Risk management and environmental liability

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1. Introduction

In the dawn of applying risk management technique, the main aim was to protect the profit and loss account of companies by using and developing an assortment of applicable techniques involving identifying, assessing, eliminating, mitigating or ultimately transferring risks to specialist third parties and calling on the latter option as a suitable supplement when the previous measures referred to were ineffective or not possible in their entirety.

Fortunately, with the passing of time, we have witnessed the appearance of huge advances generally and, with this, similarly spectacular developments in the area of risk management, featuring the identification of emerging risks, new tools becoming available and the application of new concepts with broader aims than those mentioned earlier. This is why the definition of risk management keeps on growing and now we find ourselves faced with situations that seek to protect not only the profit and loss accounts of companies, but also other capital elements such as assets, which are the core of activities; employees, which are the key engine of the business; suppliers, who are key partners in the process; the social and economic environment in the geographies in which operations take place; environmental awareness; corporate social responsibility; business reputation and ethics, and a whole raft of issues of a markedly strategic nature, such as an emphasis on nurturing talent and excellence, knowledge transfer, attracting and managing to retain crucial employees, sustainability, recycling, the circular economy, etc.

This said, and running a basic analysis, we start from the assumption that our business activities have their geographical origins in Europe and can extend at some later date to any corner of the world, which initially and fortunately provides us with a regulated environment (to a greater or a lesser degree) which leads to legal security in initiating business transactions. This, together with the new protective techniques being developed in the field of risk management, allows us the precise guarantees with which to take on substantial dealings and ambitious business projects that are properly managed with the objective of achieving steady progress that lets us create wealth and accompany the development that society demands, with the host of changes and advances taking place that will go on occurring within a relatively brief time-span according to all forecasts.

For educational purposes as regards risk management, it is important to reiterate the distinction between environmental liability and pollution liability.

Environmental liability exclusively refers to damage to natural resources (wild species and their habitat, aquifers, soil and subsoil), which can only be claimed by the public administrative bodies with respect to the owner of the business or professional activity that has caused the damage, as has been said before. In this case, the liable party must minimise the damage, remedy the consequences and return the assets to their former state, while keeping the competent authority informed.

On the other hand, in a loss event involving damage caused by general liability (pollution damage), the damage is caused to assets or persons and is claimed directly by the individual affected. In this case, the obligation shall be to compensate and remedy the detriment caused to the third party.

2. The European Union Environmental Directive of 2004 (2004/35/EC)

After this short introduction, we now go on to delve into the matter at hand (risk management and environmental liability), using a chronological format as follows so as to gain a better understanding.

We can claim that article 45 of the Spanish Constitution of 1978 features as one of the most innovative and avant-garde aspects of the era in which it was published, while it remains fully valid to this day when its text says:

> *1. Everybody has the right to enjoy an environment that is suitable for their development, as well as the duty to protect it.*
> *2. The public authorities shall ensure the rational utilisation of all natural resources to protect and improve the quality of life and both defend and restore the environment, while relying on indispensable collective solidarity.*
> *3. Criminal or, as appropriate, administrative penalties shall be established on the terms determined in law for anybody who violates the provisions of the previous section, as well as the obligation to remedy the harm done".*

There was thus a new and modern concern for the environment in Spain's constitution that gave rise to the subsequent development of several far-reaching and varied laws in relation to this area (Regulations on Hazardous Waste, for example, and other legislation with similar content and ends in connection with the environment as mentioned).

Nonetheless, afterwards, a second major episode took place which affects Spanish legislation regarding this matter, as a European Directive (2004/35/EC) was drawn up whereunder the repair of harm caused to the environment was transposed to Spanish law via the enactment of Law 26/2007 of 23 October on Environmental Liability, which, in its statement of legislative intent, establishes an administrative framework of strict and unlimited liability for the activities named in Appendix III thereof with respect to returning damaged resources to their original state, a framework based on the principles of the prevention and remedy of environmental damage that are defined in the expression the *polluter pays.*

As it says in the preamble to the law in chapter I, *"article 45 of the Constitution recognises the right of citizens to enjoy a suitable environment as an indispensable condition for the person's development, while it establishes that those who fail to fulfil the obligation to use natural resources rationally and to protect nature shall be obliged to repair the damage caused irrespective of any administrative or criminal penalties that are also applicable.*

This precept has been implemented by means of several different legal regulations which, although they have been expanded on and updated, have failed to prevent the repeated occurrence of accidents of a diverse nature that have had extremely grave consequences for the natural environment. This highlights the need to have environmental legislation that implements new systems of liability that effectively prevent environmental damage and, for those cases where this continues to happen, which ensure swift and appropriate repair".

This need was addressed by Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which was later transposed to the Spanish legal system. It should be pointed out that this is an administrative regime, which includes a set of powers whereby the public administration ensures that the law is adhered to. Thus a separation is made here between the liability referred to (administrative) and the classic concept of civil responsibility, which is assigned to the law courts when there are disputes between the parties concerned.

We can therefore say that the Spanish law of 2007 implements the original article 45 of the Spanish Constitution via the transposition of European Directive 2004/35/EC on environmental liability and guarantees that damage to the environment is remedied by the offending party, thereby avoiding the State or the Regional Autonomies having to bear the costs of the loss event.

As the preamble to the law and the European Directive itself mention, the **preventive and remedial** aspect in relation to environmental damage caused becomes fundamental, while these issues are very important for risk managers, since the concepts cited are vital and a cornerstone of our profession:

"The remedial side in the new system of environmental liability must not, under any circumstances, underestimate its preventive aspect. Instead, on the contrary, it must be given special attention, in terms of both its regulation and in its administrative application, as there is no better conservation policy than that of prevention with respect to environmental damage. This view justifies the universal application which the law confers to obligations in the matter of preventing and avoiding harm to the environment, by making adoption thereof extend to all manner of activities and in relation to all forms of behaviour, whether intentional or negligent, or merely accidental or unpredictable".

