

SPAIN

Environmental Liability

National toolkit on the practical application of
the ELD and its national equivalents

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1. Introduction

This short toolkit explains main points of the Environmental Liability Directive and its transposition in Spain. It describes the tools the public can use when undertaking steps to take measures against environmental damage or of its imminent threat. Firstly, it explains what environmental damage is under the ELD regime and who can be liable. The second part explains in detail about requests for action against environmental damage which can be submitted by the public or environmental NGOs and the procedure to be followed after its submission. Throughout the text, references are made to Spanish legislation on environmental liability. At the end are listed some useful references.

2. General issues

The Environmental Liability Directive (ELD) is an EU directive dealing with operators' liability for damages to the environment based on the "polluter pays" principle. The aim of the ELD is preventing and remedying environmental damage caused by economic activities. Aligning to the principles of precaution, prevention and rectifying environmental damage primarily at source, the ELD created the legal frame for identifying environmental damage caused by industry and production activities. The ELD therefore regulates the liability of operators of certain activities for damages caused by their activities on the environment, this is reflected in the Spanish environmental liability legal regime as strict liability, but all other economic activities are subject to environmental liability in case of negligence or intention. Environmental damages are: damages to protected species and natural habitats, damages to water bodies and land damages. In all cases the damage has to be significant, which is an undetermined concept that Member States have to specify. Spain has transposed the ELD by Law 26/2007 of Responsabilidad Medioambiental (LRM) , while there are other sectorial laws which coexist with the environmental liability regime. In general, in Spain until now the competent bodies of the Administration at the National and Autonomous Communities levels apply primarily the penalty system established in sectorial laws, and only in a few cases the environmental liability regime has been applied . In those cases, the administrative action took place once the damage had been caused. Therefore, the preventive focus of the environmental liability regime has been underused.

3. What is environmental damage

Environmental damage pursuant to ELD is of three types:

1. Damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats and species
2. Water damage, which is any damage that significantly adversely affects the ecological, chemical or quantitative status or the ecological potential of the waters concerned, and the environmental status

of the marine waters concerned, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC.

3. Land damage, which is any land contamination that creates a significant risk on human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

A great advantage of the ELD is that it is applicable not only on damages that have already been done, but also on imminent threat of environmental damage. However, the ELD cannot be used in case of air pollution as air damages are not included as environmental damages.

Article 2 of the Spanish law provides some factors to evaluate the significance of the damage:

1. For damage to protected species and natural habitats: the favourable conservation status related to the basic status following the criteria in Annex I of the LRM: the status in which they should have been if the damage has not been occurred.
2. For water damage: any adverse effects on the ecological, chemical and quantitative status of the surface, groundwaters and artificial water bodies. Also the adverse effects on the status of the marine waters when the bodies specified in "Ley de Aguas of RDL 1/2001 of 20th July" (Spanish Water Law) are not fully covered by this Law.
3. For land damage: any land pollution which creates a significant risk for human health or for the environment.

4. Who is liable?

There are two types of liable operators. These types complement each other and may also overlap.

According to the ELD an operator liable for the state of the environment is any natural or legal, private or public person who operates or controls the occupational activity, which means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character. Usually it concerns industrial and agricultural activities requiring permits under the old IPPC Directive today the Industrial Emissions Directive, waste management operations, release of pollutants into water or air and dangerous chemicals or GMOs related activities. The activities are listed in Annex III of the ELD. The ELD then sets obligations relating to environmental damage prevention and holds any such operator liable for environmental damage even if the operator followed all the rules and regulations properly.

Another type of liability under ELD applies to any professional activity (even outside the scope of those listed in Annex III) but only if the operator was at fault or negligent and if they caused damage to protected species and natural habitats. Under the Spanish environmental liability law, the scope of the environmental liability is wider: Article 3 of the LRM takes into account all damages and imminent threats caused by all operators outside the scope of Annex III, in the following terms:

- a. When there is intention, fault or negligence; preventive and remedial measures are required.
- b. When there is no fault or negligence, only preventive measures are required.

The exceptions of the liability regime are (also established by article 3.4 of LRM): damages and imminent threats caused by natural phenomenon of exceptional, inevitable and irresistible character; armed conflict, civil war or insurrection; and activities for national security and defense.

5. Request for action

If anyone suspects there might be environmental damage, they have the right to file a request for action. The request for action consists on submitting any observations relating to environmental damages or imminent threats to the competent authority and asking for preventive and remedial actions. Based on the request for action the competent authority initiates an investigation of the reported event or threat and sets adequate measures and steps for sanctioning the polluter, if needed. Those who file an observation or/and request can ask the competent authority pursuant Arts. 41 and 42 of LRM to implement adequate measures as provided by art. 12 of the ELD.

