

# Spain

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### 1 Environmental Policy and its Enforcement

#### 1.1 What is the basis of environmental policy in Spain and which agencies/bodies administer and enforce environmental law?

Spanish environmental policy has its basis in Article 45 of the Spanish Constitution, which sets forth the right to enjoy an appropriate environment and imposes on everyone a duty to preserve it. This Article also obliges the Spanish authorities to ensure a rational use of natural resources, with the aim of protecting and repairing the environment, and determines that criminal or administrative sanctions shall be imposed in the case of a breach of environmental law. In addition, the Article provides that offenders will have the obligation to repair the damage caused.

Spanish environmental legislation is also based on the principles of the European Community in this matter. One of the most important of those principles is the “polluter pays principle” (i.e. the subjects responsible for polluting the environment must pay the cost of remediation). Moreover, prevention is becoming another of the main aims of environmental policy.

The power to enforce environmental legislation pertains to national, regional and local bodies. In this regard, the Ministry of Environment and Rural and Marine Affairs, the Ministry of Industry, Tourism and Trade and the Ministry of Health and Consumer Affairs have responsibilities in the preparation of basic legislation (legislation that is common to the whole State and that sets forth the minimum levels of compliance to be met by all regions), including transposing EU Directives, and they regulate and coordinate matters that have an impact in more than one Autonomous Region.

As for Autonomous Regions, they are entitled to implement the environmental plans, to develop the basic legislation passed by the State, and to enforce most environmental legislation, including the power to grant most environmental permits.

In addition, municipalities also have environmental responsibility in matters such as air and noise pollution, or granting licences that authorise the start-up of the operation of industrial activities.

Furthermore, there are a number of independent agencies, such as the Water Basin Authorities (*Confederaciones Hidrográficas*) and the Autonomous Body of National Parks, that are empowered to enforce legislation in their specific areas. Other relevant authorities are the specialised offices of the Public Prosecutor for environmental matters and a special division of the Spanish Police, the Environmental Protection Service (*Servicio de Protección de la Naturaleza, SEPRONA*).

#### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Authorities in charge of supervising compliance with environmental laws are becoming more active in their inspection duties and stricter in the interpretation of environmental legislation. In general terms, both the human and technical resources of the authorities have increased during the last years.

#### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

According to article 7 of the Law 27/2006 of 18 July on the right of access to information on the environment, which implements EU Directives 2003/4 and 2003/35, public authorities shall disclose all the information that they have concerning, among other things: (i) legislation and international agreements about the environment; (ii) programmes, plans and policies regarding the environment and the reports on their developments; (iii) authorisations and agreements with a significant effect on the environment; and (iv) the environmental impact assessments and the assessments of the risks for the status of air and the atmosphere, water, soil, landscape, etc.

Notwithstanding the above, article 13 sets forth that the authorities shall deny by means of a justified decision, access to, and cannot publish environment-related information when disclosing such information may affect in a negative way, for example: the confidentiality provided in the legislation for administrative or judicial proceedings in course; the confidential nature of the relevant information (e.g. information protected as a commercial or industrial secret or information that affects national security); or when the request can affect international relations.

### 2 Environmental Permits

#### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

In general terms, each activity that may affect the environment will need a permit for each of the impacts that it produces (e.g. for air emissions, wastewater discharge, waste, etc.).

Without prejudice to the above, the Law 16/2002 of 1 July, on IPPC Permits, establishes that the building, assembly, exploitation, removal or substantial modification of facilities that carry out activities that could have a significant impact on the environment are subject to only one environmental permit (except those that emit

greenhouse gases, which need an additional permit), which evidences that the facility complies with all applicable environmental regulations and specifies the conditions imposed for its operation.

Given that permits are usually granted for operating a specific facility, the conditions of the permit are linked to the particular circumstances of such facility. Thus, permits can only be transferred with the transfer of the facility or of the company that owns it.

## 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

In both cases, interested persons are entitled to challenge that decision. Depending on the status of the proceedings, such challenge will be done before the same or another administrative body or before a contentious-administrative court.