Even so, from a critical and constructive standpoint, it is not necessary to conduct profound studies of the matter to conclude that the harmonisation of legislation in the European Union still requires large amounts of additional work and effort to achieve the ends that it pursues, while it can be confirmed that reaching these goals is also part of risk management. It has clearly been found that there are still disparities in applying and interpreting the law, and on occasions situations arise where member states regulate however they like (note, for example and as regards tax matters, the tax on insurance premiums known as IPS in Spain) and the rates can vary, from countries where no tax applies, such as the Czech Republic, Slovakia, Hungary, Cyprus, Romania and Poland, to others where there are high rates for this, such as in Italy, where this stands at 22.25 %. Further examples, for the sake of a better understanding, would be: Netherlands 21 %, Belgium 9.25 %, Germany 19 %, Austria 11 %, France 9 %, Luxembourg 4 %, Spain 6 %, Ukraine 3 %, etc.

The same occurs with the regulation on captive companies (countries such as Luxembourg or Ireland, for example, with diverse legislation in this area compared to the other member states, where this question still has not been legislated for).

Nevertheless, the preceding comments are only a taster before we move onto the core raison d'être for this article, which is based on the importance of environmental liability from the perspective of risk management. It is a fact, and certainly praiseworthy, that, in the field of environmental liability, the source whence the law concerning this emanates can be found in the 2004 Directive in the guise of an issue that was of concern to lawmakers following the occurrence of certain major loss events (1976 – Seveso, Italy; 1978 – Lekkerkerk, Netherlands; 1986 – Basel, Switzerland; 1989 – Exxon Valdez, Alaska/USA; 1998 – Aznalcóllar, Spain; 1999 – Erika, France/United Kingdom, etc.) and which represented the beginnings of a wonderful modern and appropriate future vision advanced with a sense of sustainability to strike a balance among business activities, development, risk management and, ultimately, awareness about better conditions for future generations, thereby heading off these kinds of situations as far as possible. Nonetheless, the Directive has been transposed with substantial timing differences among the member states and with variations as regards content (more lax application in certain cases or else different in the main and rigid in others, depending on the specific legislative conditions in each state and the degree to which these are implemented). The EC regulation established that it should be obligatory to effect transposition to the local legislation in all the member states by a deadline of 30 April 2007, yet this objective was not achieved until July 2010. The following would represent some examples: Italy in 2006; Spain, Hungary and Slovakia in 2007; Bulgaria, Ireland, Malta, the Czech Republic and Portugal in 2008; France, Greece and Luxembourg in 2009, etc.

On the other hand, as we said, the Directive establishes a framework based on the *polluter pays* principle, aimed at preventing and remedying environmental damage. This principle is already enshrined in the Treaty on the Functioning of the European Union (Article 191 (2) TFEU). With the passing of time, other very significant loss events that have recently occurred outside the orbit of the European Union have confirmed the need to go further in such regulation, such as what happened in the Mount Polley mine in British Columbia, in Canada, in August 2014 or the bursting of the dam in November 2015 in Brazil.

In this respect, within the context of Spanish legislation, environmental damage is defined as that which endangers the protection of species and natural habitats, including harm to water and soil, as well as operators who pursue the hazardous activities that are stated in Appendix III of the Directive and who have strict liability (irrespective of whether fault exists). Other operators that are not included in Appendix III can be liable if fault exists based on detriment to the protection of species or natural habitats such that there is a causal nexus between the activity and the damage produced, it being underlined that, even if this affects natural or legal persons, non governmental organisations of the environmental type are entitled to apply to the competent authorities for appropriate remedial action to be carried out if these are held to be necessary.

The Directive is a living text that has been subjected to three amendments to adapt it to current needs that have been manifested in Directive 2006/21/EC on the management of waste from extractive industries, Directive 2009/31/EC on the geological storage of carbon dioxide, which has likewise amended other directives, and in Directive 2013/30/EU on safety of offshore oil and gas operations, also amending **Directive 2004/35/EC.**

It is important to mention that after verifying this situation over one year of work, the European Parliament issued the Resolution of 26 October 2017 on application of the Environmental Liability Directive, that included 51 points and interesting conclusions that can be consulted by readers. In the section on the state of implementation (articles 3 to 7), we can see how a lack of clarity and consistency has been detected regarding key concepts, with a high degree of variability among the member states, and it was considered necessary to make additional efforts to standardise and interpret them in a similar way. Here, seven states still have to resolve regulatory matters raised with regard to their transposition process, and the conclusion is that national legislative arrangements are still playing a substantial role that

ought to have already been taken up by the Directive after all the time that has passed and the decisions taken. This matter having been identified, articles 24 to 51 of the Resolution cited put forward significant suggestions as to how to enhance the harmonisation of the Directive.

On the other hand, one should also underline the large number of questions to be sorted out that have both arisen in this process and engendered a whole host of working groups and commissions to resolve them in the European Union.

One of these is the so-called *ELD Multi-Annual Work Programme (MAWP),* which was set up for the 2017-2020 period to adjust the Environmental Liability Directive itself and which has been developed in response to the assessment carried out by REFIT *(European Commission's Regulatory Fitness and Performance Programme).* This evaluation programme seeks to pick out the opportunities for simplification and cutting unnecessary costs whenever the Commission proposes that a pre-existing law be revised. The initiatives that result in these efforts are included in the Commission's work programme every year and are monitored by the body known as the *REFIT Scoreboard.* In this case, clear gaps and loopholes, as well as shortcomings have been noted that require greater in-depth study and analysis to be addressed. With this aim in mind, the intention is for MAWP 2017-2020 to be revised and brought up-to-date on an annual basis, while making any necessary changes, gaining a better understanding and picking up on new requirements, with the ultimate goal of achieving a better quality Environmental Liability Directive in keeping with its original objectives of preventing and remedying environmental damage caused based on the *polluter pays* principle and, additionally, helping to maintain the environment and protect the natural resources in the European Union (biodiversity, water and soil).

