VOLUNTARY ENVIRONMENTAL AGREEMENTS AND WASTE MANAGEMENT – EXPERIENCES FROM SPAIN AND GERMANY

The Law and Context of the Voluntary Environmental Approach Concerning Packaging and Waste Management in Spain

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1 Introduction

We can define VEAs as those commitments signed among human or legal people (generally firms or sectors of firms) needful of Administrative authorisation, or between a public and private law people or among public people in order to improve or to go deeply into the protection of the environment.

By means of this definition, we introduce the three most important existing VEAs (Carraro and Lévêque, 1999) although we must advance that those we consider the main ones for our study are the agreed between the private and Administrations.

Few VEAs have been signed in Spain. The last European Commission Inventory of Environmental Agreements in Europe reveals that just 6 Voluntary Agreements have been approved in Spain for the protection of the environment, all of them located in the field of Industry. About 20% of these agreements concern waste management (Ingram, 1999). This figure is only valid on a nation-wide scale, as that official Inventory does not take the Agreements celebrated on the local and regional sphere into consideration. This number, low from all perspectives, in not such a low cipher if we consider that, in the Europe-wide scale there are countries which find themselves even more behind than Spain in the adoption of Agreements. For instance, Finland, with two, Ireland with one and Luxembourg with five are examples of this fact. And, what is more, except for Holland and Germany (with 93 and 103 Agreements respectively) the rest of the countries have a similar number of VEAs like Spain. So we have France with 8, Greece with 7 Italy with eleven...

2 Context in which Voluntary Agreements Concerning Waste are born in Spain

The increase that the amount of waste has experienced for the last years in Spain is not but a prime example of a common phenomenon in all industrialised countries. Three are the major causes of this spectacular rise: the population growth, the tendency to the urban concentration of the same, and the demands imposed by the modern consume society (Alenza, 1997). Thus, in Spain, from 1986 to 1995, an increase of 39% has taken place on the local production of waste, whereas the population has only been 1, 4% up.

Regarding the waste, VEAs are specially useful, as they are preventive instruments. As an example, we can quote the agreements signed by the local authorities together with merchants and consumers in order to reduce the amount of plastic bags which are usually given as a present in the shops in an indiscriminate way. These bags, made up of low density polythene, are representative of up to a 15% of the whole plastic production and complicate the processes of later treatment very much (CEIA, 1998).

Some possible reasons which can explain the scarce use that has been made of VEAs till now in Spain may be the following:

- The constitutional doubts remaining behind the legitimacy of Voluntary Agreements, to which can be added the delay in the establishment of a democratic Spanish Constitution in Spain (1978), understood as a legal support of VEAs in Spanish legal System.
- The lack of clearness about the distribution of the powers between the State, the Regions and the local authorities to the approval of Environmental Agreements, what has highlighted the outstanding shyness of the Regions when implementing VEAs.
- The ignorance of the technical content and the true legal status of the Voluntary Agreement as a means to protect the environment.

According to the terminology used by the Fifth European Program, Spanish Voluntary Agreements are included in four great subsections: continental water resources, waste management, pollution and air quality and ozone layer depletion (European Commission, 1996).

The signing parties are generally on the one hand, a Ministry, and on the other, the associations or the

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branches of companies. So, the Ministry of Environment or that of Public Works or some Autonomous Government, on the part of the Administration. On the private part, agreements have been signed with the stationery, the energy, the engine and transport sectors.

Spanish VEAs have not supposed until now an alternative to the classic environmental regulation, but rather they link with the development of the international set of rules (progressive decrease of CFCs in accordance with the Montreal Protocol) and the national (National Plan of Waste Decrease) (EEA, 1998). Therefore, it is not discussed in Spanish Law the lawfulness of those typical VEAs belonging to other countries (Holland, for example) whose application is imposed in exchange for the inhibition of the Government, which avoids giving norms unilaterally in the matter. VEAs suppose a temporarily intermediate step between the "command and control" classic regulations and the freedom of pacts as a final environmental aim (Lascoumes, 1994).

In this paper we are going to clear the first and third reasons aforementioned, which can explain the lethargy of the Environmental Agreement as an instrument in Spanish Environmental policy, decoding the keys that prevent us from a more open approach to the Environmental Agreements. So, it is a question of concreting its constitutional legitimacy and its legal nature.

3 Constitutional Relevance of VEAs in Spain

3.1 Constitutional Background of VEAs in Spain

The subject we now face is not a trivial one, taking into account that there are several States of the European Union which are warned of a possible violation of their Constitutional principles by VEAs, like those related to public participation, human rights to a healthy environment, or the prohibition to entail the powers of the Administration (for instance, the power of regulation, as a prototype) in respect to individual contracts (Jülich and Falk, 1999).

In our case, considering that VEAs are included within the figure of the collaboration agreement (CA from now one), and that this, at the same time, is a category inside the agreement genre, there is little to oppose to the capability of Spanish Laws to accept pacts signed between the Administration and the private with the purpose of protecting the environment (Sánchez Sáez). From this angle, the possible constitutional drawbacks when approving this type of agreements are the same that the contracts of Administration, that is to say, none. The attribution to the State of his conventional capability is placed in the section art. 149. 1. 18ª of Spanish Constitution.

We are studying the contractual subject, over which, on the one hand, the State has competence on basic legislation, and, on the other, the Autonomous Communities over the development of that legislation.