## 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

### *Environmental Impact Assessments (EIA)*

Projects which may have significant consequences for the environment and which are included in the applicable legislation (in particular, at a national level, Legislative Royal Decree (LRD) 1/2008 of 11 January, on environmental impact assessments of projects) are obliged, before they can obtain any permits that they need, to carry out an environmental impact study, which shall contain a description of the project, the environmental reasons that justify it, an analysis of the anticipated environmental effects, an explanation of the measures to reduce, eliminate or compensate these effects, and an environmental vigilance plan, according to article 7 of LRD on EIA. This study is the basis upon which the authorities draft an EIA determining the conditions for authorising the project.

In addition, Law 9/2006 of 28 April, on the environmental effects of plans and programmes, also needs to be considered. Plans and programmes are Administration's strategies, guidelines and proposals to satisfy social necessities by means of a group of projects. The legislation applicable to the relevant plans and programmes will incorporate the environmental assessment in their administrative implementation procedure. This procedure includes an environmental sustainability report, which shall contain a description of the significant environmental effects and the alternative solutions to these effects.

### *Environmental Audits*

Environmental audits (EA) differ from EIAs in two main ways. First of all, the main objective of an EA is to analyse the environmental management system of an existing company and to assess the company's compliance with it.

Secondly, EAs are voluntary. Thus, companies, both public and private, are allowed to voluntarily join an EU Eco-Management and Audit Scheme (EMAS) for the evaluation and improvement of their environmental performance, as provided in Regulation (EC) No. 761/2001 of the European Parliament and of the Council of 19 March 2001.

Participating in EAs can have positive consequences for the relevant company from a legal perspective. In this regard, and according to article 24 of Law 26/2007 of 23 October, on Environmental Liability (**Law on Environmental Liability**), the operators of a number of activities described in the Law must

provide a financial guarantee to face the environmental liability inherent to such activities. In some cases, the operators will be exempt from providing the financial guarantee if they justify adherence to the EMAS system or UNE-EN ISO 14001:1996 system.

## 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

The enforcement powers of regulators consist in the possibility of carrying out inspections and initiating disciplinary proceedings.

Once the disciplinary proceedings have been initiated, regulators are also entitled to take several measures that can be maintained up to the end of the proceedings in order to stop the risk or the damage caused by the violation of the permit, including closing the premises, stopping the activity carried out or temporarily suspending the permit.

Sanctions may consist, depending on the seriousness of the infringement, of one or more of the following: (i) a fine; (ii) temporary or permanent closing of the premises; (iii) suspension or removal of the permit for a determined period; and (iv) giving publicity to the sanction and to the name of the offender by such means as the authorities may deem appropriate.

The regulator can also impose on the offender the obligation to repair the damage caused to the environment.

Furthermore, in the event that a regulator considers that the violation of a permit might constitute a criminal offence, it shall inform the Public Prosecutor. If criminal proceedings are initiated, administrative proceedings shall be suspended until the criminal court passes a resolution on the case.

## 3 Waste

### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Law 10/1998 of 21 April on Waste (the **Law on Waste**) defines "waste" as "*any substance or object that belongs to any of the waste categories listed in the annexes of this piece of legislation, and of which its holder disposes of or has the intention or obligation to dispose of. In any case, it will be considered waste those that are listed in the European Catalogue of Waste, enacted by the Community Institutions*".

In this sense, the Law on Waste defines two main categories:

- Urban waste: that originating from private domiciles, shops, offices and services, and other types of waste that are not considered hazardous (e.g. waste from cleaning the streets, dead pets, abandoned furniture or that coming from small construction or repair works).
- Hazardous waste: those substances or objects catalogued as such by Spanish or European Community regulations or international conventions. Substances that in certain amounts or levels become a risk to human health or the environment are commonly regarded as hazardous waste. This type of waste is subject to stricter obligations and the management, transport, collection and storage are subject to a previous authorisation.

Other categories of waste which are subject to additional duties or controls are packaging waste, electrical and electronic equipment waste, batteries and accumulators waste, tyres, obsolete vehicles and industrial oils.

### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The Law on Waste imposes on the holder of waste the obligation, unless it is legally processing the waste itself, to give it to a waste manager (*gestor de residuos*) or to the local authorities, and to preserve waste in adequate conditions of hygiene and safety, and, as the case may be, in special areas and duly labelled, while being in its possession.

As to the recovery (*valoración*) and disposal (*eliminación*) of waste, producers are only entitled to carry out such activities if they hold the corresponding administrative authorisation.

