Annex I

Spain

Improving financial security in the context of the Environmental Liability Directive
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1. **INTRODUCTION**

Financial security for environmental damage in the form of environmental insurance has been widely available in Spain since 23 October 2007 when the Environmental Liability Act, Law 26/2007, of 23 October (Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental; ELA)\(^1\) transposed the ELD into Spanish law with retroactive effect to 30 April 2007. Even before October 2007, stand-alone environmental insurance policies were available to provide cover for liabilities for pollution-related damage under Spanish law.

Stand-alone insurance policies that provide cover for ELD and other environmental liabilities in Spain are underwritten by individual, mainly multinational, insurers and those associated with the Environmental Risks Pool (Pool Español de Riesgos Medioambientales).

Extensions to general liability policies that provide cover for environmental liabilities are available but only on a limited basis.

Environmental extensions to property policies are not available.

When the ELD was transposed, the scope of all the environmental policies offered for Spanish risks increased to provide cover for non-pollution environmental damage as well as environmental damage caused by pollution.

Spain is the pre-eminent Member State in introducing mandatory financial security for preventing and remediating environmental damage under the ELD. Royal Decree 2090/2008, of 22 December (Real Decreto 2090/2008, de 22 de diciembre, por el que se aprueba el Reglamento de desarrollo parcial de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental; Royal Decree 2090/2008)\(^2\) sets out the procedures to determine mandatory financial security.

The mandatory financial security requirements are being phased in, beginning on 31 October 2018, based on the type of facility and the degree of risk of environmental damage. The requirements do not extend to all liabilities under the ELD; they do not include complementary and compensatory remediation. The requirements are subject to specified exemptions and limits.

In addition to mandatory financial security under the ELD, financial security for compensation for bodily injury, property damage, and the remediation of environmental damage from hazardous waste sites and sites for the management of specific waste is required. Further, permits for waste disposal operations may include a requirement for a bond or other financial guarantee in addition to the above financial security instruments.

Some Autonomous Communities extend mandatory financial security requirements for waste producers to include, for example, automobile repair facilities and end-of-use vehicle facilities in respect of waste oil from such operations.

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2. ENVIRONMENTAL INSURANCE MARKET

The environmental insurance market in Spain is well developed. It has included a substantial number of insurers that offer environmental insurance policies for many years and continues to expand as more carriers enter the market and the range of policies broadens in scope. As indicated above, the market includes national and multinational insurers and a re/insurance pool. Both offer policies for small to medium sized businesses, with the latter focusing on this market. Multinational insurers provide such policies in addition to policies for operators with global programmes as well as cover for large operations in Spain itself.

The introduction of mandatory financial security raised the awareness of operators of liabilities under the ELD and other environmental legislation which, in turn, led to an increase in the number of policies purchased by them to provide cover for such risks. Whilst the introduction of mandatory financial security itself (albeit with a long lead time before it entered into effect) assisted the growth of the market by requiring specified operators to have mandatory financial security for ELD liabilities, most operators subject to mandatory financial security since that time already had environmental insurance policies.

Demand for stand-alone environmental insurance policies is moderate but growing. Environmental extensions to general liability policies are available but only on a limited basis. They do not provide cover for complementary or compensatory remediation. Demand is moderate.

2.1. Commercial insurers

2.1.1. Number of insurers

Approximately eight insurers with bases in Spain underwrite environmental insurance policies. These insurers offer global programmes providing cover for environmental risks in many States (including other Member States by way of passporting) as well as underwriting policies that provide cover for operators whose facilities and operations are based only in Spain. In addition, 17 insurers subscribe to policies offered by the Environmental Risks Pool.

By way of comparison, approximately 220 carriers are authorised to conduct insurance business in Spain. Some of these carriers offer stand-alone environmental insurance policies as well as other types of policies such as general liability, motor insurance, professional indemnity insurance, etc.

2.1.2. New insurers entering the market since 2009

It is not possible to state with any precision how many insurers have entered the environmental insurance market in Spain since 2009. Information provided by ELD stakeholders varies from none to four.

2.1.3. Existing insurers that introduced environmental insurance policies since 2009

Multinational insurers that offered insurance policies by passporting including those that had bases in Spain increased the range of the policies after 2009 to include stand-alone environmental insurance policies. Some multinational insurers already offered stand-alone environmental insurance policies before 2009.
2.2. Re/insurance pools

2.2.1. Date of establishment

The Environmental Risks Pool was established in 1994 when environmental insurance in the EU was in its infancy. The creation of the pool enabled insurers and reinsurers in it to subscribe to policies rather than underwriting them individually at a time when assessment of the costs of remediating environmental damage was new.

The pool underwrites environmental insurance policies for ELD and other environmental liabilities, including policies that satisfy the mandatory financial security requirements for ELD liabilities, in addition to extensions to general liability policies. When this report was published, the pool had underwritten over 9,500 policies, mainly for small and medium sized enterprises. It consisted of 25 insurers and reinsurers.

The scope of cover provided by the pool has gradually increased and is wider than the scope of financial security required by the mandatory financial security system (see section 5.2.6 below). Policies are offered not only for liabilities subject to the mandatory system but also for complementary and compensatory remediation under the ELD.

2.2.2. Descriptions of policies issued

The model policy issued by the Environmental Risks Pool is a stand-alone policy in two parts. The main part, the body of the policy, provides cover for preventing and remediating environmental damage under the ELD and other environmental legislation; the supplementary optional part provides cover for third-party claims for bodily injury, property damage and economic loss caused by pollution. Approximately 95% of insureds have cover under the optional part as well as the main part. Activities covered by the first part include those on an insured’s site, including liabilities arising from underground storage tanks, as well as those offsite caused by transportation and operations carried out by the insured.

Each part has a separate limit of liability. This allows insured operators who are – or will be – subject to the mandatory financial security system to comply with its requirements by ring-fencing ELD liabilities covered by the system (see section 6.2.2 below).

The policies do not provide cover for historic contamination. There is, however, a retroactivity provision that provides cover for environmental damage that is not known to the insured when the policy incepts but which is discovered during the policy period and is attributed to facts that occurred before inception of the policy (see section 3.6.2 below).

There is also a temporal extension that provides cover up to three years after termination of the policy (see section 3.6.2 below).

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3 See European Commission, Study on pools and on ad-hoc co(re)insurance agreements on the subscription market (Ernst & Young, 8 February 2013) 393; https://www.vnab.nl/CmsData/Downloads%20Algemeen/Oude%20nieuwsberichten/Study_on_co(re)insurance_pools_and_on_ad-hoc_co(re)insurance_agreements_on_the_subscription_market.pdf

4 See David Aviñó Belenguer, ‘El Seguro de Responsabilidad Medioambiental del Pool Español de Riesgos Medioambientales’; http://www.davidavino.es/el-seguro-de-responsabilidad-civil-por-contaminacion-medioambiental-del-pool-espanol-de-riesgos-medioambientales/ (in Spanish)

5 ‘Qué es el Pool de Riesgos Medioambientales?’ (5 June 2018); https://wwwshare.estamos-seguros.es/que-es-el-pool-de-riesgos-medioambientales/ (in Spanish)
2.3.  **Mutuals**

There are no mutuals in Spain that offer cover for environmental, including ELD, liabilities.

2.3.1.  *Date of establishment*

Not applicable

2.3.2.  *Descriptions of policies issued*

Not applicable

2.4.  **Other**

Some large Spanish operators, including operators with facilities in States (including Member States) other than Spain, have captive insurance companies. The captives are, as in other Member States, domiciled in countries with low applicable rates of tax. Some of the captives provide cover for ELD and other environmental liabilities.

3.  **Voluntary insurance policies for ELD and other environmental liabilities**

3.1.  **Environmental insurance policies**

Stand-alone environmental insurance policies are widely available in Spain for ELD and other environmental liabilities as well as other cover such as disaster management costs (to protect the reputation of an operator that has caused environmental damage), business interruption, and related legal expenses. The scope of cover depends on the insurer(s) underwriting the policies (see section 3.6.3 below).

The phased-in introduction of the mandatory financial security system for ELD liabilities has resulted in environmental insurance becoming crucial for operators that are subject to the system. The introduction has also increased awareness of ELD liabilities especially among small and medium sized businesses, which were previously less aware than large operators.

Property transfer policies, that is, policies that provide cover for remediating historic contamination on an insured site are also available depending on the insurer(s) underwriting the policy. Other types of policies are also available, as described in section 3.6.3 below.

3.2.  **Cover for ELD preventive costs**

Stand-alone environmental insurance policies generally provide cover for preventive costs under the ELD. The scope of cover depends on the insurer(s) underwriting the policies. Some policies provide cover for a broad scope of preventive and emergency costs; other policies provide more restrictive cover for such costs.

3.3.  **Cover for ELD primary, complementary and compensatory costs**

Virtually all stand-alone environmental insurance policies offered for risks in Spain provide cover for primary, complementary and compensatory remediation costs under the ELD.

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3.4. Cover for non-ELD liabilities

Virtually all stand-alone environmental insurance policies offered for risks in Spain provide cover for costs arising from environmental damage under other environmental legislation as well as the ELD. Due to the focus of most environmental liability legislation on pollution (contaminación), this is also the focus of the cover provided by the policies.

3.5. Nature of policies (liability only or liability and on-site remediation)

All stand-alone environmental insurance policies offered for risks in Spain provide cover for the costs of remediating environmental damage, including soil and water pollution, caused by an insured to third-party sites as well as the costs of remediating such damage on an insured’s own site. The policies also provide cover for third-party claims for bodily injury, property damage and economic loss from environmental damage.

The policies do not provide cover for damage to on-site property in the form of buildings, other structures and equipment unless, under some policies, the damage results from carrying out remediation measures themselves.

3.6. Description of policies

3.6.1. Format

Stand-alone environmental insurance policies offered by multinationals for risks in Spain generally have a menu format so that an insured may select the insuring agreement(s) it requires. There is a wide range of such policies (see section 3.6.3 below).