Thanks to this capability, the Act 13/1995, 18th May, regarding Contracts of Public Administrations, was passed. In this Act we find the essential key that allows the use of VEAs. To be exact, in its section 3. 1. d), the figure of collaboration agreements (CAs) between the Public Authorities and the Private is described. This rule will be developed later when referring to the legal nature of VEAs in Spain. In addition to this, the section 4 of this Act grants a large freedom to the Administration to accord every type of agreements, pacts or contractual conditions with people.

Clearly, it is about a rule inscribed inside the Act on Contracts of Public Administrations, which gives validity to those agreements of public or private nature. Anyway, the boundaries established by the section 4 of the Act 13/1995 for the Administration are more rigid than those set by the section 1255 of the Civil Code for the private.

Other constitutional support, this in relation with interadministrative VEAs can be found in the ability that Spanish Constitution attributes to the approval of cooperative agreements celebrated between the Autonomous Communities as to provide common services. This is mentioned in the section 145. 2 of Spanish Constitution. There, Spanish Constitution distinguishes between agreements to provide own services and cooperation agreements. The second are atypical and lend a wider margin of freedom to Autonomous Communities (Pérez Moreno y otros, 1981). In any case, this constitutional precept can be understood as valid for the celebration of agreements of cooperation and collaboration among whatever Administration.

In this sense, the section 6 of the Act 30/1992, of the Legal Regime of the Public Administrations and the Common Administrative Process, defines the legal regime of the collaboration interadministrative agreements, inside which we can include, of course, the interadministrative VEAs, which are not the prototypical ones in the field of Environmental protection.

The section 149. 1. 18ª of Spanish Constitution also grants the State the exclusive competence on "the bases of the legal regime of the Public Administrations... and the Common Administrative Processes, giving as well to Autonomous Communities the allowance to develop its own specialities on the subject matter. Because of this it was passed in

1992 the mentioned Act 30/1992, 26th November, recently modified by the Act 4/1999, 13th January. The 5th heading of the section 3 of that Act has regulated two new general principles affecting the regime of the agreements signed by Administrations. Such principles have to be followed by the Administrations when interacting with the citizens and companies. Those are the principles of **transparency** and of **the participation of the citizens in the public affairs**. Through the voluntary Agreements we can confide in the opening of new ways of positivation of the influence of citizens in the administrative affairs: it is important the "what", but it is more interesting in a legal context the "how" taking into account the participation (Pérez Moreno, 1981). And given that there is no longer a more direct relation with the citizenship than that derived from the contractual activity of the Administration, these principles must be applied to VEAs.

These two principles are, as we have advanced, those of transparency and participation. The principle of participation (section 9. 2 of Spanish Constitution) has a clearer and direct relation to VEAs, as it is in the philosophy of participation with the private where we must insert them. So much it is this way that the 5th Communitary Action Programme announces the principle of shared responsibility, one of the major contributions to the Environmental policy, emphasising the importance of the integration of the large amount of possible social agents in the prosecution of environmental aims, considering as "interested agents" not only the Public Administration but also associations of consumers, employers, ecologist organisations, housewives, trade unions, and so on... The Recommendation 96/73/CE of the European Commission, 9th December 1996, related to the Agreements on Environment through which the Communitary Directives are implemented (DOCE L nº. 333, de 21st-12-1996), develops this concept.

This principle comes from, moreover, the possibility that the private have to finish a concrete administrative process by agreements, which is a chance given by the Act 30/1992. As a matter of that, already gained by the `participative philosophy´ many important sectors of the Administrative activities, in Spain, such as the elaboration of regulations (as stated in Act 6/1997, 14th April), the economic educative health and urban coordination... it only lacked giving way to citizens to achieve the most sacred place of the classic administrative powers: the Administrative Law. That is the intention of the section 88 of the Act 30/1992, which has established a basic regime for all the agreements, pacts and accords that the Administrations sign with the private, regulating the borders and their minimal content. This basic regulation is safeguarded by the section 149. 1. 18ª of Spanish Constitution, above quoted (Sánchez Sáez, 1998).

The national regulation on environment has also a basic character, without the prejudice of the Autonomous Communities being able to set additional protective environmental rules (section 149. 1. 18ª of Spanish Constitution). The same prescription must be done about the national rule on mountains, wood profits and cattle paths. In this framework, for instance, a recent environmental regulation has been passed allowing the celebration of VEAs with the purpose of environmental protection, as we will see later on. A typical example is the Act 10/1998, 21st April, about Waste.

In other sectorial cases, it is possible to find constitutional support for the Environmental Agreements in the national basic legislation as far as the General Planning of the Economic Activity is concerned (section 149. 1. 13th of Spanish Constitution), wide setting in which historically the planning rules of reorganisation and modernisation of industrial activities are included, as for example. In these, CAs between the Public Administrations and definite industrial sectors delayed were foreseen in Spain.

3.2 Constitutional borders to the signing of VEAs in Spain

As the conventional environmental activity of the Public Administrations is considered in Spain as a specific administrative activity, the first limits that must be fulfilled on the Public part when subscribing a VEA, are the general edges to which this has to be submitted. That is to say, this must respect the principle of legality (Carretero Pérez, 1970), the principles collected in the section 103. 1 of Spanish Constitution and the basic principles of the legal Regime of the Public Administration of the Act 30/1992 (section 3, plus the novelties introduced by Act 4/1999, 13th January: principles of *bona fide*, legitimate trust, efficiency, service to the citizens, transparency and participation) which are eroding the ancient jurisdictions of the Administrations.