Nevertheless, Autonomous Regions can enact pieces of legislation that render exempt from this authorisation companies that dispose of or recover their own non-dangerous waste in their production centres.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

No, if they have duly transferred waste to an authorised waste manager or to the local authorities, depending on the type of waste. In these cases, waste managers or local authorities become liable for the waste that they have received.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The Law on Waste entitles the Government to enact legislation that obliges producers, importers or EU buyers, agents or any subject responsible for putting on the market products that become waste to choose between: (i) being directly responsible for processing the waste produced by their own products; (ii) participating in an organised waste management system; or (iii) contributing to a public waste management system. Alternatively, a system by which the final consumer, when receiving the product, deposits an amount that will be recovered when returning the package or the product may be imposed.

As a way of example, legislation regulating electrical and electronic equipment waste, batteries and accumulators waste and packaging waste have followed these possibilities.

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Depending on the infringement, criminal, civil or administrative liabilities can arise.

Should the breach be deemed a criminal offence, the offender may be punished with up to four years' imprisonment, a fine and disqualification from his professional activities for up to three years. Moreover, the punishment can be increased when certain circumstances occur, e.g. if the installation has not obtained the relevant administrative approvals, or if the inspections of the public entities have been obstructed, etc. In addition to criminal liability, the offender may be held liable for damages caused, the court may order the adoption of measures at the expense of the offender for the recovery of the damaged environment and the premises involved in the criminal offence may be definitively or temporarily (in this case,

up to five years) closed.

The main defences available are proving that the defendant: (i) did not take part in the action or omission; (ii) was not aware of (provided that the defendant was not negligent), or could not prevent the facts leading to the criminal offence; or (iii) adopted all the necessary measures to try to avoid the commission of the criminal offence.

As to civil liability, it can arise when a failure to comply with environmental regulations entails damage or prejudices to third parties, who will be entitled to claim compensation.

However, the defendant could allege: (i) that the causal link between its breach of environmental laws or permits and the damage or prejudice has not been proven; and/or (ii) that the claimant's actions or omissions contributed to the damage or prejudice and, therefore, that the claimant is not entitled to receive compensation or that it has to be reduced.

Administrative liability has already been described in answer to question 2.4 above. Available defences are mainly those regarding procedural breaches that might have occurred during the administrative proceedings, and, as the case may be, regarding the interpretation of the technicalities of applicable laws.

### 4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

The Law on Environmental Liability imposes a strict liability regime for the environmental damages defined as such in the Law (damages to protected species and natural habitats, water damage, damages to the coastline and land damage) when those damages are caused by activities included in its Annex III (those that have a significant environmental impact). In this regard, obligations are imposed on operators regardless of fault, fraud or negligence in their behaviour.

As a consequence, operators included in Annex III always have the obligation to adopt and carry out any preventive, avoidance or reparative measures and to anticipate their costs, whatever the amount, unless the environmental damages were caused (i) by a third party beyond the control of the operator of the relevant activity or (ii) by reason of compliance with orders and instructions from public authorities. In these cases, the operator may have to anticipate the costs of the necessary measures but will be entitled to recover them.

Reparative measures may also be avoided by Annex III activities in case: (i) the emission or the activity that caused the environmental damage is the specific object of an administrative authorisation granted according to the applicable legislation and which has been strictly complied with; or (ii) the damage was caused by an activity, emission or product that, at the time of use, was not considered by expert opinion then available to be potentially damaging to the environment (this second exception is available for all types of activities).

When damages are caused by activities not included in Annex III, preventive and avoidance measures will have to be adopted in all cases, while reparative measures will only be necessary in case of fault, fraud or negligence.

Injuries caused to persons, damages to private property, economic losses or rights related to the mentioned types of damages are not covered by the Law on Environmental Liability. However, the damaged party may be entitled to claim compensation under other legal regimes, as we will describe later. Compensation for civil liability claimed by a third party may be imposed even if the activity operates within permit limits.

#### 4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Criminal liability cannot be attributed to a legal entity, but only to individuals. As a consequence, in the case that a criminal offence has been committed by the actions of a company, its directors, managers or employees could be held criminally liable.