The policies for operators subject to the ELD have been adapted to include provisions to comply with the mandatory financial security system as part of their cover, rather than setting out this cover in a separate policy.

The wording issued by the Environmental Risks Pool is in two parts. The body of the policy provides cover for environmental liabilities under public law (such as the ELD). The supplementary (and optional) part provides cover for third-party claims from pollution, that is, civil law claims (see section 2.2.2 above).

3.6.2. Claims made or occurrence based

Environmental insurance policies are underwritten on a claims made basis rather than an occurrence basis. In order to understand how claims made policies operate in Spain, the following is a brief review of relevant Spanish insurance law.

Article 73 of the Law on Insurance Contracts 50/1980, of 8 October (Ley 50/1980, de 8 de octubre, de Contrato de Seguro)7 allows policies for civil liabilities (that is, bodily injury, property damage and economic loss – none of which are covered by the ELD) to be underwritten on a claims made basis provided they comply with the following two conditions. First, if the loss to the insured occurs during the policy period, the policy must provide that the claim against an insured for that loss can be made within one year after the termination of the policy period as well as during the policy period itself. Second, if the loss occurs up to one year before the policy incepts, the policy must provide that a claim against the insured for that loss can be made during the policy period.

On 26 April 2018, the Spanish Supreme Court clarified that article 73 does not require a policy to include both conditions; it is sufficient for it to include only one of them. The Spanish Supreme Court reiterated the conclusions of its judgment of 26 April 2018 on 20 and 26 March 2019.

If a policy includes either condition, the condition must be prominent in the policy and must be expressly accepted in writing by the insured.

Due to the ELD not having been transposed into Spanish law until 2007, the Law on Insurance Contracts did not include provisions concerning the time limit for claims for remediating environmental damage in addition to civil claims.

Section 6.2.2 below describes the requirements for insurance policies used to satisfy mandatory financial security for ELD liabilities.

3.6.3. Policies for operators

Multinational insurers offer a wide variety of environmental insurance policies to operators from small to medium sized operators to multinational companies. Depending on the insurer, the policies include site-specific policies designed for fixed locations are which an insured operates, policies designed for mergers and acquisitions, policies designed for property portfolios that provide cover for a large number of properties owned by an investment fund or other insured, and bespoke policies, that is, policies that are specifically designed for an individual insured’s operations.

Depending on the insurer, the policies include insuring agreements for the following:

- the remediation of on-site and off-site environmental damage under the ELD caused by operations, including transportation, carried out by the insured operator during the policy period;
- the remediation of pollution under other environmental legislation caused by operations, including transportation, carried out by the insured operator during the policy period;
- emergency measures to prevent or remediate environmental damage under the ELD that occurs during the policy period;
- emergency measures to prevent or remediate pollution under other environmental legislation, that occurs during the policy period;
- third-party claims for bodily injury and property damage from environmental damage including pollution;
- first party business interruption costs and extra expense caused by environmental damage including pollution;
- third party business interruption costs and extra expense caused by environmental damage including pollution;

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9 JUR 2019/102520 and JUR 2019/113297; see Alberto Díaz Moreno, ‘De nuevo sobre las cláusulas “claim made”’ (Lexology, 3 May 2019); https://www.lexology.com/library/detail.aspx?g=f6de3334-d310-4d4a-b24a-d746de97d91f (in Spanish)
• the remediation of pre-existing environmental damage including pollution at or emanating from sites owned or occupied by the insured provided that the damage is disclosed by the insured to insurers, or is unknown to the insured, before the inception of the policy;
• specific cover for liabilities arising from underground storage tanks;
• the remediation of environmental damage arising from the insured’s waste at an authorised non-owned disposal site;
• disaster/crisis response costs arising from an incident that has caused environmental damage including pollution (that is, costs associated with protecting an insured’s reputation); and
• related legal costs.

Only the first and third items are liabilities under the ELD and, thus, covered by the mandatory financial security system. The policies are thus designed to include, not only protection under the ELD but also protection under other public law as well as civil law and non-liability requirements. As indicated above in this section, some policies are designed for businesses, such as investors, rather than operators under the ELD.10

In addition to specimen wordings for each type of policy, multinational insurers have libraries of standard endorsements for each type. They also draft manuscript endorsements to supplement the endorsements in their libraries to meet the needs of their insureds, as necessary.

Some policies limit cover for the costs of remediating on-site environmental damage to damage that begins and ends during a specified period of hours or days, that is, sudden and accidental pollution incidents that take place within a specific time during the policy period.

All stand-alone environmental insurance policies offered by multinational insurers to operators with sites and/or operations only in Spain as well as sites and/or operations in Spain and other States are not necessarily designed for Spanish operators. Some policies are specifically designed to reflect – and provide cover for – the legal and licensing situation in Spain; others are not.

Cover provided by the Environmental Risks Pool is described in section 2.2.2 above. The pool provides cover for business interruption and extra expense only on an exceptional basis. It may provide cover for disaster response costs as an additional insuring agreement.

3.6.4. Policies for contractors and others

Environmental insurance policies that provide cover for ELD and other environmental liabilities are also available for contractors. The policies tend to provide similar types of cover as the policies for operators, as described in section 3.6.3 above, including liability for remediating environmental damage including pollution at sites at which the contractor is carrying out operations in addition to the insured contractor’s own site.

3.7. Model terms and conditions

There are no model terms and conditions for insurance policies for ELD or other environmental liabilities in Spain.

10 Article 2(6) of the ELD defines an ‘operator’ as ‘any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity’. 
3.7.1. **Organisation issuing model terms and conditions**

Not applicable

3.7.2. **Description of model terms and conditions**

Not applicable

3.7.3. **Relationship between policies with model terms and conditions and environmental insurance policies**

Not applicable

3.8. **Date of general availability of environmental insurance policies**

Stand-alone environmental insurance policies in Spain have been available since the mid-1990s when the Environmental Risks Pool began operating. Their availability has grown substantially since that time as a growing number of insurers continue to enter the environmental insurance market.

Multinational insurers have offered environmental insurance policies by means of passporting since the early 2000s, with policies for sites based only in Spain a few years later.

Environmental insurance policies for ELD liabilities have been generally available since 2007 when ELA transposed the ELD into national law.

3.9. **Environmental assessments and audits**

A business that applies for an environmental insurance policy is not required to carry out an environmental assessment or audit of sites to be covered by the policy before the policy is placed. If the putative insured already has information on the environmental condition of site(s) to be insured, this information is provided to the insurer. The insurer then considers the information as part of the underwriting process.

Environmental insurers may also carry out technical site visits (that is, visits to review the site and any facilities including pollution-control equipment at them) as part of the underwriting process although this is not a frequent occurrence. The Pool carries out such visits in less than 5% of cases. An environmental insurer reported that it tends to carry out technical site visits only for high risk activities such as mining, industrial chemical facilities, and waste disposal when it has not been provided with sufficient information properly to underwrite the risk.

If the insurance policy includes cover to satisfy mandatory financial security requirements for ELD liabilities, the operator will have carried out a risk assessment (see section 5.2.7 below).

Post-binding technical site visits may also be carried out by insurers.

3.10. **Average premium**

It is not possible to provide an average premium due to the diverse profile of insureds.

3.11. **Average policy limit**

ELD stakeholders, including insurers and brokers, provided various – and sometimes conflicting – estimates of average policy limits as follows:

- the policy limit for small to medium sized enterprises varies between EUR 30,000 and EUR 1,000,000; these represent between 85% to 95% of all operators with environmental insurance;
- the average policy limit for middle market operators is EUR 3,000,000;
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- the average policy limit for medium to large operators varies between EUR 175,000 and EUR 10,000,000;
- the average policy limit for large operators varies between EUR 5,000,000 and EUR 20,000,000;
- multinational insurers have an individual capacity of up to EUR 50,000,000; and
- the average policy limit for global accounts and high risk operations is EUR 15,000,000 with some policies having limits of over EUR 100,000,000.

Note that individual policies sometimes have different policy limits for each and every loss from an environmental damage incident or event, and in the aggregate. Other policies have the same limit for both. Some policies include sub-limits for various parts of the cover.

3.12. **Average deductible or self-insured retention**

ELD stakeholders provided various – and sometimes conflicting – estimates of average deductibles or self-insured retentions as follows.

One stakeholder stated that the average deductible or self-insured retention for each and every loss varies between 2% to 5% of the sum insured.

Another stakeholder stated that the average deductible or self-insured retention for each and every loss is EUR 5,000.

3.13. **Average policy period**

The average policy period for an insurance policy that provides cover for ELD and other environmental risks is one year, with some policies having automatic renewals.

3.14. **Sizes of typical insured businesses**

There is no typical size of insured business for environmental insurance policies in Spain. All types and sizes of businesses purchase them ranging from small and medium sized enterprises to large industrial facilities, to global businesses.

As indicated in sections 2.2.1 and 3.6.1 above, the Environmental Risks Pool tends to provide policies to small and medium sized enterprises. Multinational insurers provide policies for large operators as well as small and medium sized enterprises.

3.15. **Industrial and commercial sectors that typically purchase policies**

Industrial and commercial sectors that commonly purchase environmental insurance policies range from operators of industrial sites, transportation, contractors, service activities such as the public collection of municipal waste, and agriculture. They also include industrial and non-industrial activities such as commercial stores, cinemas, schools, restaurants and hotels.

3.16. **Industrial and commercial sectors with limited or no accessibility to policies**

As a general rule, there are no industrial or commercial sectors with limited or no accessibility to environmental insurance policies.

Some insurers, however, do not offer environmental insurance policies to operators in some sectors including nuclear, waste, mining and genetically modified organisms.

