

Spain

Environmental Liability 2012

National ELD Report

Justice and Environment 2012

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I.

Comparative Legal Analysis on ELD and other liability legislation

SPAIN

The Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) is – among others - subject to various shortcomings with regard to scope and definitions which might be one of the reasons for the low number of cases. Problems are also reported with regard to the economic assessment of damages and remediation methods.¹²

This analysis aims to help to collect evidence on the added value/weakness of the ELD to bring specific arguments for better implementation and as to a revision of the directive. Therefore the national ELD legislation is to be compared with similar liability regimes to bring on the one hand more clarity on the interaction of ELD legislation with other liability regimes and to demonstrate on the other hand value and weaknesses of all these systems.

1. National liability regimes

There was not a regime similar to ELD before the Directive came into force in Spain. It could have happened if the 1999' Environmental Liability Law Draft had passed.

The ELD has been transposed by the **Environmental Liability Act, Law 26/2007, 23rd October (Ley de Responsabilidad Medioambiental)**, which has never been used in practice because its complexity and the lack of enforcement from the competent authorities. It was a strict transposition; so the Spanish Legislative did not join the opportunity to introduce a coherent and comprehensive environmental liability system.

However, the duty for the polluter to repair environmental damages was included in the article 45.3 of the Spanish Constitution in 1978 together with the liability for environmental offences and crimes. Consequently, many special sector laws (Water, Flora and Fauna, Forest, etc.), general regional environmental protection laws and the Criminal Code recognizes the duty to repair the environment for the operator(s) of unlawful activities. Close to this, the Spanish Civil Code establish a general liability for damages which can be used in the environmental field.

¹ Compare the results of the **Stakeholder and Practitioner Workshop** on the implementation of the ELD in the EU: <http://ec.europa.eu/environment/legal/liability/workshop081111.htm>

EC Report on the effectiveness of the EU Environmental Liability Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0581:EN:NOT>

² See **J&E legal work in 2011** with regard to ELD:

<http://www.justiceandenvironment.org/publications/eld>

2. Civil and Criminal Liability regimes

The Spanish legal system, before the ELD regime, had four different types of liability which can be applied for environmental damage cases.

The civil liability, recognized in the Civil Code from 1881, includes the classical subjective damage liability clause (*Lex Aquilia*) in continental systems - article 1902 Cc - and a special strict liability for owners of machines, buildings, trees and animals regarding odors, smokes or any other damages in the neighbourhood – article 1908 Cc. There is no special civil liability for environmental damages in the Civil Code, but judges are using the general civil liability and the speciality for neighbours relations for the sake of the environment.

The criminal liability applies for the most serious unlawfully damages to the environment. The criminal penalty for the responsible person (including juridical persons/companies) creates a recognition of civil liability. Spain recognizes more than ten different environmental crimes – flora, fauna protected areas, landfills, burns, nuclear radiation, hazardous waste, etc. -, which are settled in the Criminal Code since 1995 and have played an important role to prevent environmental damages, thanks to the work of the Environmental Prosecutors Office, although there are yet problems regarding evidence in Courts.

At the administrative level we have two different regimes, one for citizens (including companies) and one for public bodies.

The administrative liability operates when someone breach any environmental rule and this offence not only results in a penalty, but also in the duty to repair the environmental damage. The special environmental laws (Water, Fauna and Flora, Air Protection, EIA, SEA, etc.) always include a catalogue of offences and the special duty to repair the damage.

The Public Bodies' Environmental Liability plays a role when the authorities are responsible for the environmental damage and a citizen ask them for restoration, using a special proceeding. The required proceeding then can lead to a Liability Declaration in favour of the citizen.

3. Main differences of national liability regimes compared with ELD

a) Competent authorities

As in Spain the major environmental competences are delegated to the Regions (Comunidades Autónomas), these Regional administrative authorities are essentially responsible to enforce environmental law -except for a few state and local competences- and consequently responsible for asking for environmental administrative liability.

Regarding civil and criminal liability only Judicial Bodies are granted to ask for responsibility against individuals; both Environmental Inspectors and citizens can ask for a criminal proceeding or start a civil process.

