation, management of waste, water resources management, occupation of the land maritime public domain, use of the marine environment, telecommunications, tourism, urban and rural land management, or land use »). The projects "legally subject to environmental impact assessment" are those set out in Annexes I and II of the Spanish EIA Law.

2) Those that require an evaluation in accordance with the regulatory regulations of the places that make up the Natura 2000 European EcoloLCPal Network, that is, any plan that “without being directly related to the management of the place or without being necessary for it, may affect appreciably to the aforementioned places, either individually or in combination with other plans” (art. 45 of the Law on Natural Heritage and Biodiversity).

The judgment of the TJUE of September 7, 2004, considered that for the application of these assumptions the precaution and prudence principles would have to be applied, so that the possible affectation must be assessed in a broad sense and the assumption applied strictly.

EIGHTH: Ultimately, the applicant points out that the TNP was not subject to an ordinary SEA procedure, as required by Law 9/2006 on the evaluation of the effects of certain plans and programs on the environment (in force at the time the first proposal of TNP was elaborated), and as required by Law 21/2013 of environmental evaluation, both laws that transpose to our system the obligations foreseen in Directive 2001/42/EC relative to the evaluation of the effects of certain plans and programs in the environment. According to the applicant, the TNP is a plan that falls under the regime of the so-called SEA or evaluation of plans and program provided for in these laws and Directive and therefore should have been submitted to SEA.

This first reason for challenge must be rejected, since we consider that the contested transitional Plan cannot be considered as included in the assumptions of the plans for which the necessary strategic environmental assessment is legally required, for the following reasons:

It must be recognized that the Plan subject to challenge has been prepared by an Administration, and that its approval was required by a legal or regulatory provision, however this aspect, by itself considered, is not sufficient for us to consider that the Plan is comprised within the provisions of the Law of 2013, being necessary the compliance of a series of requirements, of objective nature, whose concurrence correspond us to verify.

For these purposes, it is worth to highlight and specify the nature and content of the contested Plan, while we have a plan of a remarkable technical nature that constitutes a temporary derogation for the fulfilment of the ELV by large combustion plants that request it, which allows them to maintain the ELVs that were already applicable to them as of 31 December 2015, that is, the TNP will allow the companies under it to have added time, from 2016 until 30 June 2020, to undertake the necessary environmental investments that allow them to comply with the emission limit values required by Directive 2010/75/EU from 1 July 2020.

Taking into account, as we have previously argued, that the Law has incorporated a material and non-formal concept of the plans and programs, it will be necessary to verify whether the Plan is directly enforceable, as it does not need further development through concrete projects.

In this sense, we can conclude that the TNP will not entail, in any case, the authorization of new projects but the non-substantial modification of already authorized projects, understood as such the integrated environmental permits of industrial facilities. These non-substantial modifications, in any case, are intended to reduce the pollution of the existing installation, so they will not require an environmental impact assessment and therefore we understand that this assumption could not be applied.

In effect, as provided in art. 7.2 of Law 21/2013, in the regulation of the scope of the environmental impact assessment, and based on the allegation that the TNP implies the requirement of a simplified EIA:

> << a) The projects included in Annex II.
> b) Projects not included in Annex I or Annex II that may significantly affect, directly or indirectly, Protected Areas Red Natura 2000.
> c) Any modification of the characteristics of a project of Annex I or Annex II, other than the modifications described in Article 7.1.c) already authorized, executed or in process of execution, which may have significant adverse effects on the environment . It will be understood that this modification can have significant adverse effects on the environment when it assumes:
> 1. A significant increase in air emissions.
> 2. A significant increase in discharges to public channels or to the coast.
> 3. A significant increase in waste generation.
> 4. A significant increase in the use of natural resources.
> 5. An affection to Protected Spaces Natura 2000 Network.
> 6. A significant effect on cultural heritage >>.

Well, as we have just pointed out, the Plan does not incorporate forecasts of modifications to projects that may have significant effects on the environment, but rather establishes deadlines for the progressive reduction of emission limit values originally authorized.