3.17. **Number and amount of claims**

There has been a steady stream of claims against environmental insurers since at least 2009. The amount of claims is increasing as the number of stand-alone environmental insurance policies increases. One insurer reported an average of four to five claims a year in the late
2010s. The claims vary from spills of pollutants during transportation or at an insured facility to soil contamination from pollutants that have escaped from an insured facility. Industrial fires are also a frequent and important cause of pollution incidents covered by insurance.

The most common claims according to some insurers are those for the cost of preventive and remediation measures for on-site and off-site environmental damage, accompanied in some cases by claims for business interruption.

The amounts of the claims range widely from less than EUR 1,000 to over EUR 1,000,000 and even EUR 20,000,000.

3.18. Coverage litigation

There is no reported litigation concerning the terms and conditions of environmental insurance policies.

There has, however, been litigation as to whether an operator that had environmental liability, directors and officers, and other liability policies had cover for costs arising from pollution and other environmental damage when the damage at one of the insured’s premises was allegedly caused by wilful and unlawful acts.

3.19. Cover for ELD liabilities in general liability policies

The Environmental Risks Pool underwrites extensions to general liability and multi-risk (combined) policies to provide cover for preventing and remediating environmental damage under the ELD and other environmental legislation.

One Spanish broker stated that it would be very unusual for insurers to offer cover for ELD liabilities in general liability policies.

In contrast, an insurer that underwrites policies for sites and operations in Spain stated that it offers an endorsement to provide cover for ELD and other environmental risks to general liability policies, including such an endorsement to construction all risks policies.

3.20. Cover for ELD liabilities in property policies

Cover for ELD liabilities is not offered in property policies. If the property policy is part of a multi-risk policy, that policy may include cover for ELD and other environmental liabilities.

4. OTHER VOLUNTARY FINANCIAL SECURITY INSTRUMENTS AND MECHANISMS

Voluntary financial security instruments such as bank guarantees, bonds, etc. are not available for liabilities under the ELD or other environmental legislation. There is no demand for them.

4.1. Type(s)

Not applicable

4.2. Availability

Not applicable
5. **Mandatory financial security for ELD liabilities (Article 14(1))**

5.1. **Competent authority(ies)**

Article 7 of ELA establishes that the competent authorities for applying the ELD in Spain are, in most cases, the Autonomous Communities (Comunidades Autónomas), notwithstanding the competence of the State Administration in some cases.

5.2. **Legislative provisions**

5.2.1. **Name(s) of legislation**

The Spanish legislation that implements the ELD including the mandatory financial security system, is as follows.

- ELA
  - modified by Law 11/2014, of 3 July (Ley 11/2014, de 3 de julio, por la que se modifica la ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental)

- Royal Decree 2090/2008
  - modified by Royal Decree 183/2015, of 13 March (Real Decreto 183/2015, de 13 de marzo, por el que se modifica el Reglamento de desarrollo parcial de la Ley 26/2007 de 23 de octubre)

- Ministerial Order ARM/1783/2011, of 22 June (Orden ARM/1783/2011, de 22 de junio, por la que se establece el orden de prioridad y el calendario para la aprobación de las órdenes ministeriales a partir de las cuales será exigible la constitución de la garantía financiera obligatoria, previstas en la disposición final cuarta de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental)
  - modified by Order APM/1040/2017, of 23 October (Orden APM/1040/2017, de 23 de octubre, por la que se establece la fecha a partir de la cual será exigible la constitución de la garantía financiera obligatoria para las actividades del anexo III de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental, clasificadas como nivel de prioridad 1 y 2, mediante Orden ARM/1783/2011, de 22 de junio, y por la que se modifica su anexo)

- Ministerial Order TEC/1023/2019, of 10 October (Orden TEC/1023/2019, de 10 de octubre, por la que se establece la fecha a partir de la cual será exigible la constitución de la garantía financiera obligatoria para las actividades del anexo III de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental, clasificadas como nivel de prioridad 3 mediante la Orden ARM/1783/2011, de 22 de junio)

Law 11/2014, of 3 July amended ELA to include the following:

- a requirement for operators subject to mandatory financial security to notify the relevant competent authority of the nature of the financial security instrument and to justify its limits;
- deletion of a maximum deductible for insurance of 0.5%;
- deletion of an optional sublimit for preventive costs in financial security instruments (previously a maximum sub-limit of 10%); and

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encouragement to operators that are exempt from the mandatory financial security system to carry out voluntary risk assessments.

Royal Decree 183/2015, of 13 March amended ELA to limit the categories of activities subject to mandatory financial security (see section 5.9 below). The Decree also introduced a new methodology to simplify the calculation of the amount of financial security, based on an index of environmental damage and quantification and monetisation of a baseline scenario.

Ministerial Order ARM/1783/2011, of 22 June established a priority order and timetable for phasing in the mandatory financial security system based on the degree of hazard and risk.

5.2.2. Stand-alone requirement or hybrid

Mandatory financial security in Spain is a stand-alone requirement. That is, the legislation that established mandatory financial security does not combine the system with mandatory financial security for liabilities under other environmental legislation or for known costs such as the closure and post closure of a landfill.

5.2.3. Consideration of mandatory financial security legislation (if not enacted)

Not applicable

5.2.4. Reasons for decision not to enact mandatory financial security legislation

Not applicable

5.2.5. Revisions to legislation

Spain was the first Member State to introduce a detailed mandatory financial security system for ELD liabilities together with methodologies to determine the amount of financial security for individual operators.

ELA established that the date of the entry into force of mandatory financial security would be determined by ministerial orders that would be approved from 30 April 2010 onwards.

The amendment of ELA by Royal Decree 183/2015, of 13 March reduced the categories of annex III operators that would be required to comply with the mandatory financial security requirements from all the activities set out in annex III to specified operators (see section 5.9 below). Before the amendment, approximately 300,000 operators would have been required to comply with the mandatory financial security requirements.

5.2.6. ELD liabilities covered by mandatory financial security

Article 29 of ELA defines the scope of ELD liabilities that are subject to mandatory financial security as follows:

- preventive actions;
- emergency remedial actions;
- the remediation of land/soil damage; and
- primary remediation measures for water, and for species and natural habitats protected by the Birds Directive (2009/147/EC) and the Habitats Directive (92/43/EEC) and equivalent national law (biodiversity damage).

The mandatory financial security system covers the remediation of land/soil damage, water and biodiversity damage on an insured’s own site as well as such damage caused by an operator on third-party sites (both privately and publicly owned). The mandatory system does not cover complementary or compensatory remediation.
Whilst ELA provides that mandatory financial security is required for all types of environmental damage, article 32, which describes limitations on the temporal scope of financial security instruments, refers specifically to pollution (contaminación) (see section 6.2.2 below). (Exclusions of funding provided by the Compensation Fund for Environmental Damage also refer to pollution (see section 16.1.1 below).)

The Guide for the constitution of the financial guarantee of Law 26/2007 of 23 October; Communication and Revision (Guía para la constitución de la garantía financiera prevista en La Ley 26/2007, de 23 de Octubre, Comunicación y Revisión; ELD Guide)\textsuperscript{12} states that operators that have financial security for complementary and compensatory remediation costs may include details of them in the declarations required under the mandatory financial security system (see section 5.2.7 below).\textsuperscript{13} As indicated above, however, financial security for these costs is not mandatory.

5.2.7. Description of mandatory financial security provisions

Chapter III of Royal Decree 2090/2008 sets out the requirements for the methodology to determine the amount of mandatory financial security as well as specifications for the form of acceptable financial security instruments.

The Directorate General of Environmental Quality and Assessment (Dirección General de Calidad y Evaluación Ambiental), acting as Secretary of the Technical Commission for the Prevention and Remediation of Environmental Damage (Comisión Técnica de Prevención y Reparación de Daños Medioambientales) has prepared detailed standard environmental risk models and methodology guidelines for carrying out risk assessments to determine whether an operator is required to have financial security or is exempt from the requirements. The methodology also includes criteria to calculate the amount of the required financial security.

Operators subject to mandatory financial security requirements must carry out an environmental risk assessment and submit a report based on it to the relevant competent authority. If specified criteria exceed thresholds, the operator must have financial security in an amount not less than the minimal amount specified in the report.

The following is a very brief summary of the methodology. The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) has published a much more detailed version.\textsuperscript{14}

First, risk scenarios and their probability are identified. Second, the cost of the primary remediation of environmental damage is calculated by estimating the Environmental Damage Index (IDM) for each risk scenario. Third, the scenarios are ranked in terms of IDM and the probability of such damage. Fourth, the scenarios with the lowest environmental damage that account for 95% of the total are selected. Fifth, the primary remediation costs of the environmental damage associated with the scenario with the highest IDM of the scenarios selected in the fourth step (reference scenario) is quantified. Its cost can then monetised by a methodology in the form of a software tool called an Environmental Liability Supply Model

\textsuperscript{12} Ministerio para la Transición Ecológica y el Reto Demográfico, ‘Guía para la constitución de la garantía financiera prevista en La Ley 26/2007, de 23 de Octubre, Comunicación y Revisión’ (29 April 2019), Table 1, 6-12; https://www.miteco.gob.es/es/calidad-y-evaluacion-ambiental/temas/responsabilidad-medioambiental/guiaconstituciongarantiafinanciera_290419_web_tcm30-486933.pdf (in Spanish)

\textsuperscript{13} Ibid 17

(Modelo de Oferta de Responsabilidad Ambiental; MORA). Sixth, the costs of preventive measures, which must be at least 10% of the primary remediation costs, are added. The figure obtained by this methodology is the amount of the mandatory financial security.\(^{15}\) Use of MORA is free of charge and is available in both Spanish and English.\(^{16}\)

**Ex ante** validation of the environmental risk assessment either by the competent authority or independent experts is not required. Instead, the operator must submit a ‘responsible declaration’ to the competent authority that can subsequently revise the risk assessment.

