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IMPLEMENTATION OF THE ENVIRONMENTAL LIABILITY DIRECTIVE IN SPAIN

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I. Can you give some concise information about your national environmental liability system?

1.- Are there special provisions on civil liability for environmental damage?
And
2.- *Are there other (administrative type of) special provisions and procedures ... ?*

From the outset, the expression "civil liability for environmental damage" is extremely controversial and confusing, especially in the Spanish jurisdiction, as it will be argued *infra.* With this caveat in mind, it is possible to say that the old Civil Code of Spain (approved in 1889) includes a couple of provisions that are applicable in the case of damages caused to private property (namely art. 1902 and 1908) by private companies or persons and having some "environmental" implications. For instance: an upstream water discharge by an industry into a river causing damages in a private fish farm; toxic fumes released by an industrial plant producing damages on someone´s cattle, etc. However, it is arguable whether this kind of "liability" (a pure and classical *law of torts*) is really an *environmental* one, as it only covers property damages and does not affect damages to the environment at large (for instance, damages to a river, beach, public forest, etc.).

In fact, the Spanish system, prior to the transposition of Directive 2004/35 is a complex combination of civil and administrative regimes, which may be shortly identified as follows:

- (a) damages (such as those considered *supra*) produced by private persons and undertakings are handled through the typical "civil law on torts": arts. 1902-1908 of the Civil Code and concurrent legislation: *Inter privatos* litigation, before the Civil Courts
- (b) damages to the natural environment (damages to protected land, flora and fauna, pollution of air, water and soil, etc.) are handled through a system of Administrative responsibility (exclusively regulated by Administrative Law), which is enforced by administrative agencies and bodies. Administrative decisions declaring responsibility of private individuals and undertakings may be challenged before the Administrative Courts.
- (c) damages to private "environmental" property caused by governmental action are regulated by Administrative Law: individuals and firms may ask the Government for compensation; if denied, the must sue the Governmental Agency before the administrative courts.

Damages may also be caused as result of criminal actions as defined by the Penal Code (these are not considered in this report).

The schemes described in letters (a) and (b) are based on a fault/negligence basis, while the regime at letter (c) is a strict liability regime.

From the perspective of environmental protection and, especially, from the "polluter-pays principle" consideration, the most important scheme of environmental *liability* is the one identified at letter (b) above. Under Spanish administrative law, liability for environmental damage (which is specifically enshrined in the Spanish constitution at art. 45) is one ingredient of the three-tier system of administrative responsibility. Following the appropriate procedures, the competent administrative/environmental agency may declare that an individual or a firm has violated a specific statute (for instance, the Act on Waters in the case of an illegal discharge into a river resulting in an environmental damage). In that case, the agency may impose three different types of "punishments":

- (a) a pure monetary penalty, in the amount established in the statute;
- (b) the duty to restore the damaged environment, which is plainly understood to mean that the wrongdoer must leave the environment as it was before the unlawful action. The extension and form of that restoration obligation is determined by the agency in the administrative file, following a contradictory hearing; and
- (c) the obligation to pay the damage (in terms of destruction or impairment) actually caused to the environment, independent of the restoration costs. The exact amount of that compensation is to be determined by the Agency in the administrative file, and following a contradictory hearing and the appropriate evidences, as necessary.

It is important to note that:

- *primo,* all three determinations are decided unilaterally by the agency, so to say, without the participation or intervention of any court of Justice. Of course, once the agency findings are final, the individual or firm may challenge the legality of those findings before the Administrative courts;
- *secundo,* all three determinations and findings may be imposed by the agency on the basis of the unlawful conduct and are compatible

As it can be seen, in Spain the system of environmental liability is clearly a system of "administrative" liability, not one of "civil" liability.

We may illustrate this scheme with the well-known case of the accident at the minig complex of Aznalcóllar. In that case, both the national government and regional government of Andalucia started separate administrative files for the infringement of different environmental statutes. In the specific case of the file instructed by the National government, the Council of Ministers reached a decision, which consisted of three determinations:

- (a) to impose an administrative fine or penalty of 601.012 euros, for the infringement of the Water Act of 1985, which prohibits illegal, toxic discharges in the continental waters.
- (b) to order the firm to pay compensation for the damages caused to the aquatic environment, which were estimated by the Government in 2.870.181,66 euros
- (c) to pay the expenses made by the government in restoration and remedying activities. These costs were established in more than 41.600.000 euros.