The principle of administrative legality is closely related to the main commitment of Public Administrations, which is no other than objectively serving to the common good. We must think over, before anything else, about the impact that the environmental administration by means of agreements has provoked in the bases of the "classic Environmental Law". This has been motivated, among other reasons, by a very reasonable reluctance of the Tribunals to accept that the search for the collective interests and the respect to the legality characteristic of the previous environmental policy be compatible with an individual profit for a concrete firm. This prejudices were most than justified in some of the

fields of the administrative contractualism in Spain, such as the urban pacts.

Notwithstanding, a fact remains unquestionable: the evolution of the legislative technique is leading us to soothe the consequences of the principle of legality. Nowadays we see how Acts give a wide range of instruments for the search of the public interest, overcoming the legislative *rêverie* of the XIXth century. Today, it is usual that a norm be applied not only through the regulations but also through agreements or economic and financial tools, sanctions... But it is also usual that the Act does not descend to a degree of concretion that disable the chance of negotiation by the Administration (Delgado Piqueras, 1995). This evidence lends validity to no legally qualified VEAs which could be included in the margin of contractualism left by the Act.

The defence of common good by the Administration (section 103 of Spanish Constitution) is other of those general limits imposed to the contractual capability of Public powers. So, in VEAs, the Administration can negotiate, but in a way that disables Public authority to come to an agreement on environmental goals awarding the firms and not the general interests of the citizens. That leads to the question of the quality of the legal relations needed in Environmental Agreements: behavioural codes or gentlemen accords are not so dangerous to public needs as legally binding contracts. It is about an old polemic of Administrative Law, that comes from the late years of XIXth century in France (and afterwards in Spain, Italy, Germany and other European countries) about the real possibility given to Public Administration to agree like a private individual. The idea of collaboration was thought to be perfectly compatible with the general position of superiority of Administration (Carbonnier, 1988) because the collaboration way of act does not involve the parity of both sides of an agreement (Martín-Retortillo Baquer, 1959).

This argument is still more worthy in the CAs, where the Public authorities and the private find each other at the same level. However, that was the true reason used by the French Conseil d´État to deny VEAs as a legal instrument, in the famous arrêt "Friends of the Earth"(Prieur, 1995).

The section 106 of Spanish Constitution builds other general border to the administrative activity: this has to be a legal and accurate activity in relation to the scope of Administration, which involves the submission to the Judges and Tribunals. The contracts must be under that legal demand, not only the administrative but the private Law contracts, and also VEAs. The problem with attaching the administrative activity to aim its scope is the ambiguity of those objectives, which are not often well defined. This handicap is still stressed in VEAs, whose concrete purposes sometimes appear not to exist, making difficult to take legal actions on "deviation of powers".

More specific borders to contractual capability are set in the above mentioned section 4 Act 13/1995, which prevents Administration from agreeing "when the conditions of the accord were opposed to public interests, to legal regulations and to good management principles". These two first limits are general. The good management principles demand economic efficiency, which, taken to the environmental protection, requires competition and competitiveness when selecting companies for the VEA.

Huergo Lora has highlighted some material limits to the subscription of agreements in Spain. Firstly, agreements binding regulation power of Administration were hardly accepted. Given that it is by means of regulations how the general interests are ordered, it seems to be inappropriate linking a regulation, bound to attend the general concerns, to the satisfaction of a few individual interests. Although this type of drawback does not specially affect VEAs concerning Waste (due to the fact that these are mainly addressed to implement the rules) we could affirm this possibility when, as the author says, the degree of concretion of the regulation be maximum, in other words, when we face regulations that, because of the fact they are addressed to a very precise group of citizens, condition, as less as possible, the general interests (Huergo Lora, 1998).

They are also of complicate compliance the administrative acts of judgement or opinion encharged to a specific body of the Administration, due to its high impartiality and technical capability to dictate them. This is the case, for example, of the administrative sanctions.

4 VEAs Concerning Waste in Spain

As it is already known, VEAs are a *rara avis* in Spanish environmental policy. Notwithstanding, little by little such a figure is being appreciated, encouraged by the Communitary directives and by the increasing interest that the doctrine is showing (nowadays more a technical than a legal one). As a result of this understanding atmosphere, we find a very new regulation *corpus*, that, according to us, will bring about a true revolution regarding the use of VEAs in Spain, above all on the waste management framework. There are two recent Acts which have taken into account the voluntary agreements for the production, treatment and recycling of waste in Spain: the Act 11/1997, 24th April, on Packaging and Packaging Waste and the Act 10/1998, 21st April, of Waste. After them, some of the Autonomous Communities, such as Catalonia, Basque

Country and Murcia have largely used these instruments.

4.1 VEAs in the field of Packaging and Packaging Waste in Spain

Before coming deeply into the regulation of Voluntary Agreements placed in the Act of Packaging, it could be useful to inform about a previous project of VEA which failed due to many reasons. Like the French and German voluntary waste plans of the first 90s, Spain wanted to have a similar voluntary waste management system. So, the President of the Environment Spanish Employers Organisations Commission proposed it to Spanish Water and Environment State Secretary, based on a great Voluntary Agreement celebrated between Ministries, Autonomous Communities and Local authorities and the involved Spanish organisations. The works were actually very advanced when the UE Directive 94/62/CE was passed, which caused the early death of this VEA. Nevertheless, the developed studies were used to build up the structures of the Waste Management Voluntary Systems, recently approved after the Act of Packaging (Poveda Gómez, 1997).

