AVOSETTA GROUP

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Report : Spain
by :
Prof. Dr. Angel-Manuel MORENO,
Carlos III University of Madrid

I. PRODUCER RESPONSIBILITY

1.General remarks on the acceptance of this concept in Spanish law.

Traditionally, Spanish law has never welcomed the concept of « producer responsibility », in the far-reaching/environmental sense we are discussing here. The « responsibility » of the producer is confined to the world of private law and protects the interest of the parties in the contract.

The law only establishes schemes under the perspective of commercial and civil law for either: (a) Commercial/insurance law « liability » of the producer for defective products causing an injury on the consumer; (b) the commercial-law duty to replace the defective product. This obligation is currently, after a recent legal development, put on the shoulders of the vendor, not of the producer (Act of 10 July 2003, on the warranties in the sale of consumer goods, which does not mention the environmental dimension) ; (c) the civil-law duty of the vendor to compensate/replace, whereas the good has got hidden defects or the buyer has been lawfully deprived of the good by another person, for instance the legitimate owner (*saneamiento por evicción y por vicios ocultos).* What is more, Spanish Law uses the same word to describe both « responsibility » and « liability » : *responsabilidad.*

This is a preliminary, contextual obstacle for the recognition of producer/environmental responsibility » in the environmental sense we are considering here. Besides legal tradition, I would point out another « constitutional » problem for the introduction of this notion in the country. The principle of legality (rule of law), combined with the principle of proportionality, makes that the assumption in the legal regulation of trade is that any positive obligation of the producer taking place *beyond* the moment of the transaction itself, and outside the contractual dimension, has to comply with some requisites: (a) it has to be explicitly recognised by a legal norm, preferably by a statute; (b) it has to be limited to what is strictly necessary; and (c) it has to be connected with a prevalent public interest.

Consequently, we may advance a couple of general remarks in this area:

(a) The concept of environmental « producer responsibility » is alien or strange in the Spanish traditional legal tradition.
(b) The cases where « producer responsibility » schemes have been introduced are limited in number and have been triggered by EC environmental law. As a rule, Spanish environmental law does not have « autonomous » developments or instruments in this area.

We briefly consider those cases.

2. Specific fields embodying provisions on producer responsibility

2.1.- End-of-Life Vehicles (ELV)

Royal Decree 1383/2002, of 20 December 2002, incorporates Directive 2000/53, of 18 September 2002, in the Spanish legal order. As an innovative piece of legislation, the Decree explicitly mentions the principle of producer responsibility *(principio de responsabilidad de los productores*).

It is possible to find in this regulation the same instruments and techniques embodied in Directive 2000/53 (the producer of cars and of component has the duty to set a system for the collection and treatment of ELV, and so on). In the line of the EC Directive, it fixes requirements for the product (annex II) and take-back obligations. It can be said that it is a rather proper incorporation of the directive, although it does not go beyond the EC provisions. This norm is in force since the end of January, 2003.

Apart from the purely normative developments, I find interesting to mention that the government had previously approved the National plan on end-of-life vehicles (ELV) management (decision of the Council of Ministers of August the 3rd, published in the Official Gazette on October the 16th, 2001) which I already mentioned in my contribution for the Copenhagen meeting. The Plan (not a "law", formally speaking, but binding for operational purposes), set the environmental targets in the field of ELV for the period 2001-2006.

It is important to notice that the national government (Ministry of the Environment and other bodies) lacks any actual power or competence in the field of waste management, recycling of elimination whatsoever, since that is a regional and local responsibility. Accordingly, prior to this plan several regions had already approved their own regional plans on ELV, namely Andalucía, Basque Country or Navarra. In the absence of a specific national norm on ELV, those plans were framed on the statutory basis of the general Act on Waste, of 1997, and within the prospect of the European directive. This national plan, which has been negotiated with the Regions, is supposed to be an instrument for coordinating those regional plans on this subject (through several techniques, such as: sharing of information, setting up of cooperation devices, subsidies, public infrastructures, public information and awareness campaigns, etc.). It already mentioned expressly the obligations stemming from Directive 2000/53/CEE, of September the 18th, at a time when this European norm had not been incorporated in Spain yet.

2.2 Electrical and electronic waste.

So far, this directive has not been incorporated in Spain yet. A Royal Decree from the Cabinet of Ministers is expected in the future, but this can take time, since the next general elections are scheduled for next March the 14th.