Another feature of the Spanish current system is that the described regime is far from being codified in one single, comprehensive statute. On the contrary, there are a considerable

group of statutes (both at the national and at the regional level) providing for that system. Thus, it is a fragmented and piecemeal system. Almost every time the national parliament (or the seventeen regional ones) approve a statute on the protection of the environment, the final provisions are used to regulate the above described three-prong system. Just in order to provide some examples (at the national level), the following statutory provisions may be cited:

- art. 118 of the Waters Act of 2001(*Ley de Aguas)*
- art. 95 of the Coastal Management Act of 1988 (*Ley de costas)*
- art. 10 of the Act on environmental impact assessment of 1986
- art. 36 of the Act on Waste of 1998(*Ley de Residuos)*
- art. 77 of the Act on Forest Management of 2003(*Ley de Montes)*

If we compare the provisions of Directive 2004/35 with the current system of environmental/administrative responsibility already in force in Spain, it is possible to point that the European norm covers only the "restoration" tier of the three-tier national system. It does not say a word neither on the "administrative" penalties nor on the monetary "compensation" for the damages actually caused to the environment. For those reasons, and setting aside the provisions on financial securities and other noteworthy aspects, it is reasonable to support the view that the directive does not represent a "revolutionary" improvement or achievement. However, as regards Annex III activities, it modifies the fault and negligence approach. This is also applicable in the case of non-Annex II activities (see the table at 2.3.2, *infra*).

3.- Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

Yes, Spain is a party to most of the international conventions listed in annex IV and V, namely the convention on liability for nuclear accidents and the convention on the establishment of the International Fund on Civil liability for oil spills.

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

-*Has Directive 2004/35/EC already been fully implemented*?: NO

- *If not, is it under way?*

Yes, indeed. During 2005 and 2006 the Ministry of the environment prepared different versions of a draft proposal for a statute on environmental responsibility, which was hardly circulated. For months, it remained a virtual secret. Finally, the curtain was lifted and by early Spring 2007 the Council of Ministers approved a project or proposal for a statute of environmental responsibility/liability (*Proyecto de Ley de Responsabilidad medioambiental*), which was sent to the Parliament for discussion and approval. The official text of the bill was published in the Official Journal of the National Parliament (*Boletín Oficial de las Cortes Generales)* on 23 March 2007. Now the draft must be approved before March 2008, when the Houses of Parliament will be dissolved and new general elections will be held. If this is not the case, the draft will vanish and it will be necessary to restart the procedure, and an Act on the matter would be hardly expectable before the year 2009.

-*Have deficiencies of the Directive been identified during national discussions ?*:

No. This kind of worries are unusual in Spain. EC Directives are usually taken as an unarguable premise coming from Brussels (to be transposed as late as possible).

(Remark: *questions 2.2 to 2.3.20 of this questionnaire are answered on the basis of the Bill as it stands in its present version, but changes are likely to happen during the forthcoming discussions in Parliament.*)

2.2. General approach of implementation:

-*Has your country reduced the level of environmental protection as a consequence of the Directive* ? : NO (see supra)

Did your country opted for a comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act? :

As explained supra, Spain opted for a comprehensive piece of legislation to transpose the directive, which is a separate Act. It is important to note that, in its explanatory memorandum, the bill that is currently under discussion in Parliament describes the new system of environmental liability as an "administrative" system, and not a civil one, in line with the considerations made in question I.2, *supra.*

-*Did your country opted for amending several pieces of legislation*?

The new Act will clearly has an impact on the existing and scattered statutory provisions already referred to in question I *supra.* However, the bill does not clarify this crucial question, and this is one the main weakness and defect of the new legislative proposal.

-*Did your country opted for a combination of these 2 approaches*?:

Not applicable (see precedent answers)

-*Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?:*

In our view, in general terms it can be said that Spain has introduced stricter provisions, as explained in the questions below.

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

- *How is the definition of environmental damage implemented?*

As a rule, the Bill reproduces almost literally the key concepts and elements of Directive 2004/35). As regards the definition of environmental damage, it follows the wording of the directive. There are some –positive- exceptions, as explained below.

A further matter to highlight is that the Bill takes into account Article 3(3) of the Directive and grants private parties a right of compensation of damages caused to people, private property, economic losses or any other damages provided they can be regarded as environmental damage (Article 5(1), *contrario sensu*)

- *Did your country included in the notion 'protected species and natural habitats' habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))*

The definition of "protected species and natural habitats" included in the Spanish draft statute is larger than the one established in the directive, since it covers in addition: (a) wild species protected by international treaties to which Spain is party, to the extent they stay in Spanish territory, on a permanent or seasonal basis; (b) wild species protected by national or regional law and, in particular, those species listed in the National Catalogue of endangered species or in any regional such catalogue; (c) habitats protected by international treaties to which Spain is party; (d) habitats protected by national or regional law (articles 2.4 and 2.5 of the draft statute).