MORA was developed for calculating the amounts of **ex ante** and **ex post** financial security by the Directorate General of Environmental Quality and Assessment of the Ministry for the Ecological Transition and the Demographic Challenge (*Ministerio para la Transición Ecológica y el Reto Demográfico*). MORA may also be used to monetise the costs of complementary and compensatory remediation measures.\(^{17}\)

The Regulation on the partial implementation of ELA, approved by Royal Decree 2090/2008, allows the development of a series of voluntary instruments of sectoral risk analysis. In order for operators to use the instruments to prepare their individual environmental risk analyses, they must be approved by the Technical Commission for the prevention and remediation of environmental damage.

The Technical Commission has carried out the following to assist operators in carrying out sectoral environmental risk analyses:

- publication of a document entitled 'Structure and general content of the sectoral instruments used for environmental risk assessment';
- technical assistance for activities and/or professional sectors listed in annex III of ELA on the design of sectoral tools for environmental risk assessment;
- creation of three pilot schemes for the design of a standardised environmental risk report (*modelos de informe de riesgos ambientales tipo; MIRAT*), a scale chart and two methodological guides; and
- funding and development of eight sectoral environmental risk analysis.

Operators can prepare their environmental risk assessments, taking as a starting point the sectoral environmental risk tools previously approved for each sector by the Technical Commission for the prevention and remediation of environmental damage. In order to secure approval, the sectoral tools submitted by the different industrial sectors must be assessed, leading the Technical Commission to approve a corresponding assessment procedure.

The Technical Commission for the prevention and remediation of environmental damage had approved 25 sectoral risk analyses, which may be used as a basis for carrying out environmental risk analysis in these sectors, when this report was published.


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The Ministry for the Ecological Transition and the Demographic Challenge has also developed an environmental risk analysis guide for an individual facility to help operators to develop their own analyses. This is available from the Ministry’s website. 

5.2.8. Exemption for low risk sites

Article 28 of ELA established three exemptions from the mandatory financial security requirements.

First, operators of sites with low costs of primary remediation measures are exempt. That is, operators of activities subject to the mandatory financial security requirement are exempt if a verified environmental risk assessment that has been carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules indicates that the cost of any primary remediation measures will not exceed EUR 300,000.

5.2.9. Exemption for ISO 14001 certification or EMAS registration

The second exemption under article 28 of ELA is for operators that have a verified environmental risk assessment carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules. Such operators are exempt if the risk assessment indicates that the cost of any remedial works would be between EUR 300,000 and EUR 2,000,000 and the operator has an EU Eco-Management and Audit Scheme (EMAS) certificate or International Organisation for Standardisation (ISO) 14001 (UNE-EN ISO 14001:1996) certification.

In September/October 2019, Spain had 996 EMAS sites, the fifth highest number in the EU after Italy, Germany, Greece and Austria. Spain also had 834 EMAS certified organisations, the third highest number in the EU after Germany and Italy. The number of new registrations in Spain between October 2018 and April 2019 was the second highest for organisations (after Italy) and the third highest for sites (after Italy and Germany) in the EU.

The ISO survey of 2018 (the latest survey when this report was published) showed that Spain had 28,020 sites and 12,198 ISO 14001 certifications in 2018, the highest number of sites in Europe and the second highest number of certifications in Europe (after Italy).

5.2.10. Other exemptions

The third exemption under article 28 of ELA is for annex III operations that use plant protection products and biocides for agricultural and forestry purposes provided the products and biocides are defined in article 2(1) of Royal Decree 2163/1994, of 4 November (Real Decreto 2163/1994, de 4 de noviembre, por el que se implanta el sistema armonizado comunitario de...

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21 See ISO, ISO 14001 – data per country and sector – 1999 to 2017; https://isotc.iso.org/livelink/livelink?func=ll&objId=18808772&objAction=browse&viewType=1
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authorización para comercializar y utilizar productos fitosanitarios), or article 2 a) of Royal Decree 1054/2002, of 11 October (Real Decreto 1054/2002, de 11 de octubre, por el que se regula el proceso de evaluación para el registro, autorización y comercialización de biocidas), respectively.

In addition, the following public bodies are exempt from the mandatory financial security requirements:

- General State Administration and public bodies linked to or dependent on it;
- local governments and any public law bodies dependent on them; and
- regional bodies and any public law bodies dependent on them.

5.3. Environmental licence conditions

As indicated in section 5.2, mandatory financial security for ELD liabilities in Spain is established by legislation and not by conditions in environmental licences.

5.3.1. Stand-alone requirement or hybrid

Not applicable

5.3.2. Revisions to licensing requirements

Not applicable

5.3.3. ELD liabilities covered by mandatory financial security

Not applicable

5.3.4. Description of mandatory financial security conditions

Not applicable

5.4. Date of introduction

Mandatory financial security for liabilities under the ELD was initially introduced on 23 October 2007 in chapter IV of ELA.

ELA provided that the date of entry into force of mandatory financial security would be determined by ministerial orders that would be approved from 30 April 2010 onwards.

5.5. Effective date

Ministerial Order ARM/1783/2011, of 22 June, issued by the Ministry of Agriculture, Fish, Food and Environment (now the Ministry for the Ecological Transition and the Demographic Challenge), established the following periods for the approval of the corresponding ministerial orders that would establish the date of entry into force of the mandatory financial security system, according to the priority levels from the effective date of the Order:

- Priority 1: between two and three years;
- Priority 2: between three and five years; and
- Priority 3: between five and eight years.

In 2017, Order APM/1040/2017 established the date of entry into force of financial security for those activities classified as priority 1 as 31 October 2018, and for those classified as priority 2 as 31 October 2019.
On 4 February 2019, a public consultation on the Draft Ministerial Order establishing the date to phase in Priority 3 activities ended. The Ministerial Order, TEC/1023/2019, was issued on 10 October 2019. It states that financial security for priority 3 activities will be required on 16 October 2021, except for the intensive rearing of poultry or pigs, for which the effective date is 16 October 2022.

5.6. Key reasons for introduction

The key reasons for the introduction of mandatory financial security in Spain were:

- to ensure operation of the polluter pays principle; and
- to foster the adoption of risk management measures through the obligation to carry out an environmental risk assessment as the basis to determine the amount of financial security required.

5.7. Withdrawal of mandatory financial security

Not applicable but the scope of mandatory financial security for ELD liabilities was reduced from all operators covered by annex III of ELA to specified operators (see section 5.9 below).

5.8. Guidance

The General Directorate of Environmental Quality and Assessment of the Ministry for the Ecological Transition and the Demographic Challenge has developed and published different documents and technical instruments to help operators carrying out their environmental risk analysis, and in the determination of the financial security. The documents include an ELD guidance on mandatory financial security, published in April 2019.

5.9. Operators subject to mandatory financial security

Royal Decree 183/2015, of 13 March amended ELA to limit the categories of activities subject to mandatory financial security.

Mandatory financial security requirements apply only to operators that carry out the following activities amongst those listed in annex III of ELA (annex III of the ELD):

- activities under the Seveso III Directive, implemented by Royal Decree 840/2015, of 21 September (Real Decreto 840/2015, de 21 de septiembre, por el que se aprueban medidas de control de los riesgos inherentes a los accidentes graves en los que intervengan sustancias peligrosas);
- specified Integrated Pollution Prevention and Control (IPPC) activities, that is specified activities under the Industrial Emissions Directive, implemented by Royal Decree

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1/2016, of 16 December (Real Decreto Legislativo 1/2016, de 16 de diciembre, por el que se aprueba el texto refundido de la Ley de prevención y control integrados de la contaminación); and

- the operation of facilities containing mining waste classified as category A under Royal Decree 975/2009, of 12 June, waste management in the extractive and protection and restoration industries affected by mining activities (Real Decreto 975/2009, de 12 de junio, sobre gestión de los residuos de las industrias extractivas y de protección y rehabilitación del espacio afectado por actividades mineras; Royal Decree 975/2009), which implements the Extractive Waste Directive.25

That is, the mandatory financial security system applies only to operators of activities listed in the following items in annex III of ELA (annex III of the ELD):

- item 1: all activities subject to the Industrial Emissions Directive, the predecessor which is Council Directive 96/61/EC concerning integrated pollution prevention and control;
- item 7: the storage of chemicals subject to the Seveso III Directive but not all other activities listed under item 7; and
- item 13: the management of mining waste but only if the mining waste is classified as category A.

This does not mean that mandatory financial security does not apply to activities in other items of annex III of ELA. Rather it means that the mandatory financial security system for ELD liabilities does not apply to them (see sections 11.1, 11.2 and 11.3 below for mandatory financial security requirements for landfills, mining waste, and carbon capture and storage facilities, respectively).

In order to determine the priority for phasing in mandatory financial security for the above activities, the Spanish Government carried out a technical study that, among other things, identified each sector of activities and assigned National Classification of Economic Activity codes to them. The study then analysed each activity on the basis of environmental risks posed by it.26

Ministerial Order APM/1040/2017, of 23 October sets out information on the activities in each priority level together with the dates for introduction of the mandatory financial security system.

Priority 1 includes activities under the Seveso III Directive and the following activities under the Industrial Emissions Directive:

- IPPC combustion installations with a total rated thermal input of 50 megawatts or more (Industrial Emissions Directive, annex I, 1.1); and

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- disposal or recovery, other than landfilling, of hazardous waste with capacity exceeding 10 tonnes per day (Industrial Emissions Directive, annex I, 5.1), which includes mining waste under the Extractive Waste Directive.

Priority 2 includes additional activities under the Industrial Emissions Directive.

Priority 3 includes the operation of facilities containing mining waste classified as category A under Royal Decree 975/2009, which was specifically listed in ELA.

Ministerial Order APM/1040/2017 established 31 October 2018 as the date of entry into force of mandatory financial security for Priority 1 activities.