From an administrative perspective, liability will be imposed on the company in most of the cases. However, the Law on Environmental Liability provides that the managers and directors of the penalised company may be held subsidiary liable for the obligations imposed by such legislation and for the corresponding economic obligations, according to its article 13, in case that: (i) their behaviour has been decisive for the facts leading to the liability of the company; and/or (ii) in case that the legal entity has discontinued its activities, they will be responsible for the obligations pending under this legislation if they have not adopted all of the measures necessary for complying with such obligations.

With respect to civil liability, if the legal entity is penalised, the legal entity itself, its shareholders and its creditors may initiate civil proceedings in order to claim that personal liability of the directors should apply, provided that such directors have acted against the law, the company's by-laws or without the necessary diligence.

Regarding civil and administrative liability, officers and directors could be insured against claims arising from their wrongful acts. However, if liability arises out of the malicious conduct (*conducta dolosa*) of the officer or director, the insurer could claim the reimbursement of sums actually paid to the injured party.

Concerning criminal liability, as it is personal, it cannot be transferred to another person or to an insurance company.

#### 4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

##### Share Sale

Acquiring a company by share purchase implies that there is no change in the holder of the activity or installations that have caused an environmental liability to arise. As a consequence, it will be the acquired company that is liable (except regarding criminal offences) for any breach of environmental laws or any damage caused, whether it was caused before or after the sale and purchase of its share capital.

With respect to the permits, in general terms, no action will be required.

##### Asset Sale

In general, once the asset sale is performed, the seller's liability will be deemed terminated and the buyer's liability shall begin. However, there are certain exceptions to this general principle, such as when hidden defects that affect the sold assets are detected, or in cases of historical contamination of soil (explained in question 5.4).

Moreover, it is a general requirement to notify the transfer of the asset to the relevant authority and, depending on the particular piece of legislation applicable to the matter, to comply with other obligations. As a way of example, the transfer of the authorisations to produce or manage hazardous wastes is subject to a previous inspection by the competent authority.

#### 4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Under Spanish law there is no specific action through which an injured party may file a claim against a lender arising from environmental damages caused by a borrower. However, the Law on Environmental Liability states that operators whose activity has caused environmental damage or an imminent threat of such damage are to be held financially liable, and it defines an operator as “any natural or legal, private or public person who operates an economic or professional activity or, by any means, controls or has any economic power over such activity that is a determinant factor for its technical operation”.

Thus, in theory, if a lender had economic power over the technical functioning of an activity that caused environmental damage, such lender could eventually be held financially liable. Notwithstanding the foregoing, the Law on Environmental Liability also states that for determining who the operator of the activity is the provisions that establish who is the holder of the necessary permits, authorisations and registrations shall be taken into account. Thus, the real scope of these provisions will have to be clarified by the interpretation of such article by administrative bodies and courts.

## 5 Contaminated Land

### 5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

#### Soil

The Law on Waste has established a “cascade liability system”. In this sense, should contamination be detected, the following subjects shall be responsible for the cleaning and recovery of the contaminated land: first of all, the subject that caused the contamination; secondly, the holder of the contaminated land; and thirdly, the owner that is not the holder of the land.

The above is not applicable to creditors that become owners of contaminated land as a result of enforcement proceedings followed against their debtors, provided that they sell the relevant plot of land within one year from the moment when they acquired it.

#### Groundwater

Legislative Royal Decree 1/2001 of 20 July, which approves the Law on Waters, provides that those who pollute groundwater will be responsible for the corresponding administrative sanction and for repairing the environmental damage. Moreover, the Law on Environmental Liability also contains provisions on this matter, as described above.

### 5.2 How is liability allocated where more than one person is responsible for the contamination?

In general terms, liability will be joint when there are several responsible persons and it is not possible to determine the level of contribution to the damage of each of them. When it is possible to determine the degree of liability of each of them, the competent authorities can attribute this liability individually along with its economic effects.

### 5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

When a piece of land has been declared contaminated, the authorities have to verify that the decontamination works have been

sufficient to meet the criteria contained in Royal Decree 9/2005 of 14 January, on activities that could potentially damage the soil and the criteria for declaring soil as contaminated (the **RD on Soil**), for a soil to be safe for its use.