NINTH: Regarding the affection to spaces within the Natura 2000 Network, we must reiterate that the purpose of the TNP is to gradually reduce the NOx and SO2 emissions of the plants located in those spaces with respect to the current values and, consequently, achieve an improvement of the species or habitats that make up that Network.

In effect, as we have already indicated, the approval of the TNP complies with the requirements contained in Article 32 of Directive 2010/75 / EU, and implies the obligation of the plants under the TNP to comply with the emission limit values in force in the moment of its promulgation, while requiring a progressive and inexcusable reduction of emissions from

existing plants affected by the regulation, and the establishment of a period of adaptation that allows to meet both environmental requirements and the survival of plants.

In short, the TNP has been developed with the objective of reducing emissions from plants that could be located in these spaces, so that emissions, in any case, would be reduced with respect to current values, so it is not a plan likely to significantly or significantly affect the species or habitats that make up spaces in the Natura 2000 Network.

To a greater extent, the adequacy of the TNP to the community environmental regulations has been confirmed by the Commission itself, who in compliance with the provisions of article 6 of the aforementioned decision and article 46.5 of Royal Decree 815/2013, validated the content of the TNP in the European Commission Decision of May 29, 2015, modified by others of March 3, 2016 and April 27, 2017.

TENTH: Directly derived from the absence of SEA, two grounds for challenge are raised by the appellant:

<< 1st) Absence of consultations in accordance with the provisions of the environmental assessment legislation: transboundary consultations and public consultations.

Both article 7 of the SEA Directive, article 11 of the repealed Law 9/2006 and article 49 of Law 21/2013 require that transboundary consultations must be carried out when a plan can have significant effects on the environment of another Member State of the European Union.

2nd) The absence of SEA resulted in a public consultation procedure not being carried out in accordance with the provisions of Law 21/2013, which reflects the provisions of the Aarhus Convention, thus avoiding its submission to the public participation process, which is a democratic channel inherent in the ordinary SEA procedure regulated in Title II Chapter I, Section 1 of Law 21/2013.

However, given that the TNP was not subject to an SEA procedure, the procedures regarding information and public participation provided for in Law 21/2013 on environmental assessment were avoided, thus breaching the obligation consisting of:

- The submission of the draft of the TNP and the initial strategic document to consultations of the affected Public Administrations and of the stakeholders during the established legal period of 45 working days, and integration of the result of such consultations in the document of scope of the strategic environmental study

- Submission of the draft of the TNP and the strategic environmental study to the simultaneous procedures of public information prior announcement in the Spanish Official Journal (BOE), and consultations of the affected Public Administrations and of the stakeholders, for the issuance of the reports and allegations deemed pertinent in The minimum period of 45 business days from receipt.

Also, as provided in Article 26 of Law 21/2013, within 15 business days from the approval of a plan, the national authorities must proceed to the publication in the Spanish

Official Journal (BOE) of the resolution approving the plan, together with an excerpt including, among others, the way in which the strategic environmental study has been taken into consideration in the plan as well as the results of public information and consultations, and the discrepancies that could have arisen in the process >>.

The conclusion reached previously, that the TNP is not considered a "plan" for the purposes of the provisions of Law 21/2013, according to its article 5, and the requirements for its submission to strategic environmental assessment are not met, as provided in its article 6.2, determines that the provisions are not applicable, whose omission the recurring party alleges.

ELEVENTH: It is then posed the absence of a public consultation procedure in accordance with the Aarhus Convention. Specifically, it is alleged that << As it appears in the table that describes the process of elaboration and adoption of the TNP, included in the part of the facts of this demand, only the third version of the TNP was subjected to a consultation procedure public for a period of 21 days from December 4 to 21, 2015. However, this public consultation does not comply with the law because it is contrary to the provisions of the Aarhus Convention >>.

Following the story of the State Lawyer, regarding the administrative processing of the TNP, it has presented a series of peculiarities, which derive from the special requirements of the Industrial Emissions Directive.