2.3.- Batteries

Directive 91/157 was incorporated in Spain by way of another Royal Decree of the Cabinet of Ministers (*Real Decreto del Consejo de Ministros*) : 45/1996, of 19 January 1996. This regulation has been amended in several occasions, as required by the counterpart amendments of EC Law. Again, this norm has overall the same reach of the EC directive, with a notable exception : while art. 4.2 of the said Directive contains a broad stipulation on the fact that the member states shall ensure that batteries and accumulators are marked into the appropriate manner (for what concerns indications on issues such as separate collection and the heavy-metal content), the Spanish regulation clearly states that the producer will be responsible (*responsable*) for these obligations on marking.

2.4.- Packaging and packaging waste

Directive 94/62, on packaging and packaging waste has been incorporated in Spain through an Act of the national Congress : Act 11/1997, of 24 April 1997. From the strict point of conformity, this statute can be considered to be a rather fair transposition of the directive. Consequently, the Spanish regulatory scheme on packaging and packaging waste includes more or less the same provisions, techniques and instruments on « producer responsibility » in this domain.

Namely, art. 6 of the said statute lays down the basic positive obligations of the producer, in terms of take-back, deposit, integrated systems for the management of waste, and voluntary agreements. On the basis of this statutory authority, several schemes have been set up in the past years. Producers have organised themselves in order to collectively set up take-back or recycling systems, especially in the glass and paper sector. These schemes are not considered to reduce competition, since they are explicitly set forth by statute or administrative regulation. Consequently, there is no court jurisprudence on this issue

For what concerns figures in the domain of recycling/recovery and prevention of waste, they are published on an annual basis, both by the central government (Ministry of the environment, see its website: http://www.mma.es) and by the regional agencies and departments.

II.- PRODUCT POLICY

The previous remarks on the weak acceptance of “producer responsibility” in Spain can perfectly been reproduced in the domain of product policy: (1) so far, it has not been a matter of relevant concern or political attention; (2) The few development are clearly connected with the requirements of EC Law, (3) in general, there is no “autonomous” or genuine national developments. There is no national product policy general strategy.

However, among the examples of product policy stand the following ones:

a) In the area of policies towards a life-cycle approach, we can refer to Royal Decree 1383/2002, of 20 December 2002, on ELV (discussed supra). This norm is explicitly based on a « life-cycle » approach. Namely, art. 3 set precise provisions on the car manufacturing process: design, avoidance of toxic substances, and so. Also, art. 13 of the Act on Waste and packaging waste (mentioned supra) also sets rules on the present of toxic substances on packaging.

b) Safety/security of products:

Royal Decree 1801/2003, of 26 December, on the safety of products, transposes into the Spanish legal system a set of EC Directives on products, safety, namely Directive 2001/95/EC, of 3 December 2001. It introduces a general regulatory and administrative scheme for the adequate implementation of a true « product policy ». However, this regulation is mainly focused on issues of safety and security of goods, *vis à vis* consumers and individuals. Construed in a large way, « security » could also encompass the lack of risks for the environment also, although this is not evident, at least *prima facie.*

c) Chemical substances and preparations and similar

No initiative autonomous from EC legislation on chemical substances and preparations, pesticides or biocides. What is more, Spain has enjoyed additional deadlines for the banning of dangerous substances and goods, such as leaded gasoline and asbestos.

d) Voluntary schemes.

All kinds of voluntary, product-based schemes may be found in Spain: the EU Eco-label, other environmental quality labels, and EMAS (as long as it concerns also products). However, as for the EU Eco-label, it has not been a success: very few products use that label, which in practice has been replaced by other signs (environmental label under Spanish-UNE/CEN norms). The same applies to EMAS: very few corporations have applied for it, while the majority apply for the ISO 14000 certificate.

III.- MAIN ENVIRONMENTAL DEVELOPMENTS WITH EUROPEAN DIMENSION DURING 2003

They may be summarised as follows:

1.- Legislation

The most important statutes:

- Act 37/2002, of 17 November, on Noise (BOE of 18-11-2003) This statute is supposed to transpose Directive 2002/49 of 25 June 2002, on noise relating to the assessment and management of environmental of noise.
- Act 43/2003, of 21 November, on Forests Management (BOE of 22 November 2003). This Act has connections with directive 92/43 of 21 May (the Habitats directive)

See the electronic version of both statutes in the website of the Spanish Official Gazette (BOE): http//www.boe.es.