The packaging waste represents a huge part of the whole amount of waste in Spain. To get this target, the 5th Communitary Action Programme on Environment and Sustainable Development approved the mentioned Directive, and afterwards, Spanish Parliament passed the Act 11/1997, which was inserted in the framework of basic national legislation on Planning of general economic activity (art. 149. 1. 13ª of Spanish Constitution) and on Environment (art. 149. 1. 23ª of Spanish Constitution).

Spanish Packaging Act tries to achieve different aims: stimulating prevention and reusing packaging and establishing the foreseen objectives of recycling and management. In addition to the obligation, imposed to manufacturers, of using packaging waste materials, the Chapter IV of the Act orders two different processes for packaging waste treatment: the first one, which is also the general system, consists of the participation of all agents involved in the business chain (industrials, importers, wholesale and retail dealers) who must collect from their clients, up to the final consumer, an amount of money for each unit of bottled product sold, refunding to all of them the same amount when the clients bring the bottles or cans back as well. The second system, the one we are interested in, free the business agents from that obligation, when taking part in an Integrated Packaging and Packaging Waste Management System (**SIG**), known as well like "green point system". This also guarantees periodical collecting and recycling of bottles and the achievement of the purposes of reusing. The authorisation of these systems, implemented through voluntary agreements signed between the agents, concerns to Autonomous Communities.

In comparison with other European countries, Spanish Law is especially linked to European Law objectives, given that it demands from Spanish society the reduction of 10% of the whole packaging waste volume in 30th June 2001, which does not occur in any other European country.

4.2 The Legal Nature of Packaging and Packaging Waste Agreements in Spain

In this norm there is a general principle supporting the agreements for the management and treatment of the used bottles and the management of the packaging waste. This is in accordance with the 3rd Additional Disposition of the Act, encouraging the use of the agreements between the Public competent Administrations and the economic agents with the intention of preventing and reducing the impact on the environment caused by the packaging waste throughout the lifetime of the bottles. But apart from this declaration of intentions, the Act foretells the use of specific voluntary Environmental Agreements. Thus, the Act proposes the appearance of the so-called SIG, as an alternative to the obligations that the rules fix for the producers and merchants of bottled products. For this reason, rather than a complete option to the norm itself, these systems are born like a alternative within the norm (and so legitimate) which exempt them from the general waste management regime (this based on the obligation of reusing the bottles returned back by the users in exchange for the payment of a quantity of money per unit) (Rehbinder, 1997). The Act establishes this way two systems, moving itself towards the agreed solution, as this is more efficient and environmental protective.

The SIGs included in Spanish Act inspire in those French plans regulated by the French Decree 92-377, 1st April, but differs from them in the fact that whereas in Spanish ones the collect is carried out by the local Entities, that join the system by means of Voluntary Agreements, in the French ones this is ordered directly by the Act. This requirement of wilfulness was demanded from the beginning by the representatives of the local Entities (Madrid, Barcelona and others, for instance), something that, however, did not pleased the Employers Organisations very much. Unlike, in Catalonia, thanks to the Act 6/1993, on Waste, the Local corporations exceeding 5.000 inhabitants have to introduce selective waste services, which are perfectly compatible with the existence of voluntary agreements in the national regulations, as the Autonomous Communities has the competence to develop and implement those rules.

But, which is the legal nature of these systems? According to us, there are two different systems: those completely subscribed between the private and those others in which a local Entity or a Autonomous Community plays a role. On the one hand, the first systems (section 7) are structured as private contracts between the bottle companies or trade dealers of bottled items and other management firms of packaging in charge of evaluating, recycling and reusing them (Moffet and Bregha, 1999). The fact is that these systems are devoted to execute a certain type of public functions -the waste treatment- and it is for that reason that the Act demands some administrative control of the SIG. In this case, a legal authorisation is required, conceded by the Autonomous Communities.

On the other hand, the other genre of agreements (section 9) are actually typical voluntary agreements, due to the participation of a Public Administration in them (Local Authorities, generally, or Autonomous Communities, subsidiary). Here, a great margin of freedom is given to the sides of the accord. They can, for example, concrete complementary financial mechanisms, the way of transferring the property of packaging waste from Township to the management company, temporal dates of collaboration, and so on... This freedom inserts this type of VEAs in one of the seven classifications established by Börkey and Glachant. In particular, they are contractual negotiated collective engagements, similar to the Dutch *covenants* but with a content more public than private granted by the administrative protection of the regulations, as it is the rule in the countries with a heritage from French Administrative Law (Börkey and Glachant, 1997).

This second type of agreements are said to be CAs for encouraging private activities regarding general interests. As a matter of fact, they are public contracts, submitted to Administrative Law. It is not the same thing to stimulate private activities regarding the common interest than the private execution of public powers. Apart from the difference of the formal instruments used in each one (contracts and administrative authorisations, respectively), the origin of the activity also varies from one to another systems: the public powers encouraging the private activity to reuse and recycle the packaging waste (in the first ones) and the private firms agree to do the same (in the second) (Carrillo Donaire, 1999).

And, what is more, these agreements in which Administrations participates are binding agreements, given that the relations born from them are legally regulated: the private firms have to pay a certain amount of money to the Administrations in exchange for their collaboration in the transport of the packaging waste to the management entity. If not, the Administrations can collect that quantity, from the private side of the agreement, through a surety or deposit that they are demanded (section 10. 3). Any contractual breach of the voluntary agreement entitles the Administration to put a light sanction to the management firm (section 19). However, nothing is said about contractual non-completions by the Administration itself. Consequently, we have to make use of these solutions foreseen by the Contract Legislation (Act 13/1995, already mentioned) in the field of CAs. These are voluntary agreements, and the wilfulness is almost pure and does not find menaced by the enforcing administrative power of passing more harmful regulations in case of non- completion of the agreement by the firms, which supposes sometimes a distorting measure (ELNI and CAMERON MAY editors, 1999).

