Q&A on Environmental Law in Spain

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Contents

Introduction

Using a Q&A format, this article provides a guide to environmental law in Spain and gives a practical description of a wide range of topics including:

- Emissions to air and water
- Environmental impact assessments,
- Waste
- Contaminated land
- Environmental issues in transactions.

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http://www.cliffordchance.com/environment

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Environmental regulatory framework

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

The Spanish environmental legal framework comprises laws regulating particular industries and activities, and laws protecting environments and controlling certain contaminating agents.

Most Spanish environmental laws derive from the transposition of EU legislation. The main regulated environmental fields are:

- Integrated environmental control.
- Natural heritage and biodiversity protection.
- Air quality and atmosphere protection.
- Environmental responsibility.
- Nuisance activities.
- Environmental impact assessment.
- Contaminated land.
- Waste.

The local Autonomous Regions (*Comunidades Autónomas*) can develop and enforce their own environmental legislation, and local authorities also have environmental protection powers. Accordingly, enforcement of environmental law is carried out at state, regional and local authority level.

At state level, the Ministry of Agriculture, Food and Environment is the main regulatory body and is divided into several different departments. The Department of Environment is divided into four different General Directorates:

- Climate change.
- Environmental assessment.
- Sustainability of the coast.
- Sea and water.

There are also specialised bodies that derive from the Ministry of Agriculture, Food and Environment, such as the Hydrographic Confederations (*Confederaciones Hidrográficas*) (each of which is in charge of one of the main river basins in Spain) and National Parks (in charge of the network of natural parks and natural protected areas across Spain).

This structure at state level is mirrored in each Autonomous Region (the Government of Madrid has a Department of Environment, which is divided into several departments). Town Councils may also be entitled to exercise environmental protection powers.

To co-ordinate the complex distribution of environmental powers, the Minister of Agriculture, Food and Environment periodically calls the Environment Sectoral Conference. This Conference is attended by the Minister and the environmental representatives of each Autonomous Region. Its primary aim is to co-ordinate environmental policies and set related objectives, priorities and strategies.

Recently, several significant environmental laws have been enacted in Spain including:

- Law 11/2012, on urgent environmental measures. It:
  - regulates the condition of underground waters;
  - establishes new administrative procedures regarding waste and protection of the natural heritage and biodiversity;
  - adapts the Spanish regulation to the new EU Emissions Trading auction system established by European law (*See Question 10*).
- Law 15/2012, on tax measures to increase State revenue from activities relating to the energy system. This law creates the following:
  - tax on the generation of radioactive waste derived from the generation of nuclear energy;
  - tax on the storage of radioactive waste;
  - tax on the use of inland waters for hydroelectric power stations;
  - tax on the sale of electricity;
  - "green cent" levy on the sale of gas, coal and fuel-oil and gas-oil.
- Law 2/2013, on the protection and sustainable use of the coastline and amending the Coast Law 22/1988. The Coast Law of 1988 was aimed at limiting construction of any building within an 800 metre buffer zone from the sea. The new Law 2/2013 automatically suspends all licences to build within the buffer zone which were granted in contravention of the Coast Law of 1988 and introduces a replacement system of concessions for affected buildings. It also introduces amendments to existing concessions to build on the coastal public domain (including, for example, extending their terms).
- Law 5/2013, revising Law 16/2002 on prevention and integrated control of pollution and revising Law 22/2011, dated July 28, on waste and contaminated soil. Its main objectives are the reduction of emissions of industrial activities to the atmosphere, the waters and the land. It conditions the start-up of more industrial facilities obtaining an integrated environmental authorisation. It eliminates the obligation of the holders to apply for their renewal every 8 years (the verification of the compliance with the conditions will now be reviewed by the Administration every 4 years). Furthermore, it transposes the Industrial Emission Directive (Directive 2010/75/EU), establishing that all integrated environmental authorisations must be adapted to this Directive's regime by 7 January 2014.

Regulatory enforcement

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

The Spanish Constitution indirectly recognises the defence and restoration of the environment as a reasonable cause for intervention by public authorities, since it expressly declares that "the public authorities will watch over the rational utilisation of the natural resources, relying on the essential collective solidarity". These statements form the ultimate legislative basis for setting limits and conditions on the activities of individuals and businesses and the approach of regulators to enforcement.