The current MAWP has three key pillars for the period referred to (2017-2020):

1. Improving the evidence base for the evaluation process and decision-making on the part of the Commission, member states, stakeholders and practitioners (devising an assessment framework and a registry for the Directive mentioned).
2. Supporting its implementation through tools and measures towards providing greater support in this respect (general and common understanding of terms and concepts, and building capacity applied to practical issues).
3. Ensuring sufficient availability of financial capacity, in particular for large losses or in cases of insolvency (secure sufficient and available instruments to cover the liabilities indicated in the Directive).

Having said all this, we consider that the European aspect has now been pointed out, so we shall go on to discuss the situation in Spain.

3. The Spanish Environmental Law of 2007 and application of Directive 2004/35/EC

As any decent risk manager should know, Law 26/2007 of 23 October on Environmental Liability establishes an administrative regime of strict and unlimited environmental liability for the activities contained in Appendix III, which is based on the principles of prevention and remedy of environmental damage (the *polluter pays*). The aforementioned law comprises 49 articles that are grouped into six chapters and a final part that consists of 14 additional provisions, one temporary and six definitive, as well as six appendices. It is partly implemented by Royal Decree 2090/2008, in which a new system is established for remedying environmental damage whereby operators who harm natural resources or might cause such damage must take the necessary measures to prevent them or, if the damage has already been done, limit or impede the effects thereof, as well as return the natural resources to their former state before the harm occurred.

It is important to point out that not all natural resources are protected by this law. For these purposes, only those which are protected under the so-called "environmental concept" are considered, such as damage to waters, soil, seashores, coastal inlets and species of wild flora and fauna that are permanently or temporarily present in Spain, as well as the habitats of all indigenous wild species. This means that harm to the air or persons and their property are therefore excluded. On the other hand, not all harm suffered by these natural resources will give rise to environmental liability. For the law to be applied, there must be a threat of damage, or damage which has occurred, that produces adverse effects for the natural resource itself. As regards soil, the concept also includes a clear risk of giving rise to negative effects on human health.

Aside from what we have mentioned, there are some peculiar features, some of which are very interesting due to the originality of the concepts they harbour and due to the decision by the Environment Ministry of the day, when Ms. Cristina Narbona held this ministerial portfolio, whereby the Directive was used as a rule of minimums, which was later given specific implementation in Spain according to the circumstances, experiences, strategies and needs in our specific setting.

We thus conclude by summarising that the aim of the Law is to transpose Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage into Spanish law. The intention is for the polluter to be accountable for the damage caused to certain natural resources (soil, waters, wild species and protected habitats, seashores and rivers), which do not include harm to the air and persons or their properties, which are not covered by this Law, and focussing on pure ecological damage, such as to environmental natural resources, without taking account of whether these are publicly or privately owned. The offending party is obliged to restore the resource to its original state or, should this not prove possible, make up for the damage by means of other actions in other places, and paying damages in monetary form to third persons is not allowed.

4. The financial guarantees in environmental law in Spain

The Spanish Environmental Liability Law of 2007 puts into effect two key principles in EU legislation with respect to the environment: the prevention principle and the *polluter pays* principle. It therefore establishes a dual liability system: strict, for the activities in Appendix III, and fault-based liability, for other minor cases outside the appendix cited.

The competent administrative bodies for overseeing compliance with this law are the regional governments, except where the damage occurs in the public domain owned by the State, the public shoreline domain or in waters in the public domain, in which case the General State Government will take charge of such matters, guaranteeing consistency of judgement. It does not have retroactive legal effects and is compatible with the requirement of other forms of liability, be these criminal or administrative. Civil action by private individuals that are affected is also conserved, although, in article 5, the law prohibits double cost recovery. This was enacted through Royal Decree 2090/2008 of 22 December endorsing the partial implementation regulations for Law 26/2007 of 23 October on Environmental Liability.

Having mentioned the foregoing, we now move on to discussion of the current state of legislation as regards Spanish mandatory financial guarantees. Specifically, in chronological order, those which concern the activities in Appendix III, which are the first that have to be compliant in this regard and which lead us to the need to apply one of the tools which the law proposes in this sense (**insurance policies, bank guarantees** or ***ad hoc* reserves**) for loss events where the offending party is required to have the financial resources to address their economic consequences.

As is common knowledge, on 30/10/17, the Ministerial Order was published which contained the deadlines decided for the coming into effect of the obligation to set up financial guarantees to cover environmental liability in certain activities. The original law of 2007 estimated that these would be issued "from 30 April 2010", which means that there has been a long delay in publishing these. This having been accepted, the 2016-2019 period was set as the target for regulating this matter. Under Ministerial Order ARM/1783/2011 of 22 June, consideration was given to the priority and time-table for approving the ministerial orders based on which the setting up of the mandatory financial guarantee would be required.

With this episode having been overcome, the new Ministerial Order referred to concerns the owners of Level 1 priority activities (those which are subject to SEVESO rules and regulations, major combustion and recovery facilities, and the processing of hazardous waste), the financial guarantees for which have to have been duly set up as of 30/10/2018. The owners of level 2 activities (a large portion of activities which are subject to IPPC rules and those which involve industrial emissions that are not classified as level 1) have a deadline for addressing this matter of 30/10/2019.

Here, the discipline of **Risk Management** plays an important role and an array of different actions have to be set in train at these departments at companies, such as, in some cases, confirming, and in other cases, finding out, the following information:

1. An Environmental Risk Assessment (ERA), as required under the law. Risk Management must take part in this process as a key element with respect to the risks to identify and the measures and decisions to take in order to comply with the preventive role which the law intends.
2. The results thrown up by this analysis in economic terms have to be found out by establishing the techniques applied as the basis for calculating these, the specific and readily available computerised tools to use for this purpose (MORA —Environmental Liability Supply Model—, etc.), and the criteria applied and the breakdown for these.
3. The figure resulting from the ERA must be at least the established legal minimum, including costs of prevention, and both complementary and compensatory remedy, as well as a possible safety margin as a previously made recommendation.
4. There must be explicit reference to the financial guarantee to be used. Should it have been decided to take out an insurance policy for this situation, as we understand happens in most cases given that it is the easiest way to transfer risk to a third party, this option must be confirmed or an assessment made of the other alternatives that the law recommends (bank guarantee or an *ad hoc* underwriting reserve). It could be that the decision is made to use one of these options jointly, bearing in mind that, in spite of the calculations made, the liability is always limitless and the final figure might be greater than that determined in the risk assessment.
5. The Liability Statement featuring the minimum content required in Appendix IV of the Regulations must be filed with the competent administrative body.