Other basic requirements must appear in SIG to be passed, as it is usual in the sphere of voluntary agreements: concretion of objectives, clearing the setting of financial mechanisms, instruments to check the target compliance, public information of the agreement, and so on. As it is also usual in CAs, these packaging and packaging waste agreements are temporally limited (5 years). Despite the fact that the section 8 describes the content of the agreement application form, the authorisations are not transmissible to third parties. The cause of this is the discretionary nature of the authorisation, given in view of the involved firms (in tuitu personae) which is an characteristic of CAs as well.

Finally, the Act establishes in the section 18 a general clause encouraging the agreements, where the use of economic instruments by the Administrations is foretold with the "green" purposes already mentioned.

4.3 Voluntary SIG already celebrated in Spain

Thanks, among other causes, to the profit stemming from the Voluntary agreement project on Waste, which was left just before the approval of the Act 11/1997, three great SIGs were immediately born in Spain: ECOEMBES, ECOACERO and ECOVIDRIO. However, on the 11th June 1997, the second entity came to an agreement with the first one, which meant the integration of ECOACERO in ECOEMBES. See further details in Appendix. Lately, one more SIG has been celebrated in Spain: SIGRE, referring to pharmaceutical products management.

4.4 Voluntary Agreements concerning Waste in Spain: its legal nature

Last year, Spanish Parliament passed the Act 10/1998, 21st April, on Waste, which is the natural complement to Act 11/1997, already quoted. That Act transposed, with two years of delay, the European Directive 91/156/CEE. The Act includes all the types of waste produced in Spanish State, except

for the emissions to the atmosphere, the effluents on water and the radioactive waste. This Act is located in the tittle of the basic national legislation on Environment (section 149. 1. 18 Spanish Constitution). It is a novelty introduced by this Act the incentive of collaboration between the Administration and the firms responsible for introducing products in the market involving the generation of waste, through an accurate legal framework that could be implemented by means of voluntary and collaboration Environmental Agreements. The regulation disposed by this norm is essentially similar to that established in Act 11/1997.

The sections 8 and 28 address to the use of Environmental Agreements. In the section 8 the Legislator suggests the subscription of VEAs to the firms dealing with the products that turn into waste in the future, with the following purposes, stated in the section 7: using of "green" products and packaging; taking part in an Integrated Waste Management System (SIG); accepting a deposit refund and return System; informing of these processes to Autonomous Communities Administrations... The same rule was already regulated three years before by the Act 1/1995, 8th March, on Protection of the Environment, of Autonomous Community of Murcia (We must remember than in Spain, this kind of Administrations have legislative powers).

The section 28 regards to a new use of voluntary agreements: the Autonomous Communities will encourage the owners of lands polluted by the waste from themselves or from somebody else to agree voluntarily with Administrations or private individuals for the cleaning and recuperation of soils. This is a prototypical case-study of the environmental use of contracts based on the real estate property, which involves a *plus* of obligations for the owners, forced to take care of their land as to protect the right to a healthy environment, a so-called "social function" of the property (Carbonnier, 1988).

In both cases, the agreements would be celebrated, like in the Act of Packaging, exclusively between the private or between the private and the Public Administration. The Act calls the first ones "voluntary agreements", and the second ones "CAs." The reason is absolutely logical: it has been translated from the English expression "voluntary agreement" literally, because this refers to a new tool, unknown until now in the environmental Spanish policy. When one of the sides is an Administration, the expression is "CA", a well known figure in Spanish Administrative Law from the former rules on Administrative Contracts. The first ones, authorised by the Autonomous Communities, are private contracts. The second ones are public contracts, submitted to the Act 13/1995, regarding the Contracts of the Administrations. As we can see, the same scheme mentioned in the Act of Packaging is settled.

The Act concretes the payment of economic supports by the Public authorities, fixed through the voluntary or CAs when cleaning the polluted soils. Particularly, the National Spanish Plan of Recovering Polluted Soils conferes 122. 000 million pesetas for the period from 1995 to 2005, paid half and half between the State and the Autonomous Communities (Poveda Gómez, 1998). The specific amount of the help could be negotiated in the CAs, but it will be unilaterally regulated in the case of voluntary agreements, after the application form submitted by the people in charge of the cleaning. As a compensation for these helps, apart from the ecological benefit obtained from this cleaning (which is to the advantage of the collective ownership) the Act demands that the whole capital gains coming from public helps be shared with the Administration: the quantity of this benefits will be also specified in the CA or the concrete rule which regulates the concession of the allowance. This comes from the social function of the private property again.