Non-compliance with environmental law results in either administrative or criminal action. However, regulators seek to encourage the taking of preventive action. Where this fails, administrative (rather than criminal) sanctions tend to be imposed for breaches, although punitive criminal

measures are used when required. Enforcement is always compulsory. However, not all cases are enforced. In practice, many breaches of environmental regulations remain unprosecuted, due to lack of resources, difficulty in finding out about the breaches and so on.

The Spanish Penal Code of 1995 was modified to transpose Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive), adding three new types of environmental crime. The Penal Code now includes two chapters (regulating crimes against natural resources and the environment, and crimes against fauna and flora and domestic animals), which aim to punish the most serious breaches of environmental laws with imprisonment and fines.

Environmental NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

Environmental NGOs are very important in the field of environmental protection. They have recently been given a legal right to initiate lawsuits for the benefit of the environment. Before this, environmental NGOs were only entitled to participate in the implementation and monitoring of certain environmental policies. However, the increasing number of these organisations encouraged the government to introduce new mechanisms for them to actively participate in the protection of the environment.

In addition to publicly criticising several projects that are considered to be especially harmful for the environment (such as nuclear power stations, buildings near the coast, wind farms, and so on) environmental NGOs in Spain have begun initiating lawsuits against these kinds of projects, and have obtained favourable judgments that have ultimately led to cancellation of some controversial developments.

Environmental permits

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

The integrated permitting regime was introduced in Spain by Law 16/2002 on Integrated Pollution Prevention and Control (IPPC), which aims to avoid and, whenever possible, reduce and control the contamination of the atmosphere, water and land by means of an integrated prevention system based on Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive).

Under this regime, a single environmental permit is required for industrial activities included in Annex I of Law 16/2002. These activities are generally carried on at large industrial installations that could potentially produce serious damage to the environment through different types of pollution. The permit regulates all types of harmful effects of the activity on air, water and land, and contains various mandatory operating conditions.

Activities not covered by the integrated permitting regime are covered by individual sectoral regimes.

5. What is the framework for the integrated permitting regime?

Permits and regulator

Integrated environmental authorisations are issued by the environmental authority of the relevant Autonomous Region.

Length of permit

An integrated environmental authorisation is granted for an unlimited period of time. However the compliance with the conditions established and will be reviewed by the Administration every four years.

Restrictions on transfer

The integrated environmental authorisation may be transferred to another party provided that the issuing authority receives prior notification. Failure to comply with this obligation may be considered a serious infringement.

Penalties

The issuing authority can impose penalties consisting of, depending on the seriousness of the infringement:

- Fines of up to EUR2 million.
- Closure of the site for a maximum of five years.
- Disqualification from carrying out the activity for a maximum of two years.

- Revocation or suspension of the integrated environmental authorisation for a maximum of five years.
- Publication of the sanctions and the name of the offenders.

In addition, the offender must restore the site to the condition it was in before the authorisation was granted and repair any damage caused by the breach.

Water pollution

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Water discharge activities not covered by the integrated environmental authorisation are governed by Royal Legislative Decree 1/2001.

Permits and regulator

A water discharge authorisation must be obtained, which establishes the terms, limits and conditions of water discharge activities. It is generally issued by the competent Hydrographic Confederation, which manage the basin of each major river. Regional or local authorities manage and issue authorisations for discharges made into sewer systems. If the discharge is likely to result in the contamination of the groundwater or aquifers, it can only be authorised if a hydro-geological study demonstrates lack of likely environmental harm.

Prohibited activities

It is generally prohibited to directly or indirectly discharge wastewater or waste products into watercourses without having been granted prior authorisation by the competent authority. In addition, any activity that could cause pollution or degradation of the water environment is generally prohibited. These activities include:

- Accumulating solid waste or substances in a watercourse.
- Carrying out actions that could cause damage to the physical and biological water environment.
- Carrying out activities in defined protected areas.

Clean-up/compensation

In addition to the imposition of the penalties below, the regulator can also require the polluter to restore the environment to its previous state and to pay for any damage caused.

Penalties

The seriousness of an infringement mainly depends on the financial damage caused, safety of human health and the particular circumstances of the offender such as, for instance, profit obtained. Sanctions for infringement consist of fines ranging from EUR10,000 to EUR50,000 (for less serious infringements) up to EUR1 million (for very serious infringements).

Air pollution

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Air pollution activities not covered by an integrated environmental authorisation are regulated by Law 34/2007 on air quality and atmosphere protection. There are three groups of activities to which these requirements apply (the relevant criteria are reviewed every five years):

- Group A (the highest-risk/most polluting category, such as electricity-generating installations using boilers of more than 300MWt power) are subject to authorisation and more stringent requirements.
- Group B (a medium-risk category, such as oil refineries using a boiler with a power between 20MWt and 50MWt) are also subject to authorisation but with less strict requirements.
- Group C (such as coffee roasting) are only subject to notification requirements to the Autonomous Region authority.