These issues are key and, if it is decided to use insurance as the financial guarantee, we will have to follow the appropriate processing, obtaining insurance certificates with the right content that are issued in Spanish in the case of multinationals (as these will be processed through a Spanish administrative body). It is recommended that these include a suitable figure that is high than that resulting from the assessment made as a safety margin, bearing in mind the limited liability which the law mentions, and that they clearly show an additional clause confirming the existence of an automatic replacement rate so that, if a loss event occurs, the initial amounts in it remain stable to cater for any other possible loss events that might happen (either to a single company or a group of them all covered under the same policy).

The point should be made that, within the scope of what the Directive permits, the financial guarantees mentioned were not initially obligatory and only eight states (namely Bulgaria, the Czech Republic, Greece, Hungary, Portugal, Slovakia, Romania and Spain) have decided to implement them in the transposition of the Directive into their national legal systems, whereas others have not included them (notable examples being: Germany, France and Italy). Finally, just to be make the circumstances even more confused, in certain countries, the communities or regions have also gone on step ahead in this direction and legislated according to what they have been allowed to do owing to transfers of jurisdiction, without any standardised criterion in favour of implementation in common, which leads us to the conclusions in the studies and analyses carried out by the European Union which reveal an outcome of a clear lack of consistency that is far from delivering the harmonisation desired as regards this matter.

With respect to this, the European Commission has issued reports on the effectiveness of the Directive and the availability of financial guarantees to cover the liability mentioned, and it has observed that there is a dearth of practical experience in implementing the Directive and in terms of its usefulness as regards remedying environmental damage. With the goal of sorting out this issue, the European Commission has set in train specific actions, some already established in previous years, such as the staging of the working seminar by the name of *Stakeholder and Practitioner on the Implementation of the ELD* in November 2011. The actions envisaged in this case were:

1. Issuing an explanatory leaflet on the Directive.
2. Providing the member states with material on the Directive for training campaigns.
3. Exploring and exploiting links between the Directive and other legal provisions, such as the Directive on Habitats and the Framework Water Directive.
4. Evaluating additional aspects relating to risk assessment and determining the risk levels of industry in the European Union or to activities involving greater risk.
5. Conducting a comprehensive study of the viability of setting up a fund or similar instruments to tackle financial security/guarantees of European companies and industries within the context of the Directive.

This issue took on particular importance following the accident which occurred in Hungary on 4 October 2010 at the aluminium manufacturing enterprise *Hungarian Aluminium Production & Trade Company* – (MAL AG to use its Hungarian acronym). When a chemical disaster took place which featured toxic spillage on account of the bursting of one of the waste pools, it was discovered that the company had an insurance policy with insufficient cover according to the liability laid down by the Directive. The loss event sparked a rethink in the European Union and among its member states in favour of obliging their industries to obtain financial guarantees with cover to match environmental risks and liabilities and using the necessary technical resources, while considering the potential effects of this should a loss event occur and establishing preventive measures and ultimately obtaining the financial guarantee most suited to requirements.

Nonetheless, on 30 October 2017, the BOE (Official State Gazette) published the Ministerial Order APM/1040/2017 of 23 October establishing the date required to meet the deadline for setting up the mandatory financial guarantee for those activities in Appendix III of Law 26/2007 of 23 October on Environmental Liability (classified as having priority levels 1 and 2 via Ministerial Order ARM/1783/2011 of 22 June amending the appendix thereof). In the case of Spain, the activities in Appendix III are classified according to the risks they entail as high, medium and low, while three groups of priorities are established which we might summarise by simplifying details as follows:

- **Group 1 priority.** Facilities included in the SEVESO Directive (2003/105/EC) which generate electricity by combustion, with an overall thermal rate having inputs of 50 megawatts and facilities for waste or recovery, other than spillways or hazardous waste with capacity of over 10 tonnes a day.
- **Group 2 priority.** Activities with facilities that generate electricity by combustion, with an overall thermal rate having inputs of under 50 megawatts or certain plants devoted to manufacturing metal processing with high productivity rates.
- **Group 3 priority.** Mining or waste management facilities with a low treatment rate.

To summarise, the companies in Appendix III, which are considered to be top priority, must, **from 1 November 2018,** have the financial guarantees under contract and filed with the competent body in their region that are required by the law to address potential environmental liability. To this end, they must carry out a prior environmental risk assessment for their activity and, depending on the results of this, set up a financial guarantee to cover their environmental liability, which may be set at between 300,000 and 20 million euros, as a mandatory minimum, where this sum does not constitute a limit on the potential liability in a loss event situation. The group 2 priority companies must have the same financial guarantee item, but this must be under contract and filed with the competent body in their regional administration **before 1 November 2019.** Finally, we should say that there is still no legally regulated date by which the financial guarantees have to be obtained for the companies considered as having group 3 priority.

On the other hand, those companies are exempted from the financial guarantees which pursue activities that might cause damage for which the remedy is valued at a sum below 300,000 euros and those for which the remedy cost is between 300,000 and 2 million euros when they can accredit that the operator's activities are certified by the EU's Eco-Management and Audit Scheme (EMAS) or under the current UNE-EN-ISO 14001 standard.

Having said all this, there have been visibly significant changes and we must be optimistic, since what we have outlined leads us to conclude that there is a great opportunity for improvement, as well as scope for suggesting new proposals regarding what has already been established to the benefit of all concerned. This is the right course to take with respect to a matter as important as what we are discussing here, where several factors are required such as those mentioned below:

1. Awareness of a subject that is key to current sustainability and the development of future generations, which makes it necessary for a prior legislative strategy to be established that enables preliminary results to be obtained.
2. This is an arduous task in which it is hard to unite all the concepts peculiar to each member state and make them consistent, thereby offering a better alternative under the auspices of an EC project that seeks progress for society.
3. There is a fine-tuning process that is truly hard to perform and which involves a bid to connect concepts, ideas or needs and give a final common form to the applicable legislation with the agreement of everybody taking part.