The art. 32.5 of Directive 2010/75/EU states that, no later than 1 January 2013, Member States shall notify the Commission of their TNPs for evaluation, and if the Commission << does not raise objections within the following twelve months upon receipt, the Member State concerned shall consider it approved >>. The Commission should also be informed of any subsequent changes to the plan.

Article 46.5 of the Industrial Emissions Regulation states in the same way that << once the European Commission approves the transitional national plan prepared by the Ministry of Industry, Energy and Tourism and the Ministry of Agriculture, Food and Environment, The Council of Ministers, at the proposal of both ministries, will approve the transitional national plan. >>

Under these premises, Spain, after adopting the decision to apply for a Transitional National Plan, sent a first proposal of TNP to the European Commission on 14 December 2012. In relation to this first draft, the Commission considered, by means of the Decision 2013/799/EU, that it was necessary to introduce certain modifications to meet the requirements set out in Directive 2010/75/EU.

Therefore, the draft text of the TNP was again forwarded to the Commission on 3 November 2014, and with additional information, on 18 December 2014.

On this occasion, the Commission decided not to raise objections by Decision 29 May 2015, thus giving its approval.

Subsequently, the definitive list of plants under the Plan was modified in November 2015, as some of the plants initially under that plan decided to renounce it and benefit from another flexibility regime provided for in Article 47 of the Emissions Regulation industrial and in particular, to the flexibility regime of limited useful life. In this way, the text of the TNP

was notified again to the Commission on 20 November 2015, in which 3 plants initially included in the list of plants covered by the Plan were deleted.

The text of the TNP that was finally submitted to public participation from 4 to 21 December 2015, both inclusive, was the version that was considered the most up-to-date since it conformed to the one about which the Commission had not made observations.

TWELFTH: The aforementioned Aarhus Convention was ratified on 15 December 2004, entering into force on 31 March 2005, after the publication of the Instrument of ratification in the Spanish Official Journal (BOE) of 16 February. At European level the Convention was ratified by the Council Decision of 17 February 2005 (2005/370/EC).

Its purpose is << to contribute to protect the right of each person, of present and future generations, to live in an environment that guarantees their health and well-being >>; To that end, Article 1 stipulates that << each Party shall guarantee the rights of access to information on the environment, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Agreement >>.

Thus, in general, it is provided that << Each Party shall adopt the necessary legal, regulatory or other nature measures, in particular, the measures aimed to ensure the compatibility of the provisions that give effect to the provisions of this Convention regarding information , public participation and access to justice, as well as appropriate enforcement measures, in order to establish and maintain a precise, transparent and coherent framework for the purposes of applying the provisions of this Convention >>.

On the other hand, the Aarhus Convention does not refer to a specific period for the processing of the public consultation, leaving it to the election of the Member States, so it can be concluded that the process of public participation of the TNP was carried out in accordance with the Law 27/2006, of July 18, regulating the rights of access to information, public participation and access to justice in environmental matters, which transposes said convention into our legal system, not specifying the claimant any aspect of those provided in art. 16 of the aforementioned Law that may have been breached, being understood that the deadline was reasonable, that it does not imply an infraction to have submitted to consultation the Plan in its final version, and that the participation does not guarantee, in any case, the assumption of the alleged in the process by the Administration.

On the other hand, the Aarhus Convention establishes that public participation must take place when it can have a real influence and it could hardly have been exercised on a draft that not even was approved by the Commission.

Likewise, it should be noted that the TNP not only was submitted to public information through the publication on the Department's website, but also the comments and observations made by the various bodies to which the plan was forwarder for their participation were taken into account.

THIRTEEN: Finally, it is alleged that the TNP has breached of the requirement regarding the ELVs of the AAI and the one regarding the control of emission ceilings. According to the appellant << Both the IED in its article 32.2. as the REI in its article 46.2. require that the emission limit values reflected in the integrated environmental permits of the LCP that are included in the TNP comply with the provisions of both Directive 2001/80/EC, DLCP, and Royal Decree 430/2004, of 12 March, which establishes new rules on the limitation of

emissions into the atmosphere of certain pollutants from large combustion plants, and certain conditions are set for the control of emissions into the atmosphere of oil refineries >>.