Permits and regulator

The construction, installation, operation, transfer or substantial modification of facilities that involve regulated activities in Groups A and B requires prior administrative authorisation from the Autonomous Region authority. Permits are only granted for the activities if the atmospheric emissions satisfy air quality limits or objectives and the authorisation will establish terms and conditions for the emissions activity.

Prohibited activities

Activities that cause emissions to air which exceed air quality limits leading to general air quality objectives not being met are prohibited.

Clean-up/compensation and Penalties

Similar rules apply as for the water pollution regime, see *Question 6*.

Climate change, renewable energy and energy efficiency

8. Are there any national targets or legal requirements for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)? Is there a national strategy on climate change, renewable energy and/or energy efficiency?

Emissions targets

The government is subject to greenhouse gas (GHG) emissions reduction targets from several sources and is subject to Kyoto Protocol targets (*see Question 9*). The objective for the 2008-2012 term is to not exceed the level of GHG emissions of 1990 by more than 15%, according to the EU burden sharing agreement.

The government's long-term aim for 2020 is to reduce emissions by 10% (2005 being the base year) in accordance with EU commitments.

Increasing renewable energy

The Sustainable Economy Act of 2011 establishes a national objective of 20% renewable energy of total consumption by 2020 for both homes and commercial buildings.

Increasing energy efficiency

The Spanish government has set a target of 2% of annual improvement in energy efficiency for the 2010-2020 term.

On 25 October 2012, the EU adopted the Directive 2012/27/EU on energy efficiency. This Directive establishes a common framework of measures for the promotion of energy efficiency within the Union. This is to ensure the Union achieves a 20% headline target on energy efficiency by 2020 and to lead the way for further energy efficiency improvements beyond that date. It lays down rules designed to remove barriers in the energy market and to overcome market failures that hinder efficiency in the supply and use of energy. In particular the Directive provides for the establishment of indicative national energy efficiency targets for 2020 and a compulsory requirement for large companies to have energy audits every four years. Member States are required to bring into force the laws necessary to comply with the Directive by 25 June 2014 (Article 28(1)). Discussions over implementation in Spain are ongoing.

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

Spain and the EU are both parties to the UNFCCC and the Kyoto Protocol.

The EU's emissions reduction target under the Kyoto Protocol was to reduce its greenhouse gas emissions by 8% from 1990 levels in the period 2008 to 2012 (the end of the first commitment period). The EU's target was redistributed among member states, and Spain agreed to a 12.5% reduction for the first commitment period. A second commitment period has now been agreed until 2020 with parties setting their own reduction objectives. The Parties have also agreed to an amendment to the Kyoto Protocol to provide for an overall objective of reducing emissions by 18% below 1990 levels by 2020 (the original objective was a 5% reduction below 1990 levels in the first commitment period). The EU and Member States have committed to this target on a joint basis (and the EU has pledged to strengthen the commitment to a 30% reduction if a strong international agreement is reached). Parties that have signed up to the second commitment period will review their emissions reduction objectives in 2014.

Implementation

The requirements established in these international agreements have been implemented through various initiatives, including:

- Implementation of the EU Emissions Trading System (EU ETS) at the EU-level to reduce emissions through Law 1/2005 on GHG emissions trading (*see Question 10*).

- Formation of the National Climate Council, which formulates the Spanish Strategy on Climate Change. This Strategy sets five general guidelines and other sector-specific ideas on which public decisions must be based. The strategy hinges on the following principles: positive tax policy, rational land-use planning, energy saving and efficiency policies, and the establishment of a voluntary environmental management system.

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

EU ETS overview

As an EU member state, Spain is covered by the EU ETS, which works in three compliance stages:

- Phase I of the EU ETS ran from 2005 to 31 December 2007.
- Phase II ran from 1 January 2008 to 31 December 2012.
- Phase III started on 1 January 2013 and will run to 31 December 2020(see below, *Phase III*).
- Phase IV will begin in 2021.

The EU ETS applies to specified heavy industrial activities and establishes a mandatory cap-and-trade system. Participants must surrender allowances (or other credits) at the end of each compliance period to match their emissions. In addition, the operator must still return the missing allowances. Each allowance represents the emission of one tonne of carbon dioxide.