- *Is land damage protected just in case of significant risk of adverse effect on human health?*

Yes, in this case the draft statute follows literally the Directive

- *When is the conservation status of a natural habitat taken as favourable?*

Art. 2.6 of the draft statute follows literally the definition provided at art. 2.4 of the directive

- *What about the definition of "operator"? Are persons 'to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of the permit or authorisation for such an activity or the person registering or notifying such an activity" included? (art. 2.6)*

Yes, in the draft statute the definition of the operator also includes those persons referred to in art. 2.6 of the Directive. The bill excludes from the definition the organs and bodies of public administration that award administrative contracts (public procurement authorities) , something which is not even mentioned in the directive.

2.3.2. Scope

- Did your country opted for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

The system of liability included in the draft statute (art. 3) is somehow complex and includes three different situations: (a) strict liability for activities included in Annex III, that is "independent of wilfulness, fault or negligence (art. 3.1 of the Bill). What is more, there is legal presumption that a given Annex III activity has produced the damage if there is a theoretical causal link between the type of activity and the type of damage produced; (b) strict liability for preventive measures to be taken in case of serious danger of environmental damage, for non Annex III activities, (c) fault based liability for non Annex III activities, as regards the obligations for prevention and restoration.

This table may summarise the abovementioned text:

ACTIVITY	DAMAGE	CONDITIONS	OBLIGATIONS
(1) Annex III activity	"Environmental damage"	Strict liability (independent from wilfulness, fault or negligence)	Duty to adopt prevention, mitigation and restoration measures.
(2) Non Annex III activity	"Environmental damage"	Concurring wilfulness, fault or negligence	Duty to adopt prevention, mitigation and restauration measures
(3) Non Annex III activity	"Environmental damage"	Independent from wilfulness, fault or negligence	Duty to adopt prevention measures.

It should be noted that the Bill (Article 3(2)(a) and (b)) goes beyond the Directive in the case of non-Annex II activities since it refers to "environmental damage" and not only to "damage to protected species and natural habitats" (Article 3(1)(b) and Article 2(3) of the Directive).

2.3.3. Exceptions

-*Which are the exceptions to the scope of the liability regime in your country? (art 4)*

The statute proposal (art. 3) includes the exceptions already provided for by the directive at art. 4, plus damages older than 30 years, and damages to individuals (art. 5).

- *What about the permit defence and the state of the art defence (art. 8.4)?*

These two defences have been explicitly included in the draft statute (art. 14.2). However, there might be problems of inconsistency between national law and EC law as regards the concept of "express authorisation"

2.3.4. Preventive and remedial actions

- *When are preventive (art 5) and remedial (art 6) actions taken by the operator?* and
-*Which is the role of the competent authority?*

In the draft statute, preventive and remedial actions are depicted in a rather similar way as in the directive. The distinctive feature of the Spanish legislation is that it reinforces the profile and the role of the governmental action. In this sense, the statute give concrete powers (*potestades*) to the competent Agency, something which is crucial in Spanish administrative law. For instance, in the line of the directive, the Agency may of course "itself take the necessary remedial measures", but the bill explicitly states that the Agency will recover those expenses from the operator.

Unlike the Directive, the Bill distinguishes between three different types of measures:

- Preventive measures (definition identical to that provided by the Directive, Article 2(10).

- Remedial measures (idem, Article 2(11).
- Measures designed to avoid further damage. The Directive does not expressly refer to this kind of measures, save perhaps in Article 2(11), "any action (…), including *mitigating* or interim measures to restore".

- Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ? Are these discussions public ?

Under arts. 41 *et seq.* of the draft statute, environmental organisations may trigger the administrative procedures for environmental liability. These organisations must fulfil the following requirements: they must pursue the goal of environmental protection, as stated in their by-laws; they must be established at least two years prior to the production of the damage; and they must carry out their activity in the geographical area that resulted damaged. Once they trigger the administrative procedures, they are technically considered *interesados*, that is, they are entitled to take part in the procedure carried out by the agency. In this capacity, they have the right to be heard on the proposal of measures submitted by the operator. However, there are no such "public discussions".

- Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

No. Annex II of the Directive is literally reproduced in Annex II of the draft statute.

2.3.5. Preventive and remedial costs

-Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?

On this question, the bill is not very explicit. It only provides for the agency to decide and adopt the necessary interim, provisional and preventive measures. This is a weakness of the legislative proposal, which in practice may jeopardize the operation of the entire system

-Is there a special provision to give effect to art. 8.3, in fine (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial actions)? Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities ?

Yes, arts. 14.3, 15 and 16 of the draft statute includes specific provisions on this subject. Basically, the operator may, depending on the actual circumstances of the case, either sue the third parties which are the real producers of the damage, or sue the agency which unlawfully took the decisions and the orders on environmental liability. When the damage was produced due to a defective product, the operator may sue the producer or importer.

Yes, the operator must nevertheless take the remedial measures.

2.3.5. Cost allocation

- Are there national provisions within the meaning of article 9?