The applicant points out that today the majority of the ELVs established in the Integrated Environmental Permits (AAI) of the thermal power plants included in the TNP are above the emission limit values set out in Annexes III, IV and VII of Directive 2001/80/EC, transposed by Annexes III, VI and VII of Royal Decree 430/2004. It is thus violated the requirement established in both article 32.2 of the IED and article 46.2 of the REI that states that the emission limit values reflected in the AAI of the LCP included in the TNP must comply with the provisions of both Directive 2001/80/CE as in Royal Decree 430/2004.

First of all, it should be noted that the observations regarding this point have nothing to do with the TNP. They refer to the ELVs of the AAI which that the plants included in said plan must held by 31 December 2015.

However, as Mr. State's lawyer says << there is no contradiction between what is established in article 32.2 of the Industrial Emissions Directive (article 46.2.2 of the REI) and that the AAI have ELVs higher than those allowed by both Directive 2001/80 / EC as per Royal Decree 430/2004 >>.

Article 46 of the Industrial Emissions Regulation includes the provisions of art. 32 of the Directive, which provides that between 1 January 2016 and 30 June 2020, the -17- combustion plants covered by the TNP will be exempt from compliance with the emission limit values to the atmosphere would correspond according to Directive 2010/75/EU, with regard to the pollutants to which each installation have availed itself (either sulphur dioxide, nitrogen oxides or / and particles), or desulfurization rates. However, they must at least maintain the ELV established in the combustion installation permit (in Spain, the one established by the integrated environmental authorization), applicable on 31 December 2015 for such pollutants.

It is also provided that, for each of these pollutants, the TNP will set a maximum limit of the total annual emissions for all the plants covered by the plan, based on the total thermal power rating as of 31 December 2010, of the actual annual operating hours and the fuel use of each installation, calculated on the basis of the average of the last ten years of operation until 2010, inclusive. Based on this, the TNP establishes an annual ceiling for all the facilities included for each pollutant, and must be applied throughout its period of validity. This maximum ceiling, known as a bubble, is calculated on the basis of relevant ELV parameters and is linearly reduced until 2020.

Therefore, the ELV of the LCP, as of 31 December 2015, of the facilities included in the TNP are those that correspond to it by application of RD 430/2004 (which transposes the old Directive 2001/80/EC to Spanish legislation of large combustion plants), either according to the values set out in annexes III to VIII thereof or, in the case of existing facilities, the acceptance of a National Emission Reduction Plan. The former LCP Directive 2001/80/EC also contemplated as flexibility the possibility of availing itself of the National Plan for the Reduction of Emissions of Large Existing Combustion Installations (PNRE-LCP), which allowed these facilities - as indicated in RD 430/2004 and in Directive 2001/80/EC, during the application of the PNRE-LCP- were not subject to the application of the ELV of Annexes III to VIII, without prejudice to the provisions of Law 16/2002 (IPPC Law) and the provisions concerning the quality of ambient air.

Therefore, in the current TNP there are a number of plants that were once submitted to the PNRE-LCP and for that reason on 31 December 2015, in accordance with Royal Decree 430/2004, they met the specifications of the PNRE-LCP and not ELV of the annexes of that Royal Decree. An important concept from the environmental point of view, respecting the immission values, is the total emissions of an installation. Thus, an installation with very strict ELV, having the most sophisticated emission reduction systems, can be globally more polluting than another with high ELV, without emission reduction measures. It all depends on their hours of operation. Therefore, if the PNRE-LCP plants meet their annual emission ceilings and there are no local air quality problems, they may have the ELVs that are authorized in their Mis, since the emission limitation is not required by some ELV more stringent but for a reduction in annual emissions (which could be achieved with less operating hours). Finally, it should be noted that for the calculation of the annual emission ceilings of the TNP, the ELV of the plants included in it, which have been considered in 2016, are those that would apply to them according to annexes III to VIII of the Directive 2001/80/EC, not those listed in the AAI in force in December 2015".