Following allocation, allowances are subsequently traded in an online registry enabling companies to purchase additional allowances to meet their obligations. To obtain and surrender allowances, a participant must have an account in an online registry, Operators can also obtain credits (which can be traded in the EU ETS) by investing in:

- Qualifying projects to reduce emissions in industrialised countries and certain countries in economic transition (known as joint implementation (JI) under the Kyoto Protocol).
- Projects to reduce emissions in developing countries (known as the clean development mechanism (CDM) under the Kyoto Protocol).

Operators can surrender any such credits as well as EU allowances to comply with their obligations under the EU ETS.

In addition to surrendering allowances (or other credits) to match their emissions, Law 1/2005 requires participating facilities in Spain to obtain an authorisation to emit GHGs and imposes an obligation on them to report verified emissions data once a year.

Aviation

From 1 January 2012, the EU ETS covers any aircraft operator, whether EU- or foreign-based, operating international flights on routes to, from or between EU airports. There are certain exemptions, including for light aircraft, military flights, flights for government business and test flights. Various complaints were made by non-EU countries at the inclusion of flights to or from destinations outside the EU into the EU ETS. As a result the EU excluded such flights during 2012 from the EU ETS, pending discussions at international level over the future position of international aviation in the scheme.

Phase III

Phase II ends on 31 December 2012. Phase III will commence on 1 January 2013. The main changes for Phase III are as follows:

- There is a single EU registry for all users, which was activated on 20 June 2012, rather than national member state registries.
- There is a single EU-wide cap on emissions which will decrease annually, meaning that the former National Allocation Plans will no longer be required.
- Other GHGs and industrial sectors will be included.
- Allocation of allowances will be largely replaced by auctioning, with at least 50% of allowances auctioned from 2013.
- The use of credits from JI and CDM projects is limited.

Environmental impact assessments

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

The environmental impact assessment (EIA) regime is established in Royal Legislative Decree 1/2008. This act requires EIAs for certain types of public and private projects as part of their authorisation or approval process, as follows:

- Annex I projects always require an EIA. These are projects most likely to have an environmental impact and include, for example, nuclear power stations and airports.
- Annex II projects are only subject to an EIA if either:
  - the competent authority considers that this is required by the significance of the effects of the project on the environment (the applicant should ask the competent authority whether the project must be submitted to an EIA before the start of development);
  - the project affects any EU-protected "Natura 2000" sites.

The environmental authority of the body that gives consent to development projects (that is, either the Ministry of Environment or the environmental authority determined by the Autonomous Region) is the competent authority in relation to the EIA, and this therefore depends on the type and location of the project.

Permits and regulator

The developer of an Annex I or II project must obtain an Environmental Impact Declaration (*Declaración de Impacto Ambiental*) (DIA) from the competent authority. For Annex I projects, an application must be submitted for the project to be subject to an EIA, but for Annex II projects, an application to the competent authority is required, requesting whether the project should be subject to an EIA. The EIA is undertaken by the competent authority and after a compulsory public information period has been completed, the DIA is issued. This establishes the terms and conditions with which the project must comply and must be issued before the final authorisation is granted.

Penalties

It is a serious infringement to implement the project:

- Before the DIA is issued.
- Without carrying out an EIA where required.
- Without complying with the conditions established in the DIA.
- Without discussing the need for an EIA with the competent authority, for Annex II projects.

Penalties consist of:

- For very serious infringements, a fine ranging from EUR240,404.85 to EUR2,404,048.82 (and could also result in the suspension of the project implementation).
- For serious infringements, a fine ranging from EUR24,040.49 to EUR240,404.49.

The levels of these fines mainly depend on the damage caused to the environment, human health, and the particular circumstances of the offender (such as its financial position).

Waste

12. What is the regulatory regime for waste?

The regulatory regime for waste is established in Law 22/2011 regarding waste and contaminated lands (Law 22/2011). This regulation establishes measures to protect the environment and human health by preventing or reducing the adverse impact of generating and managing waste, whenever the IPPC regime does not apply.

Permits and regulator

Any operator (whether individual or legal entity) of waste treatment activities, including waste storage and the substantial modification, enlargement and relocation of relevant waste treatment facilities, requires an administrative authorisation issued by the environmental authority of each Autonomous Region. A separate authorisation is required by the owner of such facilities if they are not the operator.

Entities that dispose of their own non-hazardous waste on the same production site may be exempted from the authorisation requirements on request to the environmental authority.