In addition, the Order sets out the date of entry into force of mandatory financial security for the following Priority 2 activities of 31 October 2019:

- oil and gas refineries;
- facilities to refine petroleum or crude oil;
- coking plants;
- facilities for the production of cast iron or raw steel including continuous casting facilities with a capacity of over 2.5 tons/hour;
- ferrous metal foundries with a production capacity of over 20 tons/day;
- chemical facilities for the manufacture of salts such as ammonium chloride, potassium carbonate, sodium carbonate, perborates and argentite nitrate;
- facilities that use a chemical or biological process for the manufacture of medicines;
- explosive manufacturing facilities; and
- landfills for hazardous and non-hazardous (but not inert) waste that receive over 10 tons/day or that have a total capacity of over 25,000 tons.

The annex to Ministerial Order APM/1040/2017 lists all Seveso III and Industrial Emissions Directive activities subject to the mandatory financial security system together with their priority level group. The listing includes all activities listed in annex 1 of Royal Decree 1/2016. The annex is reproduced in the ELD Guide.27

The financial security requirements also apply to subcontractors and professionals who collaborate with the above operators in activities subject to mandatory financial security.

5.10. Amounts and limits of mandatory financial security

Article 30 of ELA provides that the limit of mandatory financial security is EUR 20,000,000. All claims from the same emission, event or incident are deemed to be one event regardless of the number of persons affected and the time at which the claims are made.

The costs of preventive measures must be at least 10% of the total amount in each case but may be sub-limited above that amount.

Article 32 provides that the unforeseen event that triggers pollution covered by mandatory financial security shall not be caused by any of the following:

- an intentional act;
- a normal and foreseeable consequence of the ownership of buildings, facilities or equipment that service the authorised activity;

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- the operator knowingly permitting an act to be carried out at the location of the authorised activity or the geographical area in which the activity is authorised;
- the knowing breach of applicable environmental legislation by the operator;
- wilful or negligent use of the facility or equipment, or the failure to maintain, repair or replace them adequately;
- abandonment or a prolonged absence in the use of the facilities without appropriate measures to prevent their deterioration or their protection or safety; and
- a consequence of mass disturbances, riots, strikes, internal disturbances, sabotage, acts of terrorism or armed gangs.

Financial security instruments may, therefore, exclude cover for the above acts.

5.11. Growth of mandatory financial security

The scope of the mandatory financial security system for ELD liabilities has not grown. Instead the types of activities covered by the system were decreased by Royal Decree 183/2015, of 13 March (see section 5.9 above).

6. REGULATORY OVERSIGHT OF FINANCIAL SECURITY INSTRUMENTS AND MECHANISMS

6.1. Review of financial security instruments or mechanisms

Article 31 of ELA provides that the instrument or mechanism that provides evidence of financial security must commence from the time at which an authorisation for the relevant annex III activity is granted and must continue throughout the pendency of the authorisation. Competent authorities must establish appropriate systems to check the continued validity of the financial security instrument or mechanism.

If a financial security instrument is exhausted or has been reduced by over 50%, the operator must replenish it within six months of the date on which the amount of the costs to which the instrument applies has been ascertained or reasonably estimated.

6.2. Financial security instruments and mechanisms accepted

Article 26 of ELA specifies acceptable financial security instruments as follows:

- an insurance policy that conforms to Insurance Contract Act, Law 50/1980, of 8 October, provided by a company authorised to conduct insurance business in Spain;
- a guarantee from a financial institution (including a bank, savings bank, credit union, or reciprocal guarantee company) authorised to operate in Spain;
- an ad hoc fund consisting of a technical reserve of financial investments backed by the public sector; and
- a combination of any of the above.

Funds subject to mandatory financial security requirements must be ring-fenced from other risks covered by the financial security instrument such as any other criminal, civil or administrative expenses and any other claims, demands or expenses. The financial security may not be pledged or mortgaged either in part or in whole.

If an operator has more than one facility that is subject to mandatory financial security, it provides financial security separately for each facility or, if the sites have the same degree of homogeneity and meet the requirements of the risk assessment, have a single financial security for all facilities. In the latter case, the amount of financial security is the highest amount for individual sites. In the event of a single financial security instrument for more than one site, which should be provided only in exceptional circumstances, the instrument must
state that if a claim occurs at one facility, the financial security for the remaining facilities is not reduced or exhausted.

Article 41 of Royal Decree 2090/2008 provides that financial security in the form of a guarantee from a financial institution must be deposited in the General Deposit Fund or any of its branches if it is established for the benefit of the General State Administration. If it is established for the benefit of an Autonomous Community, it should be deposited in the entity selected by that Autonomous Community. The competent authority may require the operator to provide documentation to confirm that the financial institution has provided the guarantee and its amount.

Article 42 of Royal Decree 2090/2008 provides that if the financial security is in the form of a technical reserve, the operator may establish the technical reserve up to five years after the financial guarantee is required. Until that date, the operator must have financial security by either insurance or a guarantee from a financial institution. The reserve must be reflected in the accounts of the company in an account called ‘Technical reserve of environmental responsibility provided in article 26.c) of Law 26/2007, of October 23’. The competent authority may require the operator to provide documentation that the technical reserve has been established and its amount.

As indicated above in this section, an operator must not commit monies in any financial security instrument including the technical reserve to any other obligations. The technical reserve does not, however, have priority over any other debts of an operator. If the operator becomes insolvent, the technical reserve becomes part of the insolvency estate and is thus subject to demands by creditors.

If money is withdrawn from the technical reserve to remediate environmental damage, it must be replaced.28

The financial security mechanism may have a sub-limit for preventive actions and emergency remedial actions, with the minimum amount of the sub-limit being 10% of the limit of indemnity.

6.2.1. Templates

Annex III of the ELD Guide sets out a model insurance certificate that an insurer may provide to the relevant competent authority to confirm that the policy complies with the mandatory financial security requirements. Annex III also sets out detailed specifications for insurance policies that satisfy the mandatory financial security requirements.29

Annex IV of the ELD Guide sets out the minimum information to be included in a responsible declaration that must be submitted by an operator to the relevant competent authority. Annex IV.1 sets out the minimum information that must be included in the declaration for operators when the cost of restoring environmental damage is EUR 300,000 or EUR 2,000,000. Annex IV.2 sets out the minimum information in the declaration for operators when the cost is lower.


6.2.2. Requirements for environmental insurance policies

Article 32 of ELA provides that the temporal scope for financial security instruments (including insurance policies) to satisfy the mandatory financial security requirements for ELD liabilities may be limited to the following three bullet points jointly:

- the commencement of the emission that results in an imminent risk of, or actual, pollution should be identified and shown to be caused within the policy period;
- the first verifiable discovery of pollution (la primera manifestación constatable de la contaminación) should occur during the policy period or up to three years following termination of the instrument; and
- the claim against the operator for the pollution should be made during the period covered by the financial security instrument or within three years from the end of that period.

Article 32 states that the first verifiable discovery means the time at which the pollution is first discovered regardless of whether it is considered to be dangerous or harmful at that time (Se entiende por primera manifestación el momento en que se descubra por primera vez la existencia de una contaminación, tanto si entonces se considera peligrosa o dañina como si no es así).

Environmental insurance policies tend to be issued on a claims made basis with a ‘first verifiable discovery’ trigger. A three-year extension is commonly provided for this trigger when the termination of the policy is due to the end of an insured operation. The three-year period provides continuity between the policy and the Compensation Fund for Environmental Damage (Fondo de Compensación de daños medioambientales) (see section 16.1 below).

Environmental insurance policies also provide retroactive cover with a cut-off date of 30 April 2007, the date on which the ELD became effective under Spanish law (see section 5.2.1 below).

One environmental insurer stated that the temporal scope of its policies is as follows:

- the commencement of the emission that results in an imminent risk of, or actual, environmental damage (including pollution) should be identified and shown to be caused within the policy period or retroactive date if applicable; and
- the claim against the operator to remediate the environmental damage (including pollution) should be made during the policy period or within three years after the expiration of the policy period.

Policies underwritten by the Environmental Risks Pool are triggered by the first verifiable discovery of pollution.

Article 39 of Royal Decree 2090/2008 provides that insurers shall issue an environmental liability insurance certificate if the operator so demands. The competent authority may also require the operator to submit receipts for the premium for an insurance policy used to provide evidence of financial security and its renewal. The insurance policy must specifically state that it provides cover for environmental damage under ELA.

The insurance policy may also provide cover for other liabilities such as claims for bodily injury, property damage and economic loss; transportation; legal expenses; business interruption; and disaster response costs. The mandatory financial security provided by the policy must,
however, be ring-fenced. The ELD Guide includes a table 2 that sets out costs that must be covered in an insurance policy in order to comply with ELA.\textsuperscript{30}

Ring-fencing does not require cover for ELD liabilities to be subject to a separate section of the insurance policy. Instead, it means that insuring agreements for the following must have a single limit of liability that cannot be eroded by other sections of the policy:

- ELD liabilities subject to the mandatory financial security system;
- non-pollution environmental damage such as uncontrolled fires damaging a protected natural habitat;
- complementary and compensatory remediation;
- environmental damage below the threshold for the ELD; and
- environmental damage which a competent authority decides to enforce by legislation other than the ELD.

The above insuring agreements are under the category specified by article 25(1) of ELA (La cuantía garantizada estará destinada específicamente a cubrir las responsabilidades medioambientales del operador que se deriven de su actividad económica o profesional).

They cannot be eroded by insuring agreements for third-party civil liability claims, proceedings for criminal offences, or administrative proceedings. Such claims are referred to in article 25(2) of ELA (La garantía regulada en esta sección será ajena e independiente de la cobertura de cualquier otra responsabilidad, ya sea penal, civil, administrativa o de otros hechos cualesquiera).

If an environmental insurance policy provides cover for more than one site subject to the mandatory financial security requirements, the limit of liability applies to each individual site. That is, the limit of liability is not the aggregate limit for all sites covered by the policy.

6.2.3. Form of mandatory environmental insurance policy

See section 6.2.2 above.