From a legal standpoint, in the risk management business, we used to wrongly term this issue Civil Environmental Liability. This concept was not correct, however, because, when there is environmental damage, this can be fortuitous or borne of liability on the part of the company involved, in which case it can be defined as civil, criminal or administrative environmental liability, depending on the type of offence perpetrated. As we have already said, in this case, what we are dealing with is a regime under which the public administration is invested with powers to ensure that the law is complied with and that the examples of liability that are enshrined in it are applied. We therefore again make the point that this concept is treated separately from classic civil liability, where conflicts between the party causing the harm and the party harmed are dealt with in court.

5. The role of the Consorcio de Compensación de Seguros

The law mentions that those operators who use the legal concept of insurance from among the choices available by way of the mandatory financial guarantee will have to supplement their policies with a contribution to the **Environmental Damage Compensation Fund (FCDM for the Spanish),** the management and administration of which is assigned to the Consorcio de Compensación de Seguros (CCS).

Such participation will consist of specific loading in the insurance premium itself, which will then be passed on to the CCS by the insurers and where the amount involved will be set according to the relevant rate scales approved by the Directorate General for Insurance and Pension Funds. Our understanding is that the functioning procedure is similar to the surcharge processed by insurers in collaboration with the CCS to cover Extraordinary Risks.

The law lays down that *"The Fund shall be used to extend the insurance cover regarding the liability insured in the original policy and on the same terms for any damage which, having been caused by the activities authorised during the period over which the policy is valid, manifests itself or is claimed after the elapsing of the windows for manifestation or claims that are accepted in the policy, and which is claimed in the course of (at most) a number of years equalling those over which the insurance policy was valid, starting from when said policy ended and where there is a limit of 30 years.*

Nevertheless, given that the windows for manifestation or claims accepted in the policy include the three years following the end of the policy's valid period, the limit on cover by the Consorcio de Compensación de Seguros should never exceed 27 years.

Should the insurance be interrupted at any time due to the policy not having been renewed, this period of interruption shall be excluded for the purposes of cover by the Fund".

Below we reproduce the text from the website of the CCS itself which shows the regulation regarding this matter, given how new it is due to its recent publication (Decision of 31 October 2018 by the Directorate General for Insurance and Pension Funds endorsing the rates and modelling for the contribution to the Environmental Damage Compensation Fund and the modelling for loading, and the Decision of 31 October 2018 by the Chairperson's Office of the Consorcio de Compensación de Seguros endorsing the modelling for the loading in favour of the Environmental Damage Compensation Fund and establishing the procedure for statements/forms and payment).

(https://www.consorseguros.es/web/ambitos-de-actividad/otras-actividades/riesgos-y-danos-medioambientales)

"Among the ways referred to for setting up the aforementioned guarantee, operators may take out an ***insurance policy,*** *which shall have to be supplemented pursuant to article 33 of Law 26/2007 of 23 October* ***with a contribution to the Environmental Damage Compensation Fund (FCDM),*** *the purpose of which is, in contrast to the other forms of financial guarantee,* ***to extend cover for environmental risk to after the operator's activity has ceased.*** *This extends to damage caused during the policy's valid period which manifests itself or is claimed subsequently, up to a limit of 30 years from the termination of the activity that has produced the damage. Thus* ***the policy of the ordinary insurer*** *will cover the remedy of environmental damage which becomes evident during the* ***three years following the cessation of activity on the part of the operator,*** *while the* ***Fund extends the policy cover for up to a further 27 years at most*** *thereafter, for a time equal to one year for each year for which the operator has been covered under an insurance policy.*

Environmental liability, and therefore the cover from the Environmental Damage Compensation Fund as well (without detriment to the special cases that may be considered in the legislation of each regional autonomy), extends to the following environmental damage:

- *That caused to wild species, flora and fauna, and habitats, onshore and aquatic zones.*
- *That caused to surface or underground water, with regard to its ecological, chemical or quantitative state, and harm to marine waters.*
- *That caused to the seashore and inlets.*
- *That which affects the soil or the subsoil.*

Damage to the air quality or persons or property is not covered.

In any event, environmental liability may not be enforced in relation to damage caused by: (i) armed conflict, hostilities or revolts; (ii) exceptional natural phenomena, or (iii) nuclear accidents.

For the purposes of raising general awareness about the ***characteristics of the Environmental Damage Compensation Fund,*** *these can be framed in (among others) the following points:*

- *Pursuant to the aforementioned article 33 of Law 26/2007, the* ***Consorcio de Compensación de Seguros*** *acts as a m****ere administrator and manager for the Environmental Damage Compensation Fund,*** *the resources of which are* ***independent in a financial and an accounting sense*** *from the other activities in which it engages. Thus the* ***Consorcio will not have to defray any payment*** *regarding environmental damage that is charged to the capital belonging to any other of its activities.*

- *The* ***Environmental Damage Compensation Fund (FCDM) subsists on the contributions from the operators*** *who are defined in the law, the activities of whom could cause damage of an environmental nature, and* ***these funds shall be transferred by the insurers together with the tariff rates*** *that they apply to their insured for the mandatory financial guarantee cover. Whatever the case,* ***the beneficiaries and recipients of the FCDM's resources are exclusively the operators.***

  The contribution to the FCDM was set in the Decision by the Directorate General for Insurance and Pension Funds of 31 October 2018 at a levy of 8 % of the amount of the tariff rate that relates to the mandatory financial guarantee for environmental liability.

