Is mandatory financial security helping to implement the polluter pays principle?

- A summary on the Spanish situation -

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Spain transposed the Environmental Liability Directive (ELD) through Law 26/2007, of 23 October on Environmental Liability and through a series of regulatory instruments. Since its entry into force, at least 12 environmental liability cases have been covered under this regime according to the report sent on April 2014 by the Spanish authorities to the European Commission in compliance with Article 18(1) of the ELD[2]. However, there is not much information available to the public on whether there have been new cases treated under this regime from that date until the time of writing this article. In addition, there is no information available on each of the specific case identifying facts and subjects involved, the environmental damage caused and on whether prevention or remedial action was taken. This absence of information is an evidence of the urgent need of creating public accessible national registers of EL incidents as Justice and Environment (J&E) emphasizes in its statement on the EU Environmental Liability System[3].

In spite of the lack of a public accessible national registry of EL incidents in Spain, when transposing the ELD, Law 26/2007 required compulsory financial security for all activities listed in its Annex III to face any environmental liability (Art. 24). The financial guarantee can be of three kinds: an insurance policy, a bank endorsement or the constitution of an *ad hoc* fund. The most common form of financial security used in Spain is the insurance policy given the previous experience of civil liability policies required for the management of hazardous waste under the derogated Law 10/1988 on Waste. In addition, Royal Decree 833/1988, of 20 July approving the Regulation to execute Law 20/1986 on Hazardous Waste allowed Autonomous Regions to require an insurance policy for authorizing the establishment and operation of industries or activities producing hazardous waste and made compulsory a civil liability insurance policy for hazardous waste operators (Art. 6). That Regulation provided that the civil liability policy had to cover not only the classical civil liability (damages to persons and property) but also the cost of restoration and recovery of the damaged environment. This provision impelled the creation of a market of insurance policies covering environmental damage.

It is important to remark that Law 26/2007 included a fourth final provision which delayed the entry into force of the obligation to count with a compulsory insurance policy to cover environmental liability as it provided:

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[2] The Autonomous Communities where environmental liability cases took place are: Andalucía, Canary Islands, Cataluña, Extremadura, Galicia and Madrid. The report is available at: http://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/ES.pdf.

[3] http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/J_E_ELD_proposals_final.pdf

> *"1. The date from which the establishment of the compulsory financial security shall be requested for every activity in annex III shall be provided by Ministerial Order of the Ministry of Environment to be approved after the agreement of the Government Delegated Commission on Economic Affairs and the consultation to Autonomous Communities and sectors concerned.*
>
> *This Order shall establish a specific calendar for those activities which were authorized before the publication of the Order.*
>
> *2. Ministerial Orders referred to in the previous paragraph shall be passed from 30 April 2010 and their preparation shall take into consideration the report of the European Commission provided by article 14.2 of the ELD as well as the capacity of financial markets to offer a diversity of complete securities at a reasonable price."*

At the same time none of those Orders were approved yet. Only Order ARM/1783/2011, of 22 June, establishing the priority order and the calendar for the approval of ministerial orders from which the establishment of a financial security shall be obligatory as provided in the fourth final provision of Law 26/2007, of 23 October on Environmental Liability, was passed. But as its title provides, this Ministerial Order only provides the priority order of activities in Annex III and delayed the entry into force of the ministerial orders to be approved, even before they were prepared, taking into consideration the priority order of activities in Annex III that it provides. Nevertheless, no ministerial order has been passed yet. In addition, the first order of priority contained in that Order only refers to combustion plants with a thermal input above 50MW and to facilities for hazardous waste recovery, including management of waste oils or for waste disposal in places different from landfill sites with capacity above 10 tons per day.

At the same time, Law 26/2007 also includes several exemptions to the obligation to count with a financial security (Article 28). These are:

- Operators whose activities might cause an environmental damage whose reparation is assessed to cost less than 300,000 Euros.
- Operators whose activities might cause an environmental damage whose reparation is assessed to cost between 300,000 and 2,000,000 Euros and prove through the submission of certificates issued by independent bodies that are adhered to EMAs[4] or to the environmental management system under UNE-EN ISO 140001 permanently.
- The use of plant protection and biocidal products for agricultural and forestry purposes.
- Operators whose activities are excluded by regulation taking into consideration their low potential to cause environmental damage and their low risk level.

The coverage of the compulsory financial security required is not higher than 20 million Euros. Law 26/2007 lays down an obligation for operators of activities listed in Annex III to draw up an environmental risk assessment with the aim of identifying possible scenarios and calculating the cost of the environmental damage that these might entail (Art. 24). This risk assessment serves operators to find out if they are obliged to count with a financial security and, if so, calculate its value. It is also an important tool to manage

[4] Eco-Management and Audit Scheme.

environmental risk. Article 33 of Regulation 2090/2008 of 22 December, approving Regulation developing partially Law 26/2007 establishes with detail the steps to undertake this environmental risk assessment.

It has to be noted, that the fact, that there is not yet an obligation to count with a financial security and that there are certain exemptions from the scope of the financial security, do not exempt Annex III operators from liability in case there is a risk of causing an environmental damage and prevention measures are required by the Autonomous Community competent authority or in case an environmental damage has been caused and remediation action is required.

For this reason, there are many operators that already count with an insurance policy for environmental liability which in many times is complemented with a policy covering also civil liability. In 1994, the Spanish Pool of Insurance Companies for Environmental Risks[5] was established, which manages an agreement of insurance and reinsurance. Their members are insurance (17) and reinsurance (8) companies. A representative of this Pool informed us that in 2015 their members have already subscribed around 7.000 insurance policies to cover environmental liability although we must take into consideration that many of those are policies required to manage hazardous waste.

We do not know whether in the 12 environmental cases referred to at the beginning of this article operators counted with a financial security. However, the Spanish authorities reported to the European Commission that in 3 of those cases the total costs of avoidance and remediation varied from 12,000 to 250,000 Euros. In an another case, avoidance costs totaled 80,000 Euros and initial remediation costs were estimated at 2,000,000 Euros. In another case the remedial measures had associated costs of 80,000 Euros and in another it cost 250,000 Euros to remedy the damage.

Given the lack of data we cannot evaluate whether in those cases having or not a financial security was useful. However, we can affirm that not having a financial security does not exempt environmental liability. But who will pay the costs, if the party responsible for the environmental damage is not capable to cover the financial costs of restoration and remediation? There are many examples, where because of the financial insolvency of the responsible party it was at the end of the day the state, ie. the society who paid the costs of remediation.[6]

Here again[7], we must highlight the need for a complex system of national regulatory instruments, institutional and financial resources, to make the ELD Directive an effective and useful tool to handle and resolve environmental liability issues.

[5] http://www.perm.es/index.cfm

[6] http://www.justiceandenvironment.org/_files/file/2012/2012%20ELD%20report%20Spain.pdf
http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/Environmental_Liability_NL.pdf

[7] http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/Environmental_Liability_NL.pdf