6.3. Financial security instruments and mechanisms not acceptable

The ELD Guide does not list any financial security instruments and mechanisms that are not acceptable. Article 26 of ELA specifies only four types of acceptable financial security (see section 6.2 above).

6.4. Time of review

Insurance policies that provide cover for environmental damage under ELA are not reviewed by a competent authority to ensure that they comply with mandatory financial security requirements before the insurer may offer the wordings to operators subject to the requirements. Competent authorities may review an insurance policy after it has been submitted by an operator and may reject it if it does not comply with mandatory financial security requirements, in which case the operator must submit another insurance policy or other financial security instrument.

One ELD stakeholder reported that some competent authorities review individual policies and some also review the environmental risk report used to establish the amount of financial security. Others review only the declaration and insurance certificate.

\textsuperscript{30} Ibid table 2, 22-23
6.5. **Regulatory costs of review**

An operator is not required to reimburse a competent authority for the costs of its review of a financial security instrument.

6.6. **Requirements for operator to review**

Article 34.3 of Royal Decree 2090/2008 provides that a competent authority may require an operator to update its environmental risk assessment at any time and, in any case, when its operations, facility or permit have been substantially modified.

In the absence of such a requirement from a competent authority, there are no legal requirements for an operator to review its financial security during the pendency of its permit to determine whether the financial security instrument still meets mandatory financial security requirements. As indicated above, if the permit is renewed or there is a substantial change in the operator’s activities, facility, or permit, review is necessary.

7. **ENFORCEMENT OF FINANCIAL SECURITY REQUIREMENTS**

The penalties for failure to have financial security when required or to maintain it in the appropriate amount during the operations for which it is required is a fine of EUR 50,001 to EUR 2,000,000, withdrawal or suspension of the environmental permit, and hence the ability to operate, for between one and two years.

There are no public reports of any competent authority having taken measures to enforce mandatory financial security requirements such as bringing an action against an operator for failure to have financial security.

The Ministry for the Ecological Transition and the Demographic Challenge was continuing to gather information concerning Priority 1 activities when this report was published.

8. **EX POST ENVIRONMENTAL DAMAGE MANDATORY FINANCIAL SECURITY (ARTICLE 8(2))**

ELA does not contain any provisions that specifically require an operator that has caused environmental damage to have financial security for the costs of remediating the damage. There is no need for it to do so provided, however, that the mandatory financial security system applies to the operator, in which case the operator will already have financial security for the costs of preventive and remedial measures.

Chapter VI of ELA, which sets out procedural rules for the enforcement of environmental liability (*Normas aplicables a los procedimientos de exigencia de responsabilidad medioambiental*), provides details of the content of orders to an operator that has caused environmental damage to remediate that damage.

Article 46(1)(e) specifies ‘performance guarantees and any other guarantees that help to ensure the effectiveness and feasibility of the measures’ (*Las garantías de cumplimiento y cuantas contribuyan a asegurar la efectividad y la viabilidad de las medidas*). Article 46(1), however, refers only to an agreed settlement during the administrative procedure; it is not a mandatory financial security requirement.

A competent authority can require an operator that has caused environmental damage to provide evidence of financial security for the costs of remediating it if the operator does not already have financial security (that is, if the operator is not subject to the financial security system for ELD liabilities). In addition, a competent authority can require such an operator to provide security over property or another means of financial security to cover the
reimbursement of costs incurred by the competent authority in remediating environmental damage.

8.1. **Date legislation or policy for mandatory financial security introduced**
Not applicable

8.2. **Effective date for ex post mandatory financial security**
Not applicable

8.3. **Financial security instruments and mechanisms accepted**
Not applicable

8.4. **Financial security instruments and mechanisms not acceptable**
Not applicable

9. **PROVIDERS OF MANDATORY FINANCIAL SECURITY INSTRUMENTS**

9.1. **Insurers**
All stand-alone insurance policies underwritten for ELD risks in Spain include provisions that satisfy the mandatory financial security requirements for ELD liabilities. The policies also provide cover for compensatory and complementary remediation under the ELD as well as environmental liabilities under legislation other than the ELD.

9.2. **Banks and other financial institutions**
Banks and other financial institutions do not issue financial security instruments for accidental environmental damage under the ELD because operators would not tend to pay for such instruments for a liability that may not occur.

Banks and other financial institutions offer financial security instruments for responsibilities under the Landfill Directive and Extractive Waste Directive (see sections 11.1.2 and 12.1.2 below).

9.3. **Sureties**
Sureties do not offer bonds for liabilities under the ELD. They do offer bonds for financial security instruments for responsibilities under the Landfill Directive and Extractive Waste Directive (see sections 11.1.2 and 12.1.2 below).

9.4. **Providers outside Member State**
Multinational insurers based in other Member States offer insurance policies to provide cover for ELD and other environmental risks in Spain through passporting.
10. **MEASURES TAKEN BY MEMBER STATE TO DEVELOP FINANCIAL SECURITY MARKETS**

Spain has been the most active of all the Member States in introducing mandatory financial security for ELD liabilities. The 2013 report from Spain to the European Commission under article 18(1) of the ELD states in detail the measures taken by Spain at that time in doing this.\(^31\)

As described in this report, Spain has carried out further measures to introduce mandatory financial security since 2013. As also described in this report, Spain has a well-developed environmental insurance market that provides mandatory financial security instruments for ELD and other environmental liabilities in the form of stand-alone environmental insurance policies.

11. **EU ENVIRONMENTAL LEGISLATION WITH MANDATORY FINANCIAL SECURITY PROVISIONS**

11.1. **Landfill Directive**

11.1.1. **Competent authority(ies)**

The competent authorities for the Landfill Directive, which is implemented in Spain by Law 22/2011, of 28 July, of waste and contaminated soil (Ley 22/2011, de 28 de julio, de residuos y suelos contaminados),\(^32\) are the environmental authorities of the Autonomous Communities.

11.1.2. **Financial security provisions**

Articles 20(4)(c) and 20(4)(d) of Law 22/2011 specifies the following instruments to satisfy mandatory financial security requirements:

- a bond for a site that manages or stores hazardous waste; and
- insurance or an ‘equivalent financial guarantee’ (garantía financiera equivalente) for hazardous waste treatment sites and sites for the management of specific waste to cover claims for bodily injury, property damage and costs for remediating the environment.

The purpose of the requirements is to provide financial security for compensation for bodily injury, property damage, and remediation of environmental damage from the hazardous waste operations and other specified operations.

Article 23(2) of Law 22/2011 provides that permits for waste disposal operations may include a requirement for a bond or other financial guarantee in addition to the above financial security instruments.\(^33\)

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In addition, article 9.1 d) of Royal Decree 1481/2001, of 27 December regulating the disposal of waste by landfill (Real Decreto 1481/2001, de 27 de diciembre, por el que se regula la eliminación de residuos mediante depósito en vertedero)\(^ {34} \) provides that a permit for a landfill, regardless of the type of waste (inert, hazardous or non-hazardous waste), is granted on condition that the operator establishes a bond or equivalent financial security to ensure that costs derived from the closure and maintenance and surveillance during the post-closure period. Article 14.2 specifies that the post-closure (aftercare) period must be at least 30 years. The amount of financial security may change as the amount of waste increases or closure or post closure measures progress.

In relation to financial security instruments that public administrations can accept in public sector procurement, in the absence of a specific regulation, Title IV of Law 9/2017, of 8 November regarding Public Sector Contracts (Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público)\(^ {35} \) applies.

11.1.3. **Financial security instruments and mechanisms accepted**

See section 11.1.2 above.

11.1.4. **Templates**

There are no templates for acceptable financial security instruments.

11.1.5. **Financial security instruments and mechanisms not acceptable**

The legislation does not specify financial security instruments and mechanisms that are not acceptable. As a general rule, financial security instruments and mechanisms other than those stated as being acceptable will not be accepted.

11.2. **Extractive Waste Directive**

11.2.1. **Competent authority(ies)**

The competent authorities for the Extractive Waste Directive, which is implemented in Spain by Royal Decree 975/2009, are the environmental authorities of the Autonomous Communities.

In 2017, the European Commission concluded that Spain had, among other things, unlawfully granted state aid to Iberpotash S.A., a company that owns and operates two potash mines in Spain, by an 'unduly low' level of financial security for the period of 2006 to 2016 in the amount of EUR 1,864,622 in breach of article 108(3) of the Treaty on the Functioning of the European Union (TFEU). Further, the Commission concluded that the sum of EUR 3,985,109.70 in respect of a waste heap at one of the potash mines was also unlawful state aid. The Commission stated that the state aid was incompatible with the internal market and must be recovered.\(^ {36} \)

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Improving financial security in the context of the Environmental Liability Directive

The Commission noted that the only Spanish assets that would be available to the company if the financial security provided by it failed were the potash mining facilities whose value would be doubtful when they had been closed.37

The company had been required to provide evidence of financial security under the Extractive Waste Directive which it did in the form of a bank guarantee.38

11.2.2. Financial security provisions

Article 41 of Royal Decree 975/2009 requires an operator to have two financial security instruments to ensure compliance with the obligations of the permit for restoring a mining site.

Article 42 requires financial security to ensure compliance with the obligations of the plan to restore land affected by mining operations. The amount of the financial security is calculated according to the environmental impact of the mining and the future use of the land. This amount is reviewed annually as the site is restored, with any remaining amount being released when the restoration plan has been fully implemented.

Article 43 requires financial security to ensure compliance with the obligations of the plan to restore land affected by mining waste facilities. Similarly to article 42, the amount of financial security is calculated according to the environmental impact of the mining waste facilities and the future use of the land. Also as with article 42, the amount of financial security is reviewed regularly as the waste site(s) is restored, with any remaining amount being released when the restoration plan has been fully implemented.

The financial security requirement for mining waste facilities does not apply to a facility with the following types of waste unless it is classified as a category A waste facility:

- inert mining waste, non-hazardous mining waste and uncontaminated soil from research use;
- mining waste from peat research and operations; and
- non-hazardous mining waste from research into mineral resources with the exception of research into evaporates other than gypsum and anhydrite.