Certain waste treatment activities involving hazardous substances and activities that generate more than 1,000 tonnes of non-hazardous waste also require notification to the environmental authority before initiation.

Operators producing waste are required to provide the competent authority with information on the waste generated each year.

Prohibited activities

Non-compliance with the above regime is considered a very serious or serious infringement, depending on the damage caused to human health and the environment, and whether the activity takes place in protected areas. To ensure compliance, the authorities are entitled to close the facilities or suspend activities.

Operator criteria

Generally, operators carrying out the activities subject to an authorisation must (*Law 22/2011*):

- Provide certain financial guarantees.
- Obtain specific insurance policies.
- Prove to the environmental authority that they have suitable personal qualities, as well as the technical means to carry out the activity.

Special rules for certain waste

Extended producer responsibility. In order to encourage recycling, certain types of products that become waste after their use are subject to extended producer responsibility rules (*Law 22/2011*). Any individual or legal entity that professionally develops, manufactures, processes, treats, sells or imports these products must comply with certain obligations, such as, to accept returned products and the waste produced from the use of those products. The law also sets out the requirements for subsequent management (re-use, recycling and recovery) of the waste and establishes who is to be responsible for the relevant costs.

Special waste. Certain types of special waste are covered by separate regimes, including:

- Radioactive waste.
- Decommissioned explosives.
- Faecal matter.

Exemptions

Certain types of waste are not regulated by the waste regime, including for example:

- Uncontaminated soil and other naturally occurring material excavated during construction activities to be used on-site for construction purposes.
- Wastewater, animal by-products, animal corpses and waste resulting from mineral resources or mining activities.

Penalties

Sanctions that can be imposed on the individuals or legal entities carrying out the prohibited activities may include:

- A fine ranging from EUR901 to EUR45,000, for serious infringements.
- A fine ranging from EUR9,001 to EUR300,000, for serious infringements involving hazardous substances.
- A fine ranging from EUR45,001 to EUR1.75 million, for very serious infringements.
- Final or temporary closure of the facilities for a maximum of five years, for very serious infringements.
- Disqualification from operating the facilities for a maximum of ten years for very serious infringements (or a maximum of one year for serious infringements).

Asbestos

13. What is the regulatory regime for asbestos?

The regulation of asbestos in Spain is established in Royal Decree 108/1991 on the prevention and reduction of environmental pollution by asbestos, which establishes that all asbestos waste must be dealt with in such a way that minimises emissions.

As asbestosis is considered a professional disease in Spain, there are also important obligations relating to asbestos risk in workplaces.

Prohibited activities

All activities that expose workers to products that potentially contain asbestos fibres are prohibited. However, activities relating to demolition and asbestos removal are exempted from this prohibition (subject to compliance with asbestos concentration limits). There are also prohibitions on emitting asbestos fibres into the air or discharging any asbestos into water, unless they comply with limits established in the relevant authorisation (*see below, Permits and regulator*), or the limits established by law in the event that the authorisation is silent.

Main obligations

Employers must:

- Measure the concentration of asbestos in the workplace.
- Adopt technical and organisational prevention measures to minimise the risks of exposure to asbestos.
- Provide personal protective equipment where necessary.
- Make workplace plans in relation to asbestos, which must be approved by the labour authorities.
- Train and inform employees about asbestos risks.

Permits and regulator

An authorisation must be obtained to emit or discharge asbestos waste. This authorisation will establish the date on which an inspection to check compliance with the

emission limits will take place. In addition, all companies that are to carry out activities involving the management of asbestos must be recorded at the Asbestos Risk Companies Register (*Registro Empresas con Riesgo de Amianto*).

Penalties

Failure to comply with the regulations regarding asbestos is enforceable under the sanctioning regimes contained in the relevant coastline, water, air pollution and hazardous waste legislation.

Contaminated land

14. What is the regulatory regime for contaminated land?

Regulator and legislation

The Spanish legal regime for contaminated land is established in Law 22/2011. The authorities of each Autonomous Region are responsible for enforcing the contaminated land regime.

Operators are under a general obligation to provide information to the authorities periodically to enable them to determine whether the land is contaminated. The government is obliged to keep a register of potentially contaminating activities (the list of which is contained in Royal Decree 9/2005).

The competent authority must issue a declaration of contaminated land where it becomes aware of land contaminated through human activities that meets the criteria and standards contained in Royal Decree 9/2005 (for instance, where there is a significant presence of the contaminating substances listed in the different Annexes of the Royal Decree).

The competent authority must keep an updated inventory of contaminated land that has been subject to a declaration.