- ***The activity of the FCDM has no facet involving insurance in the strict sense, given that the Fund's liability is limited to the amount set up in it.***

- ***The Environmental Damage Compensation Fund's mandatory financial guarantee is limited per loss event (involving environmental damage) to 20 million euros,*** *while there is provision for the Ministry for the Ecological Transition to set a deductible; which is an option that has not been considered to date.*

- ***Compared to other forms of guarantees*** *(a guarantee by endorsement and an underwriting reserve), taking out an* ***insurance policy means (via the FCDM) extending the cover for remedy of the environmental damage to beyond the damage that becomes evident or is claimed during the first three financial years*** *since interruption of the cover from the ordinary policy owing to termination of the activity.*

  The effective life of the Fund is defined in Ministerial Order AMP/1040/2017 of 23 October, which sets 31 October 2018 as the start date for its activity for priority 1 operators and one year later for priority 2 operators".

For our part, we should highlight that, according to the articles in the law, the Fund does not provide cover in the following cases:

- Activities where the policies have been cancelled prior to cessation of the activity.
- Damage that has been caused after cessation of the activity by reason of abandonment of the premises or facility which has potential to pollute without fulfilling the obligatory measures to avoid any risk of this kind.
- Regarding acts, damage or liability that would not have been covered in the insurance if the policy had been in effect.

- Damage to air quality, persons or property.
- Episodes of pollution that are irrefutably revealed for the first time before three years have elapsed since the final cessation of the insured activity. For these purposes, the date of cessation of the insured activity is held to be that upon which compulsory work on cleaning up and dismantling plants to prevent pollution in the future concludes, or else that date on which the insured stopped pursuing any kind of activity at the facility.
- Cases of pollution claimed for the first time after the closing of the applicable time window envisaged in article 4 of Law 26/2007 of 23 October.
- The Fund shall likewise not cater for the exclusions from cover which are mentioned in the relevant insurance policy or those laid down in Law 26/2007 of 23 October or implementing provisions thereof.

Insurers are likewise obliged to keep information on insurance contracts signed for this purpose (the financial guarantee) so as to be in a position to hand over any details that the CCS might require at any time, including about the activity, the name of the policy holder, the operator, the tax identification number of both, the sums assured, the valid periods and the cover conditions.

The following CCS link shows its **Proposed Clause** for inclusion in insurance policies that have cover from the Environmental Damage Compensation Fund (FCDM):
https://www.consorseguros.es/web/documents/10184/0/CLAUSULA_FCDM.pdf

Finally it should be noted that, since 1 January 1998, the CCS has been integrated into the *Pool Español de Riesgos Medioambientales* (Spanish Environmental Risks Pool), an economic interest grouping that began its activities in 1994. Subject to a re-insurance system, this Pool offers cover for damage and prejudicial consequences caused by pollution that, in all cases, will have to have come about accidentally. The interest of the CCS in the Pool since 2012 has reached 5.9627 %, which represents a maximum retention of 1,140,000 euros.

The *Pool Español de Riesgos Medioambientales* offers specific policies that provide a solution for environmental liability by means of: 1) remedying unforeseen damage caused to natural resources; 2) covering the costs of defending the insured against insured claims; 3) the possibility of providing payments into court; and 4) covering the cost of preventive measures if a situation should arise that involves imminent environmental damage. Supplementarily, within the same contract cover, is offered for civil liability for pollution damage to third parties.

6. Risk management and environmental liability

We have deliberately left this heading for the last part, given how obviously this makes sense. Dear reader, please, go over this article once more patiently, and you will see that everything mentioned relates to risk management.

Please, note that, in order to conduct Environmental Risk Assessments (ERAs), every company has to adhere to methodological matters such as these:

1. Identifying and evaluating accident scenarios and working out the likelihood of each of these occurring.

2. Quantifying the seriousness of the consequences of the environmental damage, including mitigation parameters, that arise in each scenario, to ascertain whether this is significant or not (to do this, criteria laid down in the regulations of the law are applied, which state that the factors to be weighed are the severity, extent and duration of the environmental damage).

3. Estimating an Environmental Damage Index (EDI) associated with each accident scenario pursuant to the methodology of the Ministry (the computer-based tool known as MORA, or the Environmental Liability Supply Model).

4. Calculating the "risk associated with each accident scenario" as the product of the likelihood of occurrence of the scenario and the environmental damage index.

5. Calculating the overall risk for the facility, by adding together the risks associated with each accident scenario.

6. Selecting the scenarios with the lowest associated environmental damage index that make up 95 % of the total risk.

7. Establishing the amount for the financial guarantee as the value of the environmental damage in the scenario with the highest environmental damage index (EDI) among the selected accident scenarios, while having to proceed as follows:

   - Quantifying the environmental damage generated in the scenario selected (the one with the highest EDI among those constituting 95 % of overall risk).
   - Monetising the environmental damage produced in each reference scenario, the value of which shall equal the cost of the primary remedial project. For this purpose the Ministry's already cited tool (MORA) is available. Having determined the amount for the mandatory financial guarantee, calculation is to be made of the costs of prevention and avoidance of damage, for which the operator may apply a percentage with respect to the overall amount of the mandatory guarantee or estimate these costs of prevention and avoidance via assessment of the environmental risks.

8. The company should then contract the financial guarantee via the options established in Chapter IV of the law, the setting up of which is essential to exercising the activities listed in Appendix III. These seek to ensure that the operator will have the sufficient funding to meet any costs arising from adopting the measures to prevent, avoid and remedy environmental damage. Article 24 assigns to the competent authority the responsibility for setting the financial guarantee amount for each kind of activity, according to the severity and extent of any damage that might be caused, in line with the parameters laid down under the regulations. Determining this amount must be performed according to the methodology for making the economic assessment for the remedy of environmental damage, the preparation for which is likewise envisaged in section 3 and the approval for which falls to the national government, which is designed to endow this with a basis for ensuring uniform application thereof within the state as a whole.

   As we have already said, three forms of financial guarantees are laid down, which may be set up either alternatively or to complement each other:

   - Taking out an insurance policy with an insurer that is authorised to operate in Spain. In this case the functions to which article 33 refers shall fall to the Consorcio de Compensación de Seguros.
   - Obtaining an endorsed guarantee that has been granted by a financial institution authorised to operate in Spain.
   - Setting up an underwriting reserve by setting up an *ad hoc* fund to respond to any environmental damage from the activity pursued, where this is realised via financial investments that are backed by the public sector.