FOURTEEN: The applicant points out that the legal provisions allowing the control of compliance with the emission ceilings by the LCP, required by Article 32.4 of the IED, as well as Article 46.4 of the IED and Article 6 of the Commission Implementing Decision 2012/115/EU, have not been adopted, as set forth in point 4.1 of the TNP.

Such claim cannot be accepted either. The fulfilment of the parameters is subject to an exhaustive follow-up, carried out, among others, through the Commission's Execution Decision of 10 February 2012, which establishes the rules regarding the transitory national plans to which refers to Directive 2010/75/EU of the European Parliament and of the Council, on industrial emissions, and which regulates in its Article 6, the obligation of the competent authorities to control the emissions of nitrogen oxides, sulphur dioxide and particulate matter of each combustion plant included in the transitional national plan, verifying data on controls or calculations of the owners of combustion plants; and Order PRA/321/2017, of April 7, regulating the procedures for determining the emissions of air pollutants SO2, NOx, particles and CO from large combustion plants, the control of instruments of measures and the treatment and sending of information related to such emissions.

FIFTEENTH: The dismissal of the appeal entails the imposition of the costs to the appellant (article 139.1 LRJCA), although, in view of the complexity of the topic of debate, and making use of the power conferred on the Court by paragraph 3 of the indicated Article, is set as the maximum amount to be claimed by the Administration under appeal, the amount of 4,000.00 euros and for the other parties that have opposed in the present procedure, the amount of 2,000.00 euros plus VAT, for each of them.

RULING

For all the above, in the name of the King and by the authority conferred by the Constitution, this Chamber has decided

FIRST.- To dismiss the contentious administrative appeal filed by the Asociación Instituto Internacional de Derecho y Medioambiente (IIDMA), against the Agreement of the Council of Ministers of 25 November 2016 approving the Transitional National Plan for large combustion plants, declaring the same in accordance with law.

SECOND.- Order the recurring Association to pay costs in the terms of the fifteenth legal foundation.

Notify this resolution to interested parties and enter it in the legislative collection.

This is how he remembers and signs.

José Manuel Sieira Míguez. Rafael Fernández Valverde, Octavio Juan Herrero Pina,

Juan Carlos Trillo Alonso, Wenceslao Francisco Olea Godoy, César Tolosa Tribiño.

PUBLICATION.- Read and published was the previous sentence by Honourable Mr. Magistrate Speaker, Mr. César Tolosa Tribiño, the Chamber being held at a public hearing; Attest.

ACRONYM MEANING (added for better understanding of this translation)

REI: Spanish regulation of industrial emissions (Reglamento de Emisiones Industriales).
LCP: Large Combustion Plants
IED: Industrial Emissions Directive (Directiva de Emisiones Industriales)
ELVs: Limit Emission Values (Valores Límite de Emisión)
AAI: Integrated Environmental Authorizations (Autorizaciones Ambientales Integradas)
TNP: National Transitional Plan (Plan Nacional Transitorio)
SEA: Environmental Strategic Evaluation of Plans and Programs
OFFICIAL JOURNAL: Official State Gazette (Boletín Oficial del Estado)
DLCP // DLCP: Large Combustion Plants Directive (Directiva de Grandes Instalaciones de Combustión)
MAPAMA: Former Ministry of Agriculture, Fisheries, Food and Environment
MINETAD: Former Ministry of Energy, Tourism and Digital Agenda
EIA: Environmental Impact Assessment (Evaluación de Impacto Ambiental)
LEA: Environmental Assessment Law (Ley de Evaluación Ambiental).
TJUE: Court of Justice of the European Union (Tribunal de Justicia de la Unión Europea)
PNRE-LCP: National Plan for the Reduction of Emissions of Large Combustion Installations (Plan Nacional de Reducción de Emisiones de Grandes Instalaciones de Combustión)
LRJCA: Law governing contentious-administrative jurisdiction (Ley Reguladora de la Jurisdicción Contencioso-Administrativa)