Investigation and clean-up

The issuing of a declaration of contaminated land results in a requirement to clean up the land under instruction from the competent authority. The competent authority must verify that the land has been duly cleaned up and make a further declaration that the appropriate actions have been carried out. This further declaration should be reflected in the inventory of contaminated land.

Contaminated land may also be cleaned up through collaboration agreements between the responsible party for the clean-up and certain authorised entities.

The regime also includes obligations to prevent damage occurring and to notify any damage to the authorities.

Penalties

Failure to comply with the clean-up requirements imposed by the Autonomous Region, or breach of the public contracts for the remediation of contaminated land (*see above, Investigation and clean-up*) are considered very serious infringements. Sanctions that can be imposed include:

- A fine ranging from EUR45,001 to EUR1.75 million (or EUR300,001 to EUR1.75 million for hazardous waste).
- Disqualification from operating the facilities for a period between one to ten years.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

Under Law 26/2007, liability for the remediation of contaminated land initially lies with those operators that have exercised the activities described in Annex III of Law 26/2007, on environmental liability, which includes all activities included in the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive) (such as IPPC installations and various other high-risk operations).

Operators that exercise activities other than those described in Annex III are also liable for the clean-up of contaminated land where they have acted with wilful misconduct, fault or negligence. If there are multiple polluters, all of them are obliged to remedy the damage under the same conditions.

Owner/occupier liability

Operators exercising the Annex III activities described above are primarily liable for the clean-up of contaminated land.

However, under Law 22/2011, owners and occupiers of land (at the time the contaminating event or activity occurred) can be held liable for the clean-up of the contaminated land on a secondary liability basis, regardless of their fault or negligence if there is no operator or if the polluter cannot be found.

Subsequent owners or occupiers are only liable if they continue carrying out the relevant activity that is causing contamination or if the original polluting party cannot be found.

Previous owner/occupier liability

A previous owner who does not have liability as an operator or a polluter (as described above) is not liable to clean up contaminated land.

Limitation of liability

No person can be held liable for cleaning up contamination more than 30 years after the contaminating event occurred.

Law 26/2007 contains some complex provisions that determine various situations in which an operator cannot be held liable for land contamination (these are all derived from the provisions of the Environmental Liability Directive), such as force majeure, intervention of a third party causing the damage, and so on.

16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

Since the contaminated land regime establishes that only polluters or owners/occupiers are liable for clean-up, lenders are generally only held liable if they either:

- Become owners or occupiers of contaminated land, for example, when they execute guarantees under a financing agreement.
- Exercise sufficient control over the contaminating operator so as to be held responsible for its actions.

Minimising liability

It is essential for lenders to carry out detailed due diligence of the assets or of the company to be financed, in order to minimise their liability.

Once the potential environmental risks are identified, lenders usually obtain additional warranties from the borrower to mitigate these.

17. Can an individual bring legal action against a polluter, owner or occupier?

An individual landowner may bring a civil claim for damages against neighbouring landowners who have caused contamination to their land should the damage remain unremediated after the actions stipulated by the Autonomous Region have been implemented.

Individuals may also file a criminal complaint for damages against operators who cause contamination.

Environmental liability and asset/share transfers

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

When acquiring assets, any pre-acquisition liabilities associated with the assets generally remain with the seller. However, a buyer risks:

- Incurring secondary remediation liability if they continue the contaminating activity after the acquisition.
- Incurring secondary remediation liability as the owner or the possessor of the land.
- A civil claim if the contamination migrates to nearby land.

While the buyer is not jointly and severally liable for pre-acquisition infringements of the seller, any issues that must be addressed (or permits that must be transferred to lawfully continue the business after the sale) must be carefully considered.

Share sale

In principle, when acquiring a company's shares, the buyer also acquires any liabilities incurred by the target, as liabilities remain with the target after the sale.

A buyer will be concerned primarily about the risk of the target retaining liability for:

- Compliance with environmental laws and permits.
- Contamination on its current properties and on any properties it formerly owned, used or occupied.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

A seller generally remains liable for any pre-disposal liabilities relating to a breach of environmental law or an environmental permit. This includes any contamination caused by the seller before the sale. Even though a buyer can agree to assume these liabilities contractually, the public authority enforcing the law can act against the seller. If so, the seller will be liable to the authority but will be able to bring an action against the buyer.