As a consequence, if the authority considers that the soil does not comply with the mentioned criteria, it will not render the necessary decision declaring the soil decontaminated and, instead, it will request additional works.

Moreover, any third party who shows that its rights or interests are affected by the administrative decision adopted with respect to the soil could bring a challenge against the decision rendered by the regulators to enter into the agreement.

#### **5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?**

Assuming that the plot of land has not officially been declared as being contaminated (as in that case liability for the costs of recovery will be determined by the authorities) the new owner of contaminated land will have a civil action against the seller or previous owner on the grounds of hidden defects in the event that the existence of contamination was not disclosed and was neither patent nor visible.

However, the seller shall not be liable for patent or visible defects, or for those which are neither patent nor visible where the purchaser is an expert who, by reason of his profession, ought easily to be aware of them.

If the seller was aware of the hidden defects in the asset sold and did not reveal them, the purchaser may opt between rescission of the contract, with reimbursement of the expenses paid by him and compensation for damages, or a proportional reduction of the price.

The seller will not be liable for hidden defects of which he was not aware if such provision has been included in the sale and purchase agreement.

With regard to the possibility for a polluter to transfer the risk of contaminated land liability, the agreements on that regard will only be valid and enforceable between the parties, but such agreements will not alter the liability of the polluter before the relevant authorities.

#### **5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?**

Some pieces of legislation entitle authorities to make the authorisation of projects conditional upon compliance with certain conditions concerning the landscape or protect natural areas due to their importance, but there is no general provision for monetary compensation for aesthetic damages. However, the obligation to restore and remedy environmental damages can be interpreted as an obligation to fully remedy the relevant area, including, when possible, its aesthetic values.

## **6 Powers of Regulators**

### **6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?**

Regulators have wide powers to carry out inspections. It is possible

for such regulators to conduct site inspections, take samples, require the production of documents, etc., and those responsible for the installation that is being inspected are obliged to cooperate with the inspectors.

The facts resulting from the inspection, duly documented by the inspectors, are presumed to be true, without prejudice to the possibility of filing evidence against them during subsequent proceedings.

## **7 Reporting / Disclosure Obligations**

### **7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?**

According to articles 9.2 and 17 of Law on Environmental Liability, the operators of any commercial or professional activities under this regulation are obliged to disclose immediately to the public authorities any environmental damages or the imminent threat of such damage. Non-compliance with the aforementioned regulation, may result in a violation of operator's obligations and be sanctioned with fines of up to Euro 50,000 and the removal or suspension of the permit for a determined period.

### **7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?**

Those that carry out activities listed in the RD on Soil should have filed with their Autonomous Region a preliminary report of the situation of the land before February 2007. This preliminary report should not imply an intrusive investigation of the land, but rather it should be drafted from previously existing information. Once the Autonomous Regions have reviewed the preliminary report, they can request complementary reports and the performance of analysis in order to determine the status of the land and the proceedings may eventually lead to declaring the soil as contaminated.

Furthermore, holders of the activities listed in the RD on Soil shall report periodically about the situation of the land. The content and the recurrence of these reports will be determined by the Autonomous Regions.

In addition, the owners of properties where these activities have been developed shall file a report of the situation of the land when a licence or authorisation for changing the activity of the property is requested.

### **7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?**

In the context of a sale and purchase agreement, the seller has a duty to disclose to a prospective purchaser the environmental problems of which it is aware, on the basis of the principle of good faith that should govern any commercial relationship.

In this regard, a lack of information that could be relevant for the transaction could lead the buyer to file actions requesting the nullity of the agreements, alleging that his consent should not be considered valid, as it was given without the necessary information or obtained in an improper way by the other party by means of hiding information.

In addition, and as mentioned in question 5.4 above, not informing of hidden defects of which the seller is aware can lead to additional liabilities.

## 8 General

### 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

Environmental indemnities can be used in order to limit the purchaser's liability regarding the seller's failure to comply with environmental regulations. However, environmental indemnities only have effect between the contractual parties and not before the authorities.

### 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Under Spanish laws on accounting, environmental liabilities shall be included in the balance sheet and, if they have implied a significant expense, also in a determined section of the profit and loss account and expressly mentioned in the report (*memoria*). In addition, other environmental information shall also be included in the report, such as contingencies related to the protection and improvement of the environment, providing, if possible, a quantified estimate of their possible financial impact.