There is a difference, however, between the voluntary agreements regulated in both Acts. The most important one is the establishment, in the Act 10/1998 of sanctions to the private which do not fulfil the obligations derived from the agreement. If we remember, in the Act on Packaging, it was only the bottle and the bottled products dealers the ones obliged to subscribe any kind of guarantee from which the Administration could collect in case of any contractual breach, also imposing light sanctions on the management company of the integrated system as the responsible for the non-completion of whatever obligation coming from the same. In the Act on Waste, the sanctions are imposed *in personam*, that is on the true protagonist (section 34. 2) who is involved in a voluntary or CA, so much of the section 8 as of the section 28 of the Act. These are serious and very serious sanctions. With this sanctionary regime we clearly see the binding of the legal obligations coming from the agreements. The fines will be from 5.000.001 pesetas to 200.000.000 pesetas and disqualification of the sanctioned person to keep on working, from one up to ten years in the case of the very serious ones. For the serious ones, the responsible person will be fined with an amount from 100.001 up to 5.000.000 pesetas and disqualification up to a year. As we have mentioned regarding the constitutional limits of contractual capability of the Administrations, the power of sanction is an *extra commercium* thing, excluded from a possible voluntary or collaboration agreement, due to the fact that this power is an absolute administrative authority.

The Act 3/1998, 27th February, on Environmental Protection, of the Autonomous Community of Basque Country, has the virtue of advancing the National Act on Waste in a month, foreseeing the use of Voluntary Agreements not only for the cleaning of polluted lands (section 83) but, in general, for sharing the responsibility for the management of those activities risky for the environment (generation of packaging or packaging waste, as an example). The Basque Act calls them "concerts", expression already appeared in the 60s, in the first Spanish economic Acts on Planning, inspired in those French ones. This Basque norm also sanctions the person who does not clean or restore to their original state the spoiled lands (art. 109, k).

Recently, in a "curious" temporal coincidence with this Basque Act, it has been passed the Act 3/1998 27th February, on Integral Intervention of the Environmental Administration, of the Autonomous Community of Catalonia. In this Act it is given the first definition of general VEA in the history of Spanish environmental regulation. They are told to be ***"the agreements subscribed between the environmental competent Administration and one firm or the representatives of a certain industrial sector, by means of which both sides bind each other in a voluntary way for the achievement of quantified objectives of environmental quality."***

In this concept we can appreciate the success of the spirit of accord, which is enough for such a general and brief definition like this. Many things remain clear and expressive about their legal nature:

(1) They are only voluntary agreements the ones celebrated between a public and a private side, consequently submitted to public regulations) excluding the accords signed exclusively between the public or between the private.

(2) These are always binding agreements. They have contractual nature, with the consequences attached to it: judicial review and sanctions.

(3) They must have a specific purpose. Taking this into account, the Catalonian Act does not consider the conduct codes or the gentlemen agreements as VEAs.

(4) The targets must be previously fixed by regulations (as usual) or by administrative Law (for instance, in the administrative processes of authorisation or in the conventional ending of the process).

The section 8 (4th paragraph) of the Catalonian Act allows the adoption of whatever technical measures to prevent the environment from impacts derived of human risky activities. One of these agreements can deal with waste treatment, for example, one in which can be pacted the use of the best available technologies (BAT), the quantifying of the waste volume permitted, and so on... The VEAs established by the Catalonian Act are CAs as well, but with the special feature of being a true alternative to regulation, to which they can affect or even overcome. They cannot, evidently, be against the legislation, which is a general principle of Spanish Law (principle of legality).

5 Liability and Participation Rights in Packaging and Waste VEAs in Spain

We have already anticipated some characteristics of VEAs when talking about their constitutional limits. Within the legal sphere of the Environment, there are some other regulations on VEAs, which appeared before the Acts of Packaging and Waste. For instance, the regulations about the Natural Park of Cabañeros (1995).

We have said that VEAs belong to a major genre of pacts, the so-called CAs, subscribed by the Public Administrations and the private people (firms, in general). The Environmental Agreements are a concrete type of collaboration agreements, those articulated through administrative measures of encouragement or help. In these, the Administration gives an economic quantity or a financial, technical or legal advantage to companies taking part in the environmental sector. These firms engage to act in a more environmental efficient way. For example, a technical VEA was signed in July 1999 between the Council of Environment of the Autonomous Community of Andalucía and Acerinox (a private firm devoted to the obtaining of steel from metallic waste). In this agreement, the Administration agrees to lend technical support to the company regarding its water effluents and mud filtering.

Other VEA, is implemented by the Order 23rd December 1994, passed by the Ministry of Industry and Energy, on Approval of the Second Stage of the Environmental Technology and Industry Plan (PITMA II). This is a VEA in which the State confers a legal advantage, due to the fact that the application forms for the allowances regulated, submitted by firms taking part in a VEA in the Order, are given priority (section 9. 2, b).

Collaboration agreements are regulated in section 3. 1, letters c) and d) of the Act 13/1995, 18th May, on Contracts of Public Administrations. In letter c) the Act establishes the legal rules about interadministrative CAs, developed on section 6 Act 30/1992, above quoted. In letter d) the Act orders the legal regime of CAs signed between the private people and the Public Administrations. Here, the Act says that it will be submitted to the Administrative Law those CAs having the object of a contract of public Works, public services, public supply, public consultancy, public specific tasks, or whatever other purpose devoted to directly satisfy a certain general

interest. Given that the protection of the Environment is established as a public power (section 45 Spanish Constitution), we have to conclude that Spanish VEAs are CAs of section 3. 1. d) and that their basic legal regime is the one of the administrative contracts regulated in Act 13/1995. That fact involves the application to them of the general principles of administrative contractualism: publicity, transparency, competitiveness, binding relations between the parties, liability, judicial review by Administrative Tribunals, and so on... Like prototypical administrative contracts, the Administration holds powers throughout their lifetime (Cabugheira, 1999).