Public Regional Authorities can start the proceeding to ask for administrative environmental liability against citizens because offences and they can take decisions in relation to reparation/compensation measures. These authorities have an Inspection Service to investigate operators and ask for information and for adopting reparation measures.

Judicial Bodies conduct civil processes, initiate criminal processes and adopt decisions about standing and compensation/reparation/restitution measures.

b) Scope/Damage covered

The Spanish special regimes for environmental liability, administrative, civil and criminal, cover every damage to any natural resource, including air.

The new Environmental Liability Act covers (only) the same scope of damage than the ELD.

c) Extent of damage required/Thresholds

The threshold in the Environmental Liability Act covers the same as the ELD.

By the other types of liability there are no stipulated thresholds, except in the Criminal Code. The environmental crime require a serious damage on the environment and/or a danger to the human health. However, the administrative proceedings and the Court cases take place only by significant damages because of economical and procedural reasons (approximately 1.000 Euro).

d) Liability/Accountability

Operators, producers or any person who causes damage can be liable, including juridical persons/companies.

Authorities can be liable and there is a special proceeding for the citizen to ask for environmental damage (see above).

e) Are Preventive Actions or Response Actions required?

Except for the Environmental Liability Act, who follows the ELD, there are no requirements for preventive actions since the other forms of liability are reparation-oriented models (*ex post facto*) with no preventive actions.

f) Liability Regime

The general damage liability model established in the Civil Code requires Fault-based actions or omissions. However, the jurisprudence of the Supreme Court (Tribunal Supremo) has recognized Absolute liability for “those economic activities who deals with a big risk for the environment and obtain benefits” (Supreme Court Judgements -SSTS- of 13.7.199 and 5.11.2004).

Criminal Responsibility System requires Fault-based Liability, like for other crimes.

When the Authorities can be responsible for an environmental damage, Spanish regime is based on Absolute liability.

By the Administrative Responsibility there are some Fault-based offences (e.g. Water) and some Absolute-Liability offences (e.g. GMO).

g) Costs

For evaluating the costs in case of damage in Spain, it is needed to follow the criteria settled by the jurisprudence.

In the civil liability model, compensation methods will be used as parameters.

This is not the case for Criminal Liability, where the criteria to estimate the cost is the price of the restitution of the damage to the previous status/situation.

In the Administrative Liability cases the criteria is the restitution and only if this is not possible, the authority can use a compensation approach to estimate the costs of the damage.

When the Authorities are liable and this is recognized after the required proceeding, an agreement for restitution or compensation criteria must be reached with the citizen which started the process.

If natural restitution of a damaged area is not possible, in the Spanish system the authority will ask for satisfaction in money.

h) Access to Justice and Claims for Compensation

Only the owner or affected-right persons have legal standing in a civil process to get compensated for (environmental) private damage. There are one case in the jurisprudence, in which a NGO was recognized as entitled person to ask for compensation (standing) because of damage in the fauna (*FAPAS case regarding the Brown Bear*).

Every person can start or be part in a criminal proceeding to ask for environmental liability and environmental damage restitution since article 125 of the Spanish Constitution recognizes *actio popularis* in the criminal process.

Affected-right persons can be part and use a remedy in a administrative liability proceeding against other citizens. Only by certain legal areas (land use, coastal protection, cultural heritage) or regions (e.g. Basque Country) every person (including organisations) have the right to participate and use a remedy in an administrative proceeding including to ask for restitution/compensation for environmental damage (public interest). In the rest of legal areas/regions citizens have only the right to request for the initiating of proceedings and the administrative Authority will decide.

Affected-right persons and NGOs have the right to start a proceeding to declare an Authority liable for environmental damage.

i) Burden of proof

There are special rules in the field of Public Body's liability and regarding Civil Liability (jurisprudence): it is stated a reversal of the burden of the proof.

j) Financial security

In Spain, in the civil liability and Public Body's liability exist a voluntary financial security system.

The **Environmental Liability Act** development process have not yet established a date for the obligatory financial security system, but after the Regulation (Orden ARM/1783) from 21st September 2011, this obligatory system must enter in force in 2013/2014, and only for Annex III Operators with activities with estimated damage reparation price over 300.000 Euro or 2.000.000 Euro (if the operator has EMAS or ISO:14.001).

k) Time limits for presentation of claims

For civil liability claims the time limit is one year, from the damage was or should be known.