As to dissolution in order to escape environmental liabilities, for the liquidation of a company it is necessary to appoint a liquidator who will prepare a report, sent to all creditors, setting out the financial situation at the date of liquidation.

Once the above has been done, the assets of the company are collected and sold to the benefit of the creditors, and the remaining amounts are distributed to the shareholders in proportion to their stakes in the company.

If the company is dissolved before a sanction is imposed and a subsequent environmental liability arises, the shareholders will be liable up to the amount received for their stake in the capital of the company.

If the shareholders initiate a liquidation process after a sanction is imposed, the fine should be considered as a liability within the liquidator's report, and the relevant authority imposing the fine will be considered as a creditor. Thus, the company's assets will be used to pay the fine.

### 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

As to administrative liability, subjects responsible for the infringements will be those persons or legal entities that committed them. However the Law on Environmental Liability provides in its article 10 that parent companies can be held liable for damage caused by their subsidiaries when the authorities deem that acting through the subsidiary entailed fraud or abusive use of the affiliate legal entity.

Concerning civil liability, Spanish Law provides that affiliate companies form independent legal entities separate from their parent companies. Nevertheless, if the affiliate company has been created or used for actions that entail fraud, Spanish courts have recognised the possibility of applying, on a case-by-case basis, the

"lifting of the veil" doctrine, in order to disregard the affiliate legal entity and avoid the abuse of such independence. This means that the shareholders of the affiliate company could eventually be held liable for its acts.

Criminal liability can be imposed on any individual who, from a factual perspective, manages the company that has committed the infringement, thus including shareholders or directors of a parent company.

### 8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Spanish laws do not provide protection for "whistle-blowers" regarding environmental matters.

### 8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Consumer associations and groups of consumers who have suffered damage caused by the same circumstances may seek compensation for such damage in a civil procedure. In addition, consumer associations or those created for the protection of the environment may be deemed interested parties in administrative proceedings if they can prove that they have a legitimate interest in those proceedings.

In addition to the above, the Law on Information on the Environment has created a new public action that allows non-profit entities dedicated to protect the environment to pursue before the Public Administration and before contentious-administrative courts the majority of infringements to environmental laws, even without evidencing a legitimate interest in the outcome of the case.

With regard to criminal procedures, all victims of the same environmental criminal offence are entitled to act as accuser in the same procedure and be assisted by the same lawyer.

There are no penal or exemplary damages available under Spanish law.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in Spain and how is the emissions trading market developing there?

The Law 1/2005 of 9 March, on Greenhouse Gases creates a market, integrated with the EU market of allowances, where allowances for the emission of greenhouse gases can be traded.

Further to the development of this market, Spain has already passed the National Allocation Plan 2008-2012 (*Plan Nacional de Asignación de Derechos de Emisión 2008-2012*). The main purpose of this plan is that emissions do not exceed, at the end of the period, more than 37% of the emissions of the base year (1990). It shall be noted that Spain was only authorised to increase its emissions by 15% according to EU Decision 2002/358 EC, of the Council, of 25 April 2002. Allowances that will be allocated following the National Allocation Plan 2008-2012 shall amount to an aggregate of 152,25 Mt CO<sub>2</sub>/year, which implies a reduction of 19.3% with respect to the emissions of 2005 (189.85 Mt).

## 10 Asbestos

### 10.1 Is Spain likely to follow the experience of the US in terms of asbestos litigation?

It is not likely, as Spanish civil law and its procedural system have important differences from US law and procedures (e.g. compensation awarded in Spain until now has been considerably smaller than that awarded in the US).

Currently, the majority of legal decisions regarding asbestos in Spain are related to work-related accidents or illnesses.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The situation of the asbestos-containing materials should be checked and, if required, such materials should be removed in order to ensure that there is no risk to the employees' health or to the environment. The removal shall be done ensuring that it causes no contamination, and wastes shall be treated as hazardous wastes.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Spain?

The role of insurance to cover environmental risks has, until recent times, been limited. However, this circumstance is likely to change during the next years.