Briefly, about the liability of VEAs, we have only to go to section 4 Act 13/1995, above explained, where all type of pacts, accords and agreements are allowed to the Administrations if they are neither in contradiction to the public interests, to the legal regulations nor to the principles of good management. Thus, in a VEA, in the event of contractual breach (section 29 Act 29/1998, 13th July, on Administrative Jurisdiction Tribunals) or wrong implementation (sections 25 and 30 Act 29/1998) on the part of the Administration, the firms could take legal measures and appeal against them. On the contrary, if the contractual non-completion was caused by the firms taking part in the agreement, they could be also prosecuted by Administrations.

The sectorial regulations on each type of VEA could not be opposed to this essential principles of basic legislation (*ex* section 149. 1. 18 Spanish Constitution). But, what is more, in case there was no concrete regulations for a VEA, this one would have to respect the same principles, in accordance with the orders given by section 4 Act 13/1995, given that the pursuit of public interests is an administrative duty which can never be given up.

Regarding the legitimation to apply to the courts by third parties, we have to take into consideration the rule of section 19 Act 29/1998, aforementioned, which confers that right to people and legal societies holding an accurate right or interest, to corporations, associations, trade unions and groups affected or legally entitled to defend the rights or legitimate collective interests, and to any citizen when legally foreseen (popular prosecution actions). In the environmental field, this "popular actions" are not regulated (due to the slight protection of this right in Spanish Constitution) but, for instance, do are in the sphere of town planning. A few authors complain about this lack (Jordano Fraga, 1995).

If the administrative non-completion provoked measurable damages in a third person, this third will be able to ask for extracontractual responsibility to the Administration. The section 139 Act 30/1992, awards this right to all those that suffer some harm in their properties and/or rights, provided that this damage be a consequence of the usual or unusual functioning of the Public Services. Given that the public and objective character of the administrative responsibility in Spain (without being necessary any blame or negligence). We do not see any handicap to use this other alternative, which can make up for the absence of a "popular action" on Environment. The difficult thing, of course, will be to prove in court the existence of an effective and economically valuable damage because of the administrative action, above all when that damage does not affect third parties‘ goods. Let´s imagine that the Townhall collaborating in the Waste Integrated System carelessly transports the waste to the management floor. The citizens, the private owners of goods, directly affected by the waste could react. It would be still more difficult for those people who declare a hypothetic harm to their right to a healthy environment (section 45 of Spanish Constitution).

Regarding the management agreements on Waste and Packaging signed exclusively between the private, we must conclude, *contrario sensu*, that they are contracts submitted to the private Law, framed inside the freedom to agree recognised to citizens and safeguarded by Spanish Civil Code dating from 1888 (section 1255), with the boundaries of the moral, of the public order and the Law. Anyway, the legal relationships built up between the companies signing agreements of integrated management on waste or packaging, are not indifferent to the administration, which will have to give the authorisations or receive communications and reports from the private. This way, these activities are included within the policy of Administration, also known as ordering activity of the private behaviours (Santamaría Pastor, 1988).

The judicial review of these agreements, differs in respect to the pacts celebrated with the Administrations, as it will now depends on the type of the agreement carried out between the private and the regulations applied to these, to appeal or not to the Tribunals. As the SIG counts with an administrative control (the authorisation), it is logical to think that we are before true civil contracts (*lex inter partes*), therefore, creators of authentic legal obligations for the other parts, which can be taken to administrative courts. The right to appeal does not exclusively belong to the signing parts of the agreement, but also (in the field of extracontractual civil responsibility) to those people who were damaged by the contractual breach. One of the differences between the administrative and the civil extracontractual responsibility rests on the fact that, in the second type of responsibility, the third person has to prove the existence of

blame or negligence on the part of who broke the agreement (section 1902 and following of the Civil Code). Specially, almost the whole doctrine specialised on Spanish Civil Law, see in the section 1908. 2 of the Civil Code the base that allows the claim for responsibility because of environmental harms. In that section, in fact, it is mentioned the concept of "excessive smokes", a generic expression in which nowadays we can include the emissions, noises, vibrations, emanations, and so on... derived from the waste (Díaz-Regañón, 1998).

6 Conclusion

The VEAs in Spain have remained as an underused tool because of different reasons. Among them, we have quoted the legal doubts that this instrument brought about. We have tried to clear their legitimacy, granting them a nature of public or private contracts, depending on the fact that the aims they attempt to reach be directly or indirectly of public interest, respectively.

In addition to this, the recent Spanish regulation on Waste and Packaging largely inspires in the consensus between the producers of waste and the Public Administrations (local and regional above all). This new legislation, stemming from the three last years, can mean a support in the introduction of the figure of VEAs in Spanish environmental policy, as it has already done. Pérez Moreno (1998) has highlighted the consensus and participation culture as a great new deal in the next future of environmental law. As an example of this, in this paper we have described three Voluntary Integrated Systems (SIG) signed on packaging management.

The legal relations existing between the members of these agreements are specially regulated in Spanish case, not only because this agreements are inserted in the positive rules -appearing as a development or implementation of the same and not as an alternative to it-, but also because the use of agreements in Spain happen to be particularly fortunate due to the already existence in Spanish Law of a conventional institution in which VEAs can be placed: the collaboration agreements (CAs) between the Administrations and the firms to encourage the private activities affecting positively the common good. To be exact, VEAs on waste belong to the type of "product agreements", classification established by Suurland (Suurland, 1994).