The draft statute that is currently discussed in Parliament deals with this problem at art. 11. It states that in case of multiple party causation, the responsibility will be joint.
The Bill indicates that in the case of groups of companies, environmental liability may also be attributed to the parent company provided there is an abuse of corporate personality or of the law.

2.3.6. Competent authority

-*Which authority or authorities were designated for the purposes of article 11?*

Designation of authorities is covered by art. 7 of the bill. Basically, the competence is for regions (*Comunidades Autónomas*), but the competence is for the national Ministry of the Environment in the case of damages occurred in elements of the environment which have the legal nature being the eminent domain of the State: the coastal area and the territorial waters, the river basin crossing several regions, etc.

-*Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)*

Since this is a purely administrative law question, the draft statute does not include specific provision, but rather refer to the general law on administrative procedure (Act of 26 November, 1992). In a nutshell, the operator has the right to file an appeal before a higher authority within the Ministry or Agency (*recurso de alzada)*, and if, this administrative appeal is rejected, the operator may file a judicial action against the administrative decision. Since the system enshrined by the draft statute is a genuine administrative system (and not a civil one) the competent courts will be the administrative ones.

2.3.7. Request for action

-*Which of the alternatives listed in art. 12.1. were chosen ?*

The draft statute provides for a large standing in this case. Apart from environmental organisations (see question 2.3.4, *supra*), standing is also recognised to the owner of the land where the preventive or restoration activities are to take place, and in general to any legal or physical person fulfilling the general requirements of the law on administrative procedure (which are basically those established at art. 12.1, (a) and (b) of the Directive.

-*Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damage ? (art. 12.5)*

The bill provides for application of art. 12 for both environmental damage and for cases of imminent threat of damage.

- What type of review procedure is available under national law ? (art. 13)

There is no specific provision on the subject, so the general provision of art. 44.4 of the bill (see question 2.3.6, *supra)* apply.

2.3.8. Financial security

- *How was article 14 implemented?*

Art. 14 of the directive are implemented through a detailed set of provisions in arts. 24 to 34 of the bill. In a nutshell, the corporations affected by the statute (annex III activities) are obliged to establish a financial security to cover the costs. However, there is no across-the-board minimum amount to secure, this has to be determined on a case-by-case basis by the competent authority. There are three types of financial securities: (a) an insurance policy, which will be regulated by the general (commercial) law on insurance; (b) a bank warranty; (c) the contribution to a fund.

For general, additional features of the new system:

- (a) operators likely to cause damages worth less than 300.000 euros (the Bill assumes that it is possible to assess those likely damages beforehand) may be exempted from the obligation of constituting a financial security, as well as those likely to cause damages within the range of 300.000 to 2.000.00 euros provided they belong to EMAS or to a similar system (i.e. UNE-EN ISO 14001:1996).

-(b) there is a statutory limitation on the maximum amount of the security: 20 Million euros

-(c) the draft statute creates two new publicly-run funds: the first one will cover the costs in cases of failures by the insurance companies. The second one is a state fund, which is supposed to operate when the damages affect waters and coastal area belonging to the public domain of the state.

-(d) the obligation to have a financial security will be operational starting from a date that will be determined by the Ministry of the environment. This decision will be taken not later that 30 April, 2010.

2.3.9. National law

-*Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)*

See answer to question 2.3.1, supra

- *Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)*: No

2.3.10. Temporal application

How was article 17 implemented?

In the same way as in the Directive (Damages older than 30 years, damages prior to 30 April 2007)

2.3.11. Transboundary environmental damage

- *How the system works in case of environmental damage in a transboundary context ?*

This question is addressed by art. 8 of the bill. Basically, when an activity in Spanish territory has produced or is likely to produce a damage in the territory of another EU member state (in practice, only Portugal or France) the competent authority (usually the regional one) must notify the case to the Ministry of the Environment, which, working with the Ministry of Foreign Affairs, is to take the appropriate measures in order to cooperate with the neighbour country. A different procedure is provided for in the reverse case (an activity in Portugal or

France produces or is likely to produce an environmental damage in Spanish territory), which includes informing the European Commission.

***Additional remarks*:**

Apart from all the provisions that have been considered supra and which are in the line of the directive, the draft statute also sets a harsh system of administrative penalties for all the operators and persons who infringe the obligations established in the law (duty to notify, duty to inform, duty to cooperate, failure to execute the preventive and/or remedial measures, etc). In this sense, the bill provides for penalties ranging from 10.001 to 2 Million Euros. These penalties are independent of (and compatible with) the obligations to restore and to prevent environmental damage that might be determined by the competent agency. Interestingly, the Bill only foresees the application of those penalties to private individuals but not to public authorities who may also be under the scope of the Directive. This contradicts consistent case-law regarding the obligation to set out appropriate penalties for infringement of EC Law regardless of the status of those breaching the law.