The time limit for criminal liability are 5 years from the time the effect of the criminal act occurred.

By administrative liability - except damages in environmental public goods (river basins, coastal shore) which have no time limitation -, the time limit are 3 years, 2 years or 6 months from the time the effect of the offence occurred. The different special laws (water, air pollution, biodiversity, etc.) establish when an offence is very serious (3 years), serious (2 years) or light (6 months).

To ask for liability against a public body the time limit is one year from the finalisation of the damaging action.

4. Prevailing legal norms

No, the legislation was not repealed. The earlier regimes will still be used for cases where the ELD transposition Law does not apply.

5. Damages not covered by a liability system

Yes: damage on non-protected species, exotic species and non-economic-valuable goods are not regulated at all.

6. Strengths and weaknesses of national liability systems

In relation to the Environmental Liability Act (transposed ELD), the “other” liability regimes have the following weaknesses:

- The access to justice for NGOs is too strict and not so broad like in the ELD/Environmental Liability Act.
- The time limits for presentation of claims are too short.
- The costs system prefers the compensation when restitution would be more appropriate.
- Lack of a preventive oriented model.
- Lack of systematic method to estimate the costs of damage.

At the other hand, there are some strengths in these liability regimes:

- The initiation of the process depends mostly on Judicial authorities and not on Administrative authorities. This is preferable because Administrative bodies do not usually start proceedings against polluters (lack of proof, corruption).
- The scope of activities who can hold its operator liable is broader than the ELD transposition.
- The elements of the environment which are covered of the other liability systems are broader than for the ELD-transposition law (only water, soil, Natura 2000, fauna and flora).

II.

CASE STUDY

AZNALCOLLAR CASE (1998) - *when the law system is a labyrinth for environmental justice* –

SPAIN

The elaboration of case studies on liability proceedings (non-ELD and ELD cases) is meant to give, – in addition to the legal analysis of national liability regimes - an appropriate insight into the practical application of different liability regimes and the shortcomings of ELD legislation regarding its scope and definitions. The identification of respective obstacles and challenges will give important incentives for the improvement of the Environmental Liability Directive (ELD)³.

1. Matter of case

High heavy metals spill cause by the breach of a mining damn constructed in 1978, property of the company *Boliden Apirsa*. The polluted river reached the surrounding of Doñana National Park, which is the most important wetland in Spain.

After 14 years, the regional and state Authorities did not recover the costs of the decontamination and restorative measures from the company.

2. Country

Spain

3. Location

Aznalcóllar, few miles from Sevilla. South Spain.

4. Short summary of the case

At the 25th of April 1998, a mining damn spill in Aznalcóllar (6.200 inhabitants) brought to the environment more than six millions liters of waste – including four millions of heavy metals. The spill affected the basin of Guadiamar River, close to the National Park “Coto de Doñana”.

³ DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

The authorities decontaminated and restored the soil, the river and the flora and fauna, trying to avoid a bigger disaster if the spill met the National Park and the groundwater.

The spill was similar to the Kolontár's accident in Hungary in 2010.

Although all the evidences pointed at Boliden Apirsa as responsible for the accident, the company rejected the liability arguing defects on the construction of the dam.

5. Applicable national laws

Civil Code, Criminal Code, Water Act, Administrative Law and Civil and Administrative Procedural Law.

6. Type of procedures and competent authority:

1st Criminal Process at the Local Judge. The prosecutor and the NGOs accused more than twenty-six technicians working in the mining company, at the Regional environmental Agency or in the small company which constructed the damn. **Local Judge of Sanlúcar La Mayor (Sevilla).**

2nd Administrative Court proceeding to recover from the company the Regional environmental Agency's restoration cost **from the Local Court to the Administrative Supreme Court**

3rd Civil Process at the **Regional Court** to recover the restoration costs from the polluter.

4th Administrative Proceeding at the Environmental State Agency to declare the offence and Court proceeding **from Local Court to the Administrative Supreme Court.**

5th **Commercial-Law Courts** to ask for a seizure for the *mother* company in Sweden (the *daughter* company went to bankrupt).