2.- EU Case-law: compliance with EC environmental law

During the year 2003, Spain has already been condemned by the ECJ in several infringement procedures:

1) Judgement of 16 January, 2003, *Commission v. Spain* (Case C-29/02): not transposition in due time of Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.

2) Judgement of 13 March 2003, *Commission v. Spain* (Case C-333/01): not transposition in due time of Directive 98/81/EC of 26 October 1998, amending Directive 90/219/EEC, on the contained use of genetically modified microorganisms.

3) Judgement of 15 May 2003, *Commission v. Spain* (Case C-419/01): failure to identify sensitive areas, in the context of Directive 91/271/EEC, of May 21 1991, concerning the treatment of urban waste-water (article 5). Several Autonomous Communities did not identify those areas.

4) Judgement of 12 June 2003, *Commission v. Spain* (Case C-446/01): existence of several unsupervised, illegal waste-disposal sites, then violating several articles or Directive 75/442, on waste, as amended by Directive 91/156. This case is not about late or defective transposition, but one about defective implementation/enforcement. Again, in its origin the unlawful activity falls within the scope of competences of the Autonomous Communities and Local Governments.

5) Judgement of 25 November 2004, *Commission v. Spain* (Case C-278/01). For a better understanding of this case, it has to be recalled that Spain was already condemned by the court in his judgement of 12 February 1998, in Case C-92/96, for not ensuring that the quality of several bathing sites conform with the values set by Directive 76/160, (bathing waters directive). In spite of the plans and initiatives carried out by the Spanish authorities, the Commission did not understand that Spain had fully and completely complied with the previous judgement, and thus sued Spain for a second time, under art. 228 of the Treaty. This application turned out to be successful, and the court condemned Spain, ordering that country to pay a penalty payment of 624.150 Euros per year and per each 1% of bathing areas in Spanish inshore waters not conforming to the limit values laid down under directive 76/160.

This is only the second time that a financial penalty has been imposed on a member state for breach of EU Law (all fields comprised) in the history of the European integration With this important ruling, Spain has the doubtful honour to join Greece in this shameful "hit-parade". In spite of the seriousness of this judgement, it has not triggered any significant attention from the Spanish mass media or politicians, as neither did the other ones. The leading newspapers only devoted a short notice in the inner pages.

3. Other developments

During 2003, the most controversial environmental issue in Spain has been the implementation of the National Hydrological Plan (NHP). The NHP was approved by an act of Congress in 2001: Act of July the 5th, 2001 on the National Water Management Plan (*Plan Hidrológico Nacional)*. As I explained during the Copenhagen

meeting, this National Plan is a key element in the Spanish law on water management, and was foreseen by the previous Water Management Act of 1985. Since Spain is such a diverse and heterogeneous country from the perspective of water supply and demand, the national plan tries to lay down the fundamental, strategic policy options for solving the recurrent problems of droughts and water distribution, as well as depuration of residual waters. Concerning the first problem, the plan includes a macro-complex set of projects in the domain of water management: depuration plants, regularisation of rivers and streams, and water transfers. Precisely, this latter part is most controversial, especially the project of transferring water from the Ebro River to East and Southern regions (*El trasvase del Ebro)*, which is by far the most important project of all. It is almost one thousand Km. long. The project faces fierce opposition in the Region of Aragón, while it is more than warmly welcomed by the Regions of Valencia, Murcia and Andalucía. The project is championed by the current Cabinet, ruled by Aznar´s Popular Party.

In late October, 2003, the central Ministry for the environment issued the Statement onf Environmental Impact assessment for the project. The statement has been heavily criticised by many groups and experts, because it was completed in too short a time for such a complex project (only three months), because it was unrealistic and because the Ministry for the environment itself is the one that both analyses the impact of the project and carries it out (!). The government of Aragón has announced that it will sue the central government, before both national and EC instances. Several letters of complaint on this project have been filed before the Commission by individuals and groups

Critics argue that the Ebro Waters Transfer Project violates several EC directives on Nature conservation and Water protection, namely the Framework waters directive and the EIA one. Meanwhile, the works have already started...