Share sale

Liabilities incurred by the target before the sale remain with the target. Therefore, the seller does not generally retain any environmental liabilities after the sale. There is a small risk that the seller could incur joint and several liability with the target after the acquisition if, during its ownership of the target's shares, it has sufficient direct involvement in the target's activities so as to be held responsible for its actions (the corporate veil can be lifted in some such circumstances).

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

A seller of either assets or shares is generally not required by law to disclose environmental issues to a buyer. However, if the seller conceals environmental issues related to the target assets or the target company, the seller is liable to reimburse the buyer for any costs or losses incurred by the buyer. That said, the legal warranty period is short (30 days to six months depending on the type of contract), so the risk incurred by the seller is relatively low.

Additionally, a seller can be liable to the buyer if, in bad faith, it makes a misrepresentation or misleads the buyer through its conduct. There are different consequences, depending on the categorisation of its conduct:

- If the conduct of the seller is deemed to be "General Wilful Misconduct" (*Dolo Principal*) and is of a serious nature (where the buyer is blameless), it renders the contract void.
- If the conduct of the seller is less serious and deemed to amount to incidental fraud (*Dolo Incidental*), it allows the buyer simply to claim damages from the seller.

21. Is environmental due diligence common in an asset sale/a share sale?

Environmental due diligence is common in asset sales and commercial transactions whenever there is an environmental element.

Scope

Environmental due diligence carried out in the context of an asset sale in Spain is usually aimed at verifying that all environmental permits, licences and authorisations have been duly obtained, and that the conditions imposed on them (such as prevention measures and information obligations) are being complied with. An overview is also usually provided of the obligations included in the relevant permits, licences and authorisations, and the sanctioning regime applicable to the activities carried out by the assets to be sold/acquired. Likely liabilities that might be incurred by the seller/purchaser are also commonly investigated.

Types of assessment

The most common environmental due diligence is carried out by legal advisors, and is in line with the scope detailed above. In addition, environmental consultants typically conduct a more in-depth analysis of the environmental aspects in a commercial transaction.

Environmental consultants

Environmental consultants are often instructed by purchasers to carry out assessments relating to the relevant environmental permits, licences and authorisations and possible contamination relating to the activities carried out by the asset to be sold/acquired, and to carry out preliminary environmental due diligence reports, which are then passed on to the legal advisors.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

Environmental warranties are usually given by sellers in asset/share sales. The issues they cover depends on the circumstances of each transaction (such as the bargaining power of the parties, nature of the target's business, issues discovered during the due diligence process, likelihood and importance of other environmental issues, and so on).

Asset sale

The most common warranties in an asset sale are that:

- The industrial processes used by the business comply with all applicable regulations, including holding all necessary permits, licences and authorisations.
- The business has not been involved in any activity that could potentially contaminate the land.
- The assets being transferred are not located in environmentally protected areas, and the assets are not located on land listed as or declared contaminated.
- The business has met all legal requirements in relation to Environmental Impact Assessment.
- No environmental proceedings or third-party claims have been brought against the business, and no sanctions or penalties have been imposed.
- The business has taken out insurance policies to cover any environmental damage.

Indemnities can be given by the seller and these usually refer to specific issues identified during the due diligence process (both in asset and share sales).

Share sale

A similar set of warranties and indemnities is given in share deals. However, as the target will be liable for any environmental damages caused before the transaction, additional warranties are usually obtained, such as that:

- The target is under no obligation to remedy any kind of environmental damage or pay any indemnification for such damage.
- The seller is unaware of any environmental incident that may have occurred that could entail liability of the target.

23. Are there usually limits on environmental warranties and indemnities?

There are nearly always limits on environmental warranties and indemnities, including:

- **Time limits.** These depend on the nature of the environmental issues covered, but usually refer to the period of underlying liability under the statute of limitations.
- **Financial limits.** Financial caps usually apply to all warranty claims (including environmental claims) and are usually set as a percentage of the purchase price.
- **Other limits.** Environmental claims are usually limited to those events occurring before completion of the transaction. In addition, sellers try to limit their liability under the warranties by reference to their materiality and the seller's awareness.

Reporting and auditing

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Public registers

Public authorities must keep public registers of environmental information, such as pending authorisation procedures, declared contaminated land, and so on. These registers can be inspected by any member of the public. More generally, public authorities must take the necessary steps to ensure that environmental information progressively becomes available in electronic databases that are easily accessible to the public (including by easy access online). Most of the Autonomous Regions publish the grant of environmental authorisations or other relevant environmental documents on their websites.