A request and any observation relating to instances of environmental damage or its imminent threat can be submitted by any natural and legal persons who are affected or likely affected by environmental damage or who have an interest on decision-making relating to environmental damage or alleging the impairment of a right where national administrative procedural law requires this as a precondition. This means that members of the general public are able to motion the opening of an environmental damage investigation. The ELD presumes that environmental NGOs are automatically affected by environmental damage.

In order to file a request, it is sufficient to have knowledge of circumstances suggesting that environmental damage might have occurred or that there is an imminent threat of it; it is not necessary to prove being affected by environmental damage. The basic precondition is existence of environmental damage itself or of its imminent threat. (Art. 12 of ELD)

In Spanish national law, the equivalent to the request of action is transposed by article 42 of the LRM. This Law provides for four kinds of persons who can file a request:

1. Anyone – natural or legal person- who is interested on the proceedings under article 4 of Law 39/2015 on the Administrative Procedure . That's to say all those who are entitled or who have rights directly affected or those whose individual or collective interests may be affected by the final decision and have appeared during the process.
2. Any non-profit organization which fulfill the following requirements:
 - i. General or concrete interest on environmental protection provided in their by-laws.
 - ii. At least constituted for 2 years before the request of action and have been defending environmental interests during that period.
 - iii. The imminent risk or the environmental damage must affect the territorial scope of activity of the organization set by Statutes.

Environmental NGOs belong to this group

3. Owners of the lands where preventing and remedial measures must take place.
4. All those who are foreseen by the Laws of the Autonomous Communities.

6. Formal requirements

Article 41.2 of the LRM provides for the formal requirements to make a request. The request for action must be written and it has to specify the damages or the imminent risks to the environment. When possible, it has to specify other aspects as:

- The action or inaction of the suspected operator.
- Identification of the polluter.
- The date when the action occurred.
- The place where the damage/risk was occasioned.
- The causal link between the action/inaction and the damage.

The LRM does not set any other formal requirements. There is no cost for submitting neither request nor observations and the submitter does not bear costs of the potential administrative procedure. If, however, the observation is supported by e.g. expert opinion or data, these costs are covered by the submitter.

7. Competent authority

Due to the coexistence between national laws and autonomic laws, Autonomous Communities have the competence to enforce the LRM by article 7 of the Act in their territorial scope where damages or imminent threats are taking place. If the damages or threats are occurring in places under the competence of the State, then is the State Administration which is entitled to enforce environmental liability. In that last case, it would be handled by the Ministerio de Agricultura, Alimentación y Medio Ambiente (MAGRAMA) under the Dirección General de Calidad y Evaluación Ambiental.

Most of the Autonomous Communities (AACC) haven't established yet the competent authorities to apply the environmental liability. Just some of them have initiated inquiries or disciplinary actions: Catalonia (4 cases), Galicia (1 case), Madrid (2 cases), Extremadura (3 cases), Andalusia (1 case) and Canary Islands (1 case) for the moment

The ELD does not set particular timeframe for the competent authority to deal with the observation, but it does oblige the competent authority to as soon as possible inform the persons who submitted observations to the authority of the decision to accede or to refuse the request for action and shall oblige the reasons for it.

Pursuant to the Spanish national legislation, the competent authority is obliged to inform the person who submitted the observation within 10 days since receiving the observation about whether the proceedings would be initiated or whether no reasons were found for starting the proceedings (Article 41.3 of LRM). It's also possible to appeal the decision before the competent authorities under Law on the Administrative Procedure or before the courts.

8. Financial Securities

Article 14 of the ELD encourages Member States to develop financial security instruments by economic and financial operators with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive. Chapter IV of the LRM provide for the financial securities regime. Article . 24 provides for the obligation of the operators in Annex III to have a financial guarantee . However, these provisions did not immediately entered into force and it is still necessary the approval of Ministerial Orders to establish the deadline for constituting them.

It should 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 remedial action is required.

9. References

- <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0035-20130718> Directive 2004\35\EC
- <https://www.boe.es/buscar/act.php?id=BOE-A-2007-18475&p=20150922&tn=1#a41> Ley 26/2007 de 23 de Octubre de Responsabilidad Medioambiental
- <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0122> REFIT Evaluation of the Environmental Liability Directive
- <http://www.magrama.gob.es/es/calidad-y-evaluacion-ambiental/temas/responsabilidad-mediambiental/preguntas-frecuentes.aspx> MAGRAMA
- http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2016/Is_mandatory_financial_security_helping_to_implement_the_polluter_pays_principle.pdf

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