The financial security provisions came into effect for mining sites that were already operating and that were required to provide evidence of financial security under Law 12/1981 establishing additional measures for the protection of natural sites affected by mining activities, and Decree 202/1994, of 14 June establishing the criteria for determining the guarantees related to the restoration programmes for mining activities.39

11.2.3. Financial security instruments and mechanisms accepted

Article 41 of Royal Decree 975/2009 specifies bank deposits and bonds as acceptable instruments for the costs of restoring a site.

Article 41(6) states that the costs covered by the financial security instrument must be independent of the costs covered by financial security as required by ELA and Royal Decree 2090/2008, with the caveat that a single financial security instrument may satisfy both financial security requirements.

37 Ibid para 92, 18
38 Ibid para 90, 18
39 Ibid
In turn, final provision two of Royal Decree 2090/2008 provides that financial security instruments entered into to comply with mandatory financial security for ELD liabilities must take into account coverage provided by mandatory financial security instruments entered into by operators subject to the Extractive Waste Directive so there is no overlap or gaps. The operator may integrate financial security requirements into a single instrument provided that it includes the mandatory guarantee to restore the site affected by the location of the mining waste and its adjoining services and facilities. If this is the case, the amount allocated to each of the risks must be clearly defined and easily available from the remainder of the financial security.

11.2.4. Templates
There are no templates for acceptable financial security instruments.

11.2.5. Financial security instruments not acceptable
The legislation does not specify financial security instruments and mechanisms that are not acceptable. As a general rule, financial security instruments and mechanisms other than those stated as being acceptable will not be accepted.

11.3. Carbon Capture and Storage Directive

11.3.1. Status of implementation
Spain has one carbon capture and storage project that was operating when this report was published. The project, in León province, is a research project; not a commercial project.\(^{40}\) Further, the project is for the capture of carbon dioxide for transportation; it is not a storage facility.\(^{41}\) The facility is not, therefore, subject to the mandatory financial security requirements under article 19 of the Directive on the geological storage of carbon dioxide (2009/31/EC) (for a storage permit).

Section 5.9 above refers to the capture of carbon dioxide from a facility under the Directive due to that activity being subject to the Industrial Emissions Directive.

11.3.2. Competent authority(ies)
The competent authority for the Directive on the geological storage of carbon dioxide, which is implemented in Spain by Act 40/2010, of 29 December 2010, concerning the geological storage of carbon dioxide (Ley 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbon)\(^{42}\), is the Ministry for the Ecological Transition and the Demographic Challenge.

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11.3.3. Financial security provisions

Article 12(7) of Act 40/2010 states that the requirement for financial security under it is independent of the requirement for financial security in ELA, provided that account is taken of the latter so that there is no overlap between them.

Article 14(j) states that the operator of a facility for the storage of carbon dioxide must establish and maintain the financial security or other equivalent measure.

Article 20 states that, pursuant to the frequency set out in the concession for the facility, and in any event at least once a year, the holder of the permit shall submit proof of the maintenance of the financial security to the competent authority of the Autonomous Community.

Preamble II states that the financial security instrument must cover compliance with obligations arising from the concession and obligations arising from inclusion of the storage site in the scope of application of Act 1/2005, of 9 March, which regulates the greenhouse gas emissions trading scheme.

11.3.4. Financial security instruments and mechanisms accepted

Acceptable financial security instruments and mechanisms are not specified.

11.3.5. Templates

There are no templates for financial security instruments or mechanisms.

11.3.6. Financial security instruments and mechanisms not acceptable

There is no list of financial security instruments or mechanisms that are not acceptable.

12. EU Recommendation on hydraulic fracturing

12.1. Status

Spain has unconventional gas reserves in the Basque Country and Cantabria, with estimated reserves of approximately 1.4 trillion cubic metres. Several Autonomous Communities enacted legislation banning hydraulic fracturing (fracking) but these were struck down by the Constitutional Court on the basis, among other things, that the Spanish Government has exclusive jurisdiction to regulate energy and mining. These were followed, in 2018, by a ruling of the Constitutional Court that the Autonomous Communities could prohibit fracking in specified areas of their territory on the basis of a plan that had established areas in which, due to their characteristics, fracking should not take place.

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All fracking projects are subject to the preparation of an environmental assessment under Law 21/2013, of 9 December on environmental assessment (Ley 21/2013, de 9 de diciembre, de evaluación ambiental).

12.2. Competent authority(ies)

The competent authority for the licensing of oil and gas, including unconventional oil and gas, is the Ministry for the Ecological Transition and the Demographic Challenge. If the concession for unconventional oil exploitation is limited to a single Autonomous Community, the competent authority is the energy authority for that Community.

12.3. Financial security provisions

Law 34/1998, of 7 October, on the hydrocarbons sector (Ley 34/1998, de 7 de octubre, del sector de hidrocarburos) governs the licensing of exploration and production permits for oil and gas. The Law was amended in 2013 to insert provisions concerning unconventional oil and gas into it.

There are three types of licences: an investigation permit; an exploration authorisation; and a production concession (sometimes referred to as an exploration authorisation, an exploration permit and a production permit). The financial security and other requirements apply to conventional as well as unconventional oil and gas licences.

12.4. Financial security instruments and mechanisms accepted

Article 9(4) of Law 34/1998 requires an operator of any of the licences (see section 12.3 above) to provide evidence of liability insurance for claims for bodily injury and property damage. In addition, the operator of an exploration authorisation must provide evidence of financial security in the form of a bank guarantee or cash to cover obligations under the authorisation.

Article 21 requires the operator of a production concession to provide evidence of financial security for obligations under the concession including decommissioning and restoration.

Article 21 refers to financial security instruments set out in article 3 of the Regulations of the General Deposit Fund, approved by Royal Decree 161/1997, of 7 February (Reglamento de la Caja General de Depósitos, aprobado por el Real Decreto 161/1997, de 7 de febrero).

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Article 3 sets out the following acceptable financial security instruments, with the Autonomous Communities having the power to determine their acceptable instruments:

- cash;
- securities;
- guarantees provided by credit institutions or mutual guarantee societies; and
- surety bonds.

Law 34/1998 does not refer to financial security for ELD liabilities.

In addition, a financial guarantee for the costs of remediating the environment is mandatory. The guarantee may take three forms: a fund of the Technical Reserve (Fondo de Reserva Técnica), a financial statement, or an environmental liability insurance policy.  

12.5. Templates

There are no templates for acceptable financial security instruments.

12.6. Financial security instruments and mechanisms not acceptable

The legislation does not specify financial security instruments and mechanisms that are not acceptable. As a general rule, financial security instruments and mechanisms other than those stated as being acceptable will not be accepted.

13. EU environmental legislation with no mandatory financial security provisions

13.1. Industrial Emissions Directive

13.1.1. Competent authority(ies)

The competent authorities for the Industrial Emissions Directive (2010/75/EU) in Spain are the environmental authorities of each Autonomous Community.

The Industrial Emissions Directive is implemented in Spain by the following:

- Law 5/2013, of 11 June, amending Law 16/2002, of 1 July, on integrated pollution prevention and control, and Law 22/2011, of 28 July on waste and contaminated soil (Ley 5/2013, de 11 de junio, por la que se modifican la Ley 16/2002, de 1 de julio, de prevención y control integrados de la contaminación y la Ley 22/2011, de 28 de julio, de residuos y suelos contaminados), and
- Royal Legislative Decree 1/2016, of 16 December, approving the consolidated text of the Law on Integrated Pollution Prevention and Control (Real Decreto Legislativo 1/2016, de 16 de diciembre, por el que se aprueba el texto refundido de la Ley de prevención y control integrados de la contaminación).  


52 Ley 5/2013, de 11 de junio, por la que se modifican la Ley 16/2002, de 1 de julio, de prevención y control integrados de la contaminación y la Ley 22/2011, de 28 de julio, de residuos y suelos contaminados (consolidated version); https://www.boe.es/eli/es/l/2013/06/11/5/con (in Spanish)

53 Real Decreto Legislativo 1/2016, de 16 de diciembre, por el que se aprueba el texto refundido de la Ley de prevención y control integrados de la contaminación (consolidated version); https://www.boe.es/buscar/act.php?id=BOE-A-2016-12601&tn=2 (in Spanish)
13.1.2. **Financial security provisions**

Law 5/2013 and Royal Decree 1/2016 do not include any mandatory financial security provisions except for the following references to ELA.

Article 10 of Law 5/2013, which concerns the modification of a facility, provides among other things that the modification may result in a requirement for mandatory financial security under ELA.

Section 12 of Royal Decree 1/2016, which concerns applications for and the granting of an integrated environmental authorisation, states that bonds and insurance that may be required under ELA should be submitted in the documentation for an application for an environmental authorisation.

13.1.3. **Financial security instruments and mechanisms accepted**

Not applicable

13.1.4. **Templates**

Not applicable

13.1.5. **Financial security instruments and mechanisms not acceptable**

Not applicable

13.2. **Seveso III Directive**

13.2.1. **Competent authority(ies)**

The competent authority for the Seveso III Directive, which is implemented in Spain by Royal Decree 840/2015, of 21 September approving measures to control risks inherent in serious accidents involving dangerous substances (Real Decreto 840/2015, de 21 de septiembre, por el que se aprueban medidas de control de los riesgos inherentes a los accidentes graves en los que intervengan sustancias peligrosas),⁵⁴ are the environmental authorities of each Autonomous Community.

13.2.2. **Financial security provisions**

There are no mandatory financial security requirements for the implementation of the Seveso III Directive in Spain.