9. Finally the company is to file a Liability Statement with the government which indicates that it has set up the financial guarantee, the amount thereof, the proof of having taken the action envisaged in the legislation, and which contains the legally required information.

10. It should also be remembered that Chapter V of the law deals with the system for infringements and penalties, which area is not covered by the policy to be taken out if this form of financial guarantee is chosen. The infringements specified in article 37 define the forms of behaviour which represent failure to fulfil the obligations which the law imposes on operators, and groups them into two categories: very serious and serious, according to the harm, which may be major or minor, that might be caused to natural resources by these forms of conduct. The penalties, on the other hand, envisage fines ranging from 10,001 to 50,000 euros in the case of serious infringements and from 50,001 to 2,000,000 euros for those that are very serious. In addition to this, in both cases there is provision for the possibility of suspending the authorisation granted to the operator for a maximum period of two years for very serious infringements and one year for those classified as serious.

For educational purposes as regards risk management, it is important to reiterate the distinction between environmental liability and pollution liability.

Environmental liability exclusively refers to damage to natural resources (wild species and their habitat, aquifers, soil and subsoil), which can only be claimed by the public administrative bodies with respect to the owner of the business or professional activity that has caused the damage, as has been said before. In this case, the liable party must minimise the damage, remedy the consequences and return the assets to their former state, while keeping the competent authority informed.

On the other hand, in a loss event involving damage caused by general liability (pollution damage), the damage is caused to assets or persons and is claimed directly by the individual affected. In this case, the obligation shall be to compensate and remedy the detriment caused to the third party.

A wide assortment of platforms, fora and courses have referred to this distinction (the Inade forum of 10/6/2018, etc.).

We may conclude that, although there is a traditional tendency to act after the loss event has happened, in this case we very appropriately strive to step in beforehand in managing it. This is a rule that does not allow direct compensation of the party harmed, but instead seeks to prevent, evaluate, mitigate, remedy, compensate and restore the loss that takes place to its former state, spearheaded by the Administration in setting administrative regulations and avoiding judicial disputes as far as possible, and one which distinguishes civil from administrative liability, in a quest for sustainability and improving the fortunes of future generations. Action presented like this can only deserve our applause and support.

On the other hand, the social setting and the stakeholders in it are also collaborating: organisations and institutions such as the ministry itself and the *Pool Español de Riesgos Medioambientales* are doing exceptional work in dissemination and raising awareness in this regard, in the case of the Pool, by devising different insurance products which help to raise awareness and gain an understanding of, and manage this question.

Finally, in the realm of remedying and minimising the loss event, it is a point of pride to note that teams such as the *Unidad Militar de Emergencias* (UME, the Military Emergency Unit) or the Red Cross (among others) are placing their best efforts, resources, expertise, capabilities and courage at the service of the public to safeguard human lives while endangering their own and protecting the environment and mitigating natural catastrophes through their actions.

Furthermore, from an educational standpoint, the annual plan of certain organisations such as the *Asociación Española de Gerencia de Riesgos y Seguros* (AGERS, the Spanish Risk and Insurance Management Association) includes courses, seminars, speeches and working conferences on this issue, given both its importance and the overwhelming need to share knowledge, the basis of education, as one of the key functions of AGERS.

Nonetheless, some questions still remain that require answers:

- Do the risk managers at major companies know what we are exposed to or do they simply outsource these matters to third parties, complying with the law but without becoming involved, due to lack of knowledge, in the approach and the potential solutions?
- Are their environmental management departments at companies of this kind?
- Has it been possible to convey awareness on this issue to senior management and the rest of the organisation?
- Do we have the appropriate assessments and guarantees that the law envisages?
- Will we manage to identify the risks and avoid them as far as possible before they actually transpire?
- We are talking about the larger companies, but what about the small to medium sized companies (SMEs)? Are they aware of the situation? Do they assess the potential impact as regards their financial survival and the environmental damage that can be caused if their activities are categorised as hazardous, as is discussed in this article? Are the instructions being followed that the law lays down such as with respect to the Environmental Risk Assessment?, etc.
- And lastly, what is the state of play with entrepreneurs, students, non-governmental organisations, the unions and universities themselves with respect to the necessary connection, education, communication and collaboration in this regard?

Coordination needs to be established that allows us to fit the model to the scale of each operator's need. Luckily, we have a very mature insurance market to deal with this, with bodies and institutions that provide us with support and trained-up brokers who know the discipline from its very roots and are qualified to achieve the best solution in terms of cost, effectiveness, prevention and abiding by the law. We must not lose sight of this, as we are sure that we will have the chance to demonstrate whether this issue has been properly managed at our company when a significant event of this type has to be managed or avoided.

As can be observed in general, and specifically in Appendix I to this article, arduous efforts have been undertaken in the Spanish arena since the promulgation of the European Directive of 2004 and the publication of Law 26/2007 on Environmental Liability, including in the form of additional legal texts and legislation to implement and apply them. According to this legal compendium, the setting up of financial guarantees now required under the last Ministerial Order of 2017 has to reflect the Environmental Risk Assessment (ERA), while various different tools have been developed, such as the Spanish standard UNE 150008:2008 (which concerns analysing and assessing environmental risk), the Standard Model for Environmental Risk Reports (MIRAT for the Spanish), the Rate Tables, the Methodology Guides, the Environmental Damage Index (IDM for the Spanish) and the Environmental Liability Supply Model (MORA for the Spanish), to facilitate the Environmental Risk Assessment (ERA) required and set up the mandatory financial guarantees.