As it has been said in the study about the effectiveness of VEAs, these can be more useful as a complement of other environmental instruments (regulations or financial tools) to which they could help in an efficient way, particularly in the sense of improving the environmental sensibility of consumers, of creating consensus and of constituting a sphere of shared information among the different sectors (EEA, 1998).

7 Appendix

Details about the three Packaging SIG subscribed in Spain

As we have advanced above, three were the SIG which appeared at the beginning in Spain: they are systems managed by the associations ECOVIDRIO, ECOACERO and ECOEMBES. These triad has also been said to have been reduced to a duet months later, thanks to the integration of ECOACERO into ECOEMBES. Also SIGRE has join the voluntary approach, concerning the management of the pharmaceutical products. The function of ECOACERO in ECOEMBES is developed through the Technical Commission of tinplate, formed by 18 members, of which ECOACERO will name 9. The Ecological Association for the recycling of tinplate (ECOACERO) was set up the 30th November 1996. Among its purposes, we can find the following: 1) solutions to environmental problems generated by light metallic bottles, like tinplate and tin; 2) the Constitution of an integrated system under the protection of the European Directive 94/62/CE and of the rules of Spanish Acts, that develop it; 3) Exploitation, recovering, investigation, formation, spreading of techniques, and **subscription of voluntary agreements with all kind of private and public entities for the achievement of the previous aims.** While ECOEMBES tries to cover all the types of bottled materials, except for the glass, ECOVIDRIO makes the same with the glass, but only through the recycling as this is a material which is worthless from the energy perspective.

ECOEMBES

The partners who joined the Voluntary management System of ECOEMBES were several:

(1) GRUPO DE ENVASADORES which includes the following companies and associations: FEDERACIÓN DE INDUSTRIAS DE ALIMENTACIÓN Y BEBIDAS (FIAB), ASOCIACIÓN NACIONAL DE FABRICANTES BEBIDAS REFRESCANTES (ANFABPA), ASOCIACIÓN NACIONAL DE EMPRESAS DE AGUAS DE BEBIDAS ENVASADAS(ANEABE), ASOCIACIÓN NACIONAL DE FABRICANTES DE PERFUMERÍA Y AFINES (STANPA), ASOCIACIÓN NACIONAL DE INDUSTRIALES ENVASADORES Y REFINADORES DE ACEITES COMESTIBLES (ANIERAC), ASOCIACIÓN GENERAL DE FABRICANTES DE AZUCAR DE ESPAÑA (AGFA),

ASOCIACIÓN DE FABRICANTES DE DETERGENTES TENSOACTIVOS Y PRODUCTOS AFINES (ADTA), CODORNIU, CAMP, LECHE PASCUAL, PROCTER & GAMBLE, NESTLE, NUTREXPA, UNILEVER, CAMPOFRIO, COLGATE-PALMOLIVE, GALLINA BLANCA, DANONE, HENKEL, FREIXENET JHONSON'S WAX, CLESA, GILLETTE, BIMBO, KRAFT, JACOBS SUCHARD, L'OREAL, GENERAL BISCUITS, PESCANOVA, AUSONIA, ARBOFA, PROMARCA Y COCA-COLA.

(2) GRUPO DE COMERCIO Y DISTRIBUCIÓN, which includes the following companies and associations:
IFA, EUROMADI, MERCADONA, EL CORTE INGLÉS, PRYCA, ALCAMPO, DIA, CONTINENTE, MARK & SPENCER. Y EROSKI.

(3) GRUPO MATERIAS PRIMAS (MATERIALES DE ENVASADO): which includes the following companies and associations:
RECIPAP (Paper), ANEP (plastic PET), TETIRA LAVAL HISPANIA (Tetra-brik), CICLOPLAST (Plastics, except for PET), ARPAL (Aluminium), FEDEMCO (Wood), ECOACERO (tinplate and steel).

(4) GRUPO RECICLADORES Y OTROS, which includes the following companies and associations:
ECOLENO S.L., CESPA S.A., CESPA G.R., ASOCIACION NACIONAL DE RECICLADORES DE PLASTICO (ANARPLA), (ASOCIACIÓN CATALANA DE PYMEs DE LA RECUPERACIO DE PAPEL Y CARIO (ACARE), RECIPAP S.L. (paper recyclers) y PAPELES GAYA.

ECOVIDRIO

In the beginning, ECOVIDRIO was founded by 13 associations which included about 3.000 thousand companies of the sector, manufacturing more than one billion pesetas (what have already developed a Program on Recycling and Collecting valid in about 3.500 Townships all over Spain. Among them, we find the following:

Agrupación Nacional de Reciclado de Vidrio (A.N.A.R.E.VI), Asociación Nacional de Empresas de Fabricación Automática de Envases de Vidrio (ANFEVI), Asociación Española de Fabricantes de Sidra, Asociación Española de Mostos, BSN Vidrio España, Cerveceros de Espa6a, Confederación Española de Vino, Federación Española de Vino, Federación Española ce Fabricantes ce Bebidas Espirituosas, Vicasa, Vídrala, Vidriera Leonesa, Vidriera Rovira.

Ecovidrio includes in its Statutes the amounts that the bottlers will provide per each bottled product that they put in the market by means of such system: 20 cents of peseta per each bottle up to 1/2 litre and 40 cents per each bottle of 1/2 litre or more capacity. On its part, Ecoembes defines the cost of the green point for the empty bottles according to 5 or 6 categories of volume, and, in the case of flat bottles, it will be according to the weight (Poveda Gómez, 1997).

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