Third party procedures

Anyone can request environmental information from the relevant public authorities, without the need to prove an interest. The public authority will provide the requested information within one month, unless any of the exceptional circumstances apply that allow the public authority to refuse the request. These include when the provision of such information may negatively affect international relationships, national defence, public security, confidentiality of commercial or industrial data, or confidentiality of personal data.

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

Environmental auditing is not compulsory. However, the voluntary EMAS European eco-management and eco-audit scheme has been implemented, and companies that join this European scheme obtain a series of benefits. Under this scheme companies must regularly provide environmental information through an Environmental

Statement (a public document that is clear and concise and includes reliable, objectively verifiable information on the organisation's environmental performance).

Benefits for leadership and corporate image include:

- Support and improvement of the corporate image.
- Greater credibility and confidence for stakeholders, such as public authorities, the general public, shareholders, employees and other clients.
- Improved relations with the local community because of the public nature of the Environmental Statement.

Certain Autonomous Regions have also awarded grants to companies that have joined this scheme.

Reporting requirements

Companies subject to environmental authorisations must submit to inspections of their activities by public authorities and the provision of operational information (including for example, reporting data on emissions from their facilities). They also have obligations, for example in relation to changes to the facilities, which must be notified to the regulators.

Operators producing waste must provide the competent authority with information on the waste generated each year.

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

The owners of facilities must immediately inform the competent authority of any incident or accident that may affect the environment, and provide the necessary assistance and co-operation to those who perform monitoring, inspection and control functions.

Failure to inform the competent authority of any incident or accident, and the prevention, delay, or obstruction of inspection or monitoring are considered serious breaches of the law, and parties may be liable to:

- A fine ranging from EUR20,001 to EUR200,000.
- Temporary closure of the premises for a maximum of two years.
- Withdrawal of the authorisation for a maximum of one year.

Companies are not required to inform the public. However, where there is an imminent threat to human health or the environment caused by human activities or natural causes, public authorities must immediately and without delay communicate all information to the public.

27. What access powers do environmental regulators have to access a company?

Each Autonomous Region has its own regulations with regard to the powers of inspection and control. However, every Region's inspectors can access facilities at any time and without prior notice for inspection purposes, specifically to obtain necessary information, documentation and samples. In some cases, Autonomous Regions have empowered inspectors to instruct the operators to implement certain preventive measures.

Environmental insurance

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

Environmental insurance is available to cover:

- Environmental damage caused by pollution to natural resources (covering obligations to prevent, mitigate and remedy such damage under the environmental liability regime set out in the Environmental Liability Directive, Law 26/2007 and Law 22/2011) (*see Question 15*).
- Other types of land remediation (relating to ongoing operational pollution liability).
- Civil liability caused by pollution, other than that which is provided for in the regulations regarding environmental liability in Law 22/2011 and Law 26/2007.

Insurance for historical contamination is not usually available, as the policies normally cover events that occur from the date the policy was entered into.

Typically, operators seek specific environmental insurance because it is either limited or excluded from general operational and building insurance policies.

Obtaining insurance

There are specific products offered by most insurance companies covering environmental damage, and it is therefore relatively easy to obtain. These policies are frequently used by companies with environmental risks.

Environmental tax

29. What are the main environmental taxes in your jurisdiction?

There are no state environmental taxes applicable in Spain, although the Spanish government recently announced that a new state tax applicable to energy generators will be approved shortly. However, there are a wide range of environmental taxes established at a regional level by the Autonomous Regions.

Reform

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

After a significant wave of new environmental laws adopted in the past year (*See Question 1*), no significant reforms of the state environmental legal framework are currently being considered by the state government. However, the legal regime applicable (this article does not consider reforms that may be progressing in each Autonomous Region) may vary.

The regulatory authorities

Ministry of Agriculture, Food and Environment

Main activities: The Ministry of Agriculture, Food and Environment is responsible for matters related to environmental quality and evaluation, climate change, farming, fishing, food, biodiversity, rural development, water, coasts and marine environment, at a national level.

W *www.magrama.gob.es/es/*

National Parks

Main activities: The autonomous body National Parks is in charge of the co-ordination and development of the network of national parks in Spain.

W *www.magrama.gob.es/es/organismo-autonomo-parques-nacionales-oapn/default.aspx*

Online resources

W *www.magrama.gob.es/es/calidad-y-evaluacion-ambiental/legislacion/*

Website of the Ministry of Agriculture, Food and Environment containing updated legislation regarding the different areas of environmental control. Only some English versions of the documents are available, and these are only for guidance.

Appendix: Author details

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