All this confirms that there is concern over this subject which passes into the economic, social, business and legislative spheres, with the creation and making available of IT tools for companies and operators that facilitate raising awareness and complying with the law. We must nonetheless conclude by mentioning that, for a risk manager, the primary concern would be to comply with the key precepts in the law and sorting them in a disciplined way and focussing on prevention as a key concept. Knowing the risks becomes an essential weapon in combating loss events. In this case, we understand that we cannot allow ourselves the luxury of unburdening our consciences with the fact that financial guarantees exist which, even though they remedy events that have occurred as far as possible, fail to avoid loss events and damage happening. This issue is key to achieving a sustainable economy in a society that is making progress and maturing at a frenetic pace thanks to technological advances, knowledge and awareness, education and training, and best practices through analysing experience.

Appendix I - Legislative developments regarding environmental liability in Spain

(1).- Source: The website of the Ministry of Agriculture, Fisheries and Foods and the Ministry for the Ecological Transition, where there are direct links for consultation of every legislative text referred to.

(2).- The Ministry for the Ecological Transition, established by Royal Decree 355/2018 of 6 June restructuring the ministerial departments and Royal Decree 595/2018 of 22 June establishing the basic organic structure of ministerial departments, is the department of the General State Administration in charge of proposing and implementing government policy on energy and the environment towards making the transition to a more ecological production and social model. Likewise the Ministry for the Ecological Transition is in charge of policy for water as an essential public asset.

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

- Directive 2004/35/EC of 21 April 2004.

Law 26/2007 of 23 October on Environmental Liability.

- Law 26/2007 of 23 October.
- Consolidated text of Law 26/2007 of 23 October amended by article 32 of Royal Decree Law 8/2011 of 1 July.
- Law 11/2014 of 3 July amending Law 26/2007 of 23 October on Environmental Liability.
- Consolidated text of Law 26/2007 of 23 October amended by Law 11/2014 of 3 July.

Regulations partially implementing Law 26/2007 of 23 October on Environmental Liability.

- Royal Decree 2090/2008 of 22 December endorsing the regulations partially implementing Law 26/2007 of 23 October.
- Corrections to Royal Decree 2090/2008 of 22 December.
- Royal Decree 183/2015 of 13 March amending the regulations partially implementing Law 26/2007 of 23 October.
- Consolidated text of the regulations partially implementing Law 26/2007, amended by Royal Decree 183/2015 of 13 March.

Ministerial Order ARM/1783/2011 of 22 June establishing the order of priority and schedule for approving the ministerial orders based upon which setting up the mandatory financial guarantee would be enforceable which are envisaged in final provision four of Law 26/2007 of 23 October on Liability.

- Ministerial Order ARM/1783/2011 of 22 June.
- Consolidated text of Ministerial Order ARM/1783/2011 of 22 June that was amended by Ministerial Order APM/1040/2017.

Ministerial Order APM/1040/2017 of 23 October establishing the date from which the setting up of the mandatory financial guarantee would be enforceable for the activities in Appendix III of Law 26/2007 of 23 October on Environmental Liability, where these are classified as priority level 1 and priority level 2 under Ministerial Order ARM/1783/2011 of 22 June modifying the appendix thereof.

- Ministerial Order APM/1040/2017 of 23 October.

(3).- Source: Website of the Consorcio de Compensación del Seguros in its section on environmental legislation.

- Resolution of 31 October 2018 by the Directorate General for Insurance and Pension Funds approving the rate for the contribution to the Environmental Damage Compensation Fund.
- Decision of 31 October 2018 by the Chairman's Office of the Consorcio de Compensación de Seguros endorsing the modelling for the loading in favour of the Environmental Damage Compensation Fund and establishing the procedure for statements/forms and payment.

Appendix II - European Green Capitals

As was stated by the European Commissioner for the Environment, Maritime Affairs and Fisheries, Karmenu Vella, two thirds of Europeans currently live in cities. This means an approximate total of 333 million persons. Everyday, new forms of innovation are created for urban life to be more "green" and this is the reason why attempts are being made to incentivise such policies by institutions with awards and prizes established in this regard.

The **European Green Capital Award** instituted by the European Union since 2010 for cities with over 100,000 inhabitants is one of these. In 2018, the winning city was **Nijmegen,** the oldest city in the Netherlands. The exemplary policies for climate adaptation, the support for bicycle transport, water and waste management and the profound involvement of the citizenry make Nijmegen "a genuine ambassador for change", highlighted Joanna Drake, the deputy director general of the Commission's directorate general for the environment.

The mayor of Nijmegen since 2012, Hubert Bruls, said: "We have been making a big effort to make the municipality of Nijmegen more sustainable for years. Our aim is for the city to be climate neutral by 2045".

It should be recalled here that Vitoria-Gasteiz won the Green Capital award in 2012. This is the only city in Spain to have held this distinction. The judges were impressed that the city has a high proportion of public green spaces and that all of the residents live within 300 metres of an open green space. There are also numerous tangible measures to help boost the biodiversity and the services of ecosystems. The flora and fauna is monitored, fragmentation of the habitat is reduced where possible, measures have been taken to cut back on light pollution and there is a target of reducing domestic water consumption to less than 100 litres per person per day.

Similarly, since 2015 a new European Union honour has been created, known as the **European Green Leaf Award.** This distinction is aimed at populations of between 50,000 and 100,000 inhabitants which make efforts to protect their environment. In 2018, the award was given jointly to the cities of **Leuven (Belgium)** and Växjö **(Sweden).** It should be remembered that, in the year when this award was inaugurated (2015), the winners were Mollet del Vallés (Spain) and Torres Vedras (Portugal).

It has been concluded that in Europe there are almost 1,000 cities that can opt for these two awards and distinctions, meaning that, according to Karmenu Vella, this proves that "natural diversity is also a source of inspiration." This is part of our cultural heritage. Any person who lives in an urban zone is an interested party in the development of our surroundings. If we take ownership of the extraordinary ideas of these winners, we will make cities greener and more beautiful places in which to live."

Websites consulted

- The Ministry of Agriculture, Fisheries and Foods / the Ministry for the Ecological Transition.
- The *Pool Español de Riesgos Medioambientales* (Spanish Environmental Risks Pool).
- The Spanish Association of Risk and Insurance Management (AGERS).
- The European Commission. Environmental Legislation.
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- The European Environment Agency.
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