13.2.3. **Financial security instruments and mechanisms accepted**

Not applicable

13.2.4. **Templates**

Not applicable

13.2.5. **Financial security instruments and mechanisms not acceptable**

Not applicable

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⁵⁴ Real Decreto 840/2015, de 21 de septiembre, por el que se aprueban medidas de control de los riesgos inherentes a los accidentes graves en los que intervengan sustancias peligrosas (consolidated version); [http://noticias.juridicas.com/base_datos/Laboral/560815-rd-840-2015-de-21-sep-medidas-de-control-de-los-riesgos-inherentes-a-los.html](http://noticias.juridicas.com/base_datos/Laboral/560815-rd-840-2015-de-21-sep-medidas-de-control-de-los-riesgos-inherentes-a-los.html) (in Spanish)
13.3. Other legislation

The legislation that implements the Landfill Directive in Spain requires financial security for compensation for bodily injury, property damage, and the remediation of environmental damage from the hazardous waste operations and other specified operations.

The financial security instruments that are required for hazardous waste treatment sites and sites for the management of specific waste are an insurance policy that provides cover claims for bodily injury, property damage and costs for remediating the environment. Article 23(2) of Law 22/2011 states that permits for waste disposal operations may include a requirement for a bond or other financial guarantee in addition to the above financial security instruments (see section 11.1.2 above).

Some Autonomous Communities extend mandatory financial security requirements for waste producers to include, for example, automobile repair facilities and end-of-use vehicle facilities in respect of waste oil from such operations.

14. Mandatory financial security for offshore oil and gas operations

14.1. Competent authority(ies)

The Ministry for the Ecological Transition and the Demographic Challenge is the competent authority for licensing the exploration and production of oil and gas including offshore oil and gas.

14.2. Status of offshore oil and gas operations

Commercial production of offshore oil and gas in Spain is negligible.55

14.3. Requirements for financial security

See sections 12.3 and 12.4.

14.4. Requirement for financial security for ELD liabilities

There is no requirement for an operator of offshore oil and gas operations to have evidence of financial security for ELD liabilities under Spanish law.

15. Failure of financial security

15.1. Inadequate level of financial security instrument or mechanism to pay claims

Incidents exist in Spain in which a financial security instrument has been inadequate to cover the full costs of remediation. For example, at least two operators that are reinsured by the Environmental Risks Pool did not have adequate insurance to cover the costs of remediating environmental damage. Despite this, the pool has continued to supervise the remedial works and has continued to meet with the relevant competent authorities until the authorities issue a certificate of validation that the works are completed.

55 See María José Descalzo Benito and Ignacio Álvarez Couso, ‘Oil and gas regulation in Spain: overview’ (Practical Law, 1 July 2018); https://uk.practicallaw.thomsonreuters.com/w-011-1357?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1; see also European Commission Joint Research Centre, EU Offshore Authorities Group – Web Portal; Offshore oil and gas production; https://euoag.jrc.ec.europa.eu/node/63
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One insurer in Spain stated that all other insurers that offer environmental insurance policies in Spain would offer the same service because, among other things, it accelerated the closure of claims.

In addition, in an incident that occurred prior to the introduction of the ELD and ELA, Boliden Apirsa S.L. had inadequate insurance to pay to remediate the environmental disaster at Aznalcóllar near Seville.

On 25 April 1998, a dam at the Los Frailes pyrite mine operated by Boliden Apirsa S.L. a subsidiary of the Swedish mining company Boliden BV, collapsed resulting in the release of water and slurry from a 1.5 square kilometre tailings pond. Acidic water and heavily contaminated slurry tailings polluted about 45 kilometres of the Agrio River. The pollutants were prevented from contaminating the nearby Doñana National Park only by the emergency construction of barriers. The park, which is Spain’s largest park, is a Natura 2000 and World Heritage site. The disaster had severe adverse economic impacts on the agriculture, fishing, mining and tourism sectors in the region as well as causing environmental damage.

Boliden Apirsa S.L. carried out remedial works at a cost of EUR 20,000,000, of which EUR 12,000,000 was covered by insurance. In January 2005, Boliden Apirsa S.L. entered insolvency proceedings.

When this report was published, the Spanish Government and the Government of Andalucía (Junta de Andalucia) were still litigating against Boliden BV (the parent company) and its affiliates Boliden Mineral AB and Boliden AB, to recover over EUR 142,000,000 paid by them for works to remediate the environmental damage.56

15.2. Insolvency of operator leading to failure of financial security instrument or mechanism

Article 10 of ELA provides that if an operator is a trading company that belongs to a group of companies, the parent company may be liable for preventing or remediating environmental damage if the competent authority concludes that the parent company has committed fraud or abused the legal personality of the subsidiary. This provision appears to equate to piercing the corporate veil under the law of some other Member States.

Article 13(2) of ELA provides that legal and de facto managers of companies whose conduct is the determining factor of the company’s liability, are secondarily liable for preventing or remediating environmental damage caused by the company.

As indicated in section 6.2 above, the technical funds held by operators may not be secure if the operator becomes insolvent.

15.3. Other

There are no public reports of other failures of voluntary or mandatory financial security.

16. Funds

16.1. Name(s)

ELA established two funds as follows.

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16.1.1. **Compensation Fund for Environmental Damage**

Article 33 of chapter IV of ELA, and article 44 of Royal Decree 2090/2008 established a Compensation Fund for Environmental Damage within the Insurance Clearing Consortium.

Money in the fund was originally to be used to cover:

- environmental damage from authorised activities during the period of the insurance policy but which did not materialise, or for which a claim was not brought, during the policy period; and

- the liability of insured operators whose insurers have been declared bankrupt, been dissolved or been declared insolvent, and which have been subject to an audited settlement procedure or been taken over by the Insurance Clearing Consortium.

The version of the legislation in effect when this report was published had deleted the liability of insured operators whose insurers had been declared bankrupt or insolvent or that had dissolved - as in the second bullet point above.

The deadline for the fund to cover a claim under the first, and only remaining, bullet point is a period that is equal to the number of years during which the relevant insurance policy was in force, beginning three years after the expiration date of the policy, with a long-stop deadline of 27 years in order to cover the maximum period in which liability exists under ELA. That is, the fund covers such claims during the 30 year long stop limitations period for liability under article 17 of the ELD for which insurance that was in place no longer provides cover.

The total amount to be paid by the fund is the amount of the financial security requirement that the insurance policy would have covered subject to the total amount of money in the fund.

Article 44 of Royal Decree 2090/2008 excludes the following from coverage by the fund:

- activities covered by an insurance policy that ceased before the activity was discontinued;
- damage generated after an activity ceased due to abandonment of the facilities that had the potential to pollute if mandatory measures to avoid the risk are not carried out;
- events, damage or liability that would not have been covered by the insurance policy if the policy had remained in force;
- pollution incidents that are first discovered within three years after the activity ceased. In this respect, the suspension date for the insured activity is the date on which the decommissioning of the facilities for the purposes of preventing future pollution were completed or the date on which the insured ceased to carry out any type of activities at the facility; and
- pollution incidents for which a claim is made over 30 years after the date of the emission, event or incident that caused the damage (pursuant to the limitations period set out in article 4 of ELA).

Article 44 of Royal Decree 2090/2008 requires insurers to keep specified details of insurance policies and to provide the information to the Insurance Clearing Consortium on demand.

The limitation of the mandatory financial security system to pollution incidents and primary remediation compared to the broader scope of the fund can cause a problem for insurers that offer environmental insurance policies.
16.1.2. State Fund

Article 34 of chapter IV of ELA established a State fund to pay the costs of preventing or remedying environmental damage when an operator is required to carry out preventive or remedial measures and the operator proves that it followed the compulsory order of a public authority, or the state-of-the-art defence applies.

The State Fund is managed by the Ministry for the Ecological Transition and the Demographic Challenge.

The Autonomous Communities may participate in the funding and management of the State Fund, in which case its scope is extended.

16.2. Extension of existing fund to cover remedial costs under the ELD

When the ELD was transposed into Spanish law in 2007, funds for the remediation of environmental damage already existed in the Autonomous Communities of Galicia and Madrid.57 These funds, which are briefly described below, were not extended by ELA to cover ELD liabilities.

The Fund for Restoration of Degraded Spaces (Fondo de Restauración de Espacios Degradados) was established by Law 10/1997, of 22 August on urban solid waste of Galicia (Ley 10/1997, de 22 de agosto, de residuos sólidos urbanos de Galicia).58 Article 35 of the Law states that the purpose of the fund is financing measures to restore land contaminated by uncontrolled landfills and unauthorised deposits of urban solid waste.59

Law 16/995, of 4 May on forestry and the protection of nature of the Community of Madrid (Ley 16/1995, de 4 de mayo, Forestal y de Protección de la Naturaleza de la Comunidad de Madrid) does not establish a fund as such. Instead, the Law provides for funding to be made available to landowners in ‘Urgent Action Zones’ due to the land being affected by severe fires, erosion, pests, diseases, and other harm.

16.3. Purpose

The purpose of the Compensation Fund for Environmental Damage is to extend cover by insurance policies used to provide evidence of financial security for ELD liabilities beyond the policy period when environmental damage or a claim for remediating such damage occur after the policy period.

16.4. Type

The Compensation Fund for Environmental Damage provides funding to remediate environmental damage. Funding is limited to the remediation of environmental damage under the provisions of a financial security instrument that is required under the mandatory financial security system.

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The State fund provides funding to remediate environmental damage at State-owned property when the operator is not obliged to bear the costs of remediating environmental damage due to applicable of the mandatory defences (articles 14.2 and 15.2 of ELA).

As with the Compensation Fund, funding is limited to the remediation of environmental damage under the provisions of a financial security instrument that is required under the mandatory financial security system.

16.5. Source(s) of funding

The source of funding for the Compensation Fund for Environmental Damage is contributions from a surcharge on the premiums of insurance policies used to provide evidence of financial security.

The State fund is funded by the General State Budget.

16.6. Number and amount of claims

There had not been any claims when this report was published. The Compensation Fund for Environmental Damage had begun to operate only for a short time before this report was published. The State Fund had not begun operations.
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