In this regard, according to the Law on Environmental Liability, operators included in its Annex III will have to provide a financial guarantee, to be determined on a case by case basis with a maximum of €20,000,000, to cover the environmental liability foreseen by such Law. One of the ways of complying with such obligation will be to subscribe an insurance policy for such purpose. According to the Fourth Final Provision of the Law on Environmental Liability, the date from which the financial guarantee will be necessary shall be determined by an Order of the Ministry of Environment, but this Order will not be passed before 30 April 2010.

Given the above, the Spanish Pool of Environmental Risks (*Pool Español de Riesgos Medioambientales*, which is an Economic Interest Grouping incorporated in 1994, comprising the main

insurance and reinsurance companies operating in Spain and aimed at facing the environmental risks of companies) has substituted the environmental insurances that it offered for one single policy, which covers the liability foreseen in the Law on Environmental Liability. This basic policy may be complemented with the coverage of the expenses for decontaminating the own soil of the insured party and/or with the coverage of civil liability for the damages to people, property and economic prejudices caused by contamination.

### 11.2 What is the environmental insurance claims experience in Spain?

The experience existing in Spain of environmental insurance claims decided by the courts is limited. In the existing precedents, the courts have mainly analysed the terms of the insurance policies in the light of the information available to the insurer when the policy was subscribed (e.g. if the insurer should have been aware of the risks it was insuring) and whether the relevant facts took place within the period covered by the policy in order to determine if the insurer is liable for the amounts claimed.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Spain.

The main focus of the Spanish Government for the recent past and probably for the following years regarding environment law is climate change and specially the reduction of emissions of greenhouse gases. This said, the worldwide financial turmoil suffered in 2009 has taken legislative priorities elsewhere other than environment legislation.

Nonetheless, significant amendments in order to simplify administrative proceedings and reduce interference between administrations (i.e. central and autonomous) regarding environmental competence have been carried out by means of Law 25/2009 of 22 December, also known as Omnibus law. The Law on Environmental Impact has been also modified in this same direction by means of Law 6/2010.

Further regulation is expected throughout 2010, mainly through the transposition of EU directives 2009/28 and 2009/29 (also known as the green package) and the enactment of the Sustainable Economy Act which is currently being discussed in the Spanish Parliament.

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Vicente Sierra is partner responsible for the Spanish Dispute resolution practice. Prior to joining Freshfields Bruckhaus Deringer in 1998, he was a partner at the Madrid law firm Hervada & Klingenberg where he handled domestic and cross-border commercial litigation and arbitration matters, acting for national and international clients.

He has considerable experience in commercial litigation and arbitration, both domestic and cross-border, this field of international litigation and arbitration being his main area of practice. Vicente has a consolidated reputation in product liability matters and has been frequently recognised for his dedication and knowledge in matters of this nature. He has worked for numerous first class national and international clients from different business sectors.

He is currently responsible for the defence in Spain of a major international tobacco manufacturer as well as top tier energy, oil, pharmaceutical and chemical multinationals. Vicente is listed in Chambers as an expert in Dispute Resolution. He is also listed in Legal 500.

Vicente speaks Spanish, English and French. He studied Law at the Universidad Complutense de Madrid. He is a member of the Madrid Bar Association and the New York State Bar Association.

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Christian Castellá is a senior associate in the Madrid Dispute Resolution department. Prior to joining Freshfields Bruckhaus Deringer in March 2002, he worked in firms such as Baker & McKenzie and Bufete Socorro Grau where he acquired experience and know-how in the areas of commercial litigation, and intellectual and industrial property.

Christian has broad litigation experience in proceedings before courts and arbitration tribunals (both nationally and internationally), and in civil and commercial matters, as well as in pre-contentious matters. His practice covers advising both international and national clients relating to areas such as business collaboration agreements (e.g. agency, distribution, franchise and joint venture), product liability matters, corporate matters in relation to shareholder and creditor disputes (e.g. directors' liability) as well as trade mark protection and unfair competition claims.

Christian has a Law degree from the Universidad de Barcelona (Abad Oliba) (1996). He has a Masters in Law from the Instituto de Empresa (Madrid, 1997) and an LLM in Intellectual Property from Queen Mary & Westfield College (London, 2000). He is a member of the Barcelona Bar (*Colegio de Abogados de Barcelona*), as a practising lawyer, since October 1996.

Christian speaks Spanish, Catalan, English and German.

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