7. Polluter

BOLIDEN, a Swedish Mining company (www.boliden.com), through BOLIDEN APIRSA (Spanish *daughter* company)

8. Claimant

Spanish Government (Guadalquivir River Basin Authority at the Ministry of Environment) and Andalusian Regional Government (Environmental Agency).

9. Other participants involved

- NGOs: *Ecologistas en Acción* and *Greenpeace* in the criminal proceeding.
- Owners, who claimed unsuccessfully for environmental damage against the Environmental Agency because of lack of inspections (Administrative Supreme Court Judgements of the 28th of December 2011, the 6th and 13th of March 2012).
- The company, who claimed unsuccessfully for liability against the authors of the dam's design (Civil Supreme Court Judgement from the 11th of January 2012)

10. Description of the damage and the applied liability regime

– Main impact and sort of damage caused

The spill caused damage to the soil (river basin), water (rivers Guadiamar and Agrio) and flora and fauna because of heavy metals (zinc and arsenic). It produced big risks for the groundwater and the surrounding of a National Park (Coto de Doñana)

– Extent of damage caused

The damages included 4.634 hectares of soil damage in a river basin, 62 kilometers of a river course and 200 hectares of agricultural soil.

– Preventive/response actions being taken

There were not preventive actions and response actions were taken to decontaminate and restore the environment.

The works of decontamination and restoration were divided in three parts: 20,1% was paid from the company (Boliden Apirsa), 7,4% from the State Government (Ministry of Environment) and 72,5% from the Regional Government (Environmental Agency).

– Applied liability

Fault based liability (*culpa in vigilando*) of the Company after an administrative proceeding to declare an offence and ask for the duty to restore the damage.

– Type of compensation

Cleaning of toxic waste for 80 millions €.

Natural restitution for 22 millions €, which were paid from the Regional Authority.

– Description of the evidence procedure

– Time limits for presentation of claims

Criminal case: Five years

Administrative: Three years.

Civil: One year, but the time limit was stopped because of the criminal and Administrative courts proceedings.

11. Outcome of the proceedings

No one was accused after a criminal proceeding, which finished in 2000 (judgement at the 22nd of December).

The Regional Agency went to the Civil Court to recover the restoration and decontamination cost (more than 80.000.000 €) from the company and after it to the Administrative Court. After thirteen years of discussions the Supreme Court rules at 26th April 2012 that the competent jurisdiction is the civil one.

Nowadays the company *Boliden Apirsa* only was held as responsible in the Court for an offence against the Water Act after a process initiated by the Ministry of Environment, which included a punishment (600.000 €) and the obligation to pay to the Administration for the damage to the environment (more than 2.500.000 €) and the restoration costs. However, when the Administration tried to get this amount the daughter company (*Boliden Apirsa*) went to bankrupt and it was impossible to adopt a seizure against the mother company in Sweden (*Boliden AB*).

12. Remedies taken

- NGO's remedy against the criminal court decision.
- State Environmental Agency's remedy at the Administrative Supreme Court to impose the punishment for the offence and recover the costs.
- Regional Environmental Agency's remedy at the Supreme Court to make clear which jurisdiction is competent for the recovering of the restoration's costs.

13. Current status of case

The Regional Agency shall start from the beginning to recover the restoration cost in the Civil Courts.

The State must wait to ask for the punishment and recover the damage cost until the creditor's meeting of *Boliden Apirsa* is finished and applied for the liability of the mother company – *Boliden* - in Sweden.

The area and the river are almost decontaminated and there is no risk for the National Park, its wetland and the groundwater. There is a environmental friendly industrial area in the former mine and the river basin is a protected area now.

14. Obstacles/Challenges generated in this case

Lack of clear regime for environmental damage,
Lack of obligation to adopt preventive measures,
Lack of obligation for financial guaranty,

No possibility to NGOs to recover or ask in a judicial way for recovering with/without the Agencies.

Liability in national courts of “mother” companies for the acts of the “daughter” companies, and Long and complex judicial way to recover the cost of restoration from the polluter.

Contact information:

name: Eduardo Salazar Ortuño
organization: J&E
address: C/ Apóstoles 10, 1º B, Murcia
tel/fax: 968211439/968227191
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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