



The new regime for CCS in Spain: an overview

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Introduction

A new regulatory regime for carbon capture and storage (CCS) has been implemented in Spain – Act 40/2010, of 29 December 2010 (the CCS Act).¹ The statute, passed after a relatively short parliamentary consideration, entered into force on 31 December 2010. This legal development is driven by the need to transpose the EU CCS Directive 2009/31/EC (the CCS Directive). Consequently, the new rule follows the regulatory structure of the CCS Directive, but includes legal techniques which are typical of Spanish national administrative law.

Legislators originally considered relying on preexisting mining legislation (dating back to 1974) as the foundation of a regime for CCS, but this option was later rejected on the grounds that a comprehensive and modern bespoke rule was needed.

The Act predominantly regulates the geological storage of CO₂, while capture and transportation are only regulated in a marginal way. As is usual in Spanish administrative and environmental statutes, this new piece of legislation will be supplemented by more detailed administrative regulations which have yet to be announced. As Spain is a highly decentralised country, it is important to stress that the Act has been passed by the national legislature, based on the constitutional legislative authority of the central government in the areas of energy, economic regulation and environmental protection, and therefore the rule applies nationwide. This legal basis does allow for the Regions (*Comunidades Autónomas*) to introduce additional legal requirements, but this is unlikely to happen because of the technical nature of the national regulation and because the (seventeen) regional governments have so far been reluctant to impose additional environmental regulatory burdens on business.

One important question is whether a Region has the power to ban CCS in its territory. Although the Regions have full implementation powers in the field of environmental protection, the key executive competence in the domain of CCS (the granting of concessions for CO₂ storage) is exercised by the national government, namely the Department of Industry, Tourism and Commerce (DITC). The Regions are only allowed to issue a preliminary report which is non binding. This precedent was set by legislation on biotechnology passed by the Regions which contained a 'veto' on transgenic agriculture. However, this veto had no binding force and in reality Spain has the largest transgenic corn harvest in the EU. Finally, under the Spanish constitution, the Regions cannot pass laws and regulation that would act as barriers to trade, and a regional ban on CCS would, in our view, amount to just such an interference in the national market.

As for the administrative implementation, the CCS Act embodies a complex and delicate allocation of powers between the national and the regional government agencies, and it is this interaction that might be the likely source of implementation problems.

Main features of the CO₂ storage regime

Storage concessions

The heart of the new regulatory scheme deals with CO₂ storage. In order to properly understand this Spanish law, it is important to stress that the CCS Act is based on the country's traditional administrative law techniques, the most important of which is the technique of *dominio público* (henceforth, public domain). In broad terms, public domain is government property which cannot be sold or acquired by any individual or firm, and which cannot be seized by any court of law. Any use of this property is governed by the competent administrative agency, which enjoys unilateral and coercive powers to recover or to protect the property. Different types of permits or licences must be obtained by the operator from the competent agency in order to authorise an operator to carry out an activity. The most intensive use of public domain by a company or an individual needs a government concession (*concesión administrativa*), which can only be granted for a limited period of time. In Spanish environmental law there are many examples of public domain: the coast, beaches, onshore waters, offshore waters and subterranean waters are all the public domain of the state.

The most important aspect of the CCS Act is s.3, which declares all subterranean geological formations that may hold CO₂ in its dense phase to be the public domain of the state (meaning the national government). Any use of such subterranean formations – either in Spain's continental territory or under its territorial waters or exclusive economic zone – has to be based on a concession granted by the DITC, which may be for a period up to fifty years. This period consists of an initial grant of thirty years which can be extended twice for two additional ten-year periods. However, if the storage space is not exhausted by the end of the fifty year period, the DITC may grant an exceptional, additional ten year period before the eventual closure of the site.²

Concessions for storage of CO₂ give the grantee exclusive storage rights in the site. Storage will be carried out by operators – thought most likely to be electricity generation companies – who will be primarily concerned with storing their own carbon emissions; however, they may also store other corporate bodies' emissions and charge a fee to do so. These transactions between firms are not regulated by the CCS Act, and may therefore be assumed to be governed by ordinary private law.

Administrative concessions for CO₂ storage must be granted on a transparent and non discriminatory basis whenever there are several applicants for the same complex. However, preference will be given to the applicant who already holds a valid exploration licence for the site. If the concession is granted on land which does not belong to the applicant, the land is potentially subject to expropriation by the public administration and later transfer to the applicant, who in turn must pay appropriate compensation.

Both the application process and subsequent administration of a concession must follow a precise administrative procedure. The CCS Act does not provide such a procedure, but rather lays down broad procedural directions and calls for future administrative regulation to be passed by central government to establish the correct process. Until this is achieved, two points need to be considered. First, the national Department of the Environment has to carry out an environmental impact assessment (EIA) for any project granted a concession for a geological complex. Potential disagreements between the Department of the Environment and the DITC are regulated by the general laws on EIA. Second, the applicant must provide financial security to ensure that all the obligations stemming from the storage and operation of the site are met. However, the CCS Act does not regulate this issue in detail, but calls for future administrative regulation on the matter. In practice, these references to future regulation mean that the CCS Act cannot be implemented until those provisions are in force.

Site exploration

In practice, CO₂ storage cannot take place without proper site exploration. Under the CCS Act, site exploration requires a licence (*permiso de exploración*) which is granted by the competent Regional agency if the area to be explored is situated entirely within the territory of that Region. If the area crosses a border between the Regions, competence is shifted to the DITC which, as has been seen, plays a key role in the regulatory structure of the CCS Act. It is arguable whether this feature of the statute is legally sound under the present devolved structure. Under the text of the Spanish constitution of 1978, the national government lacks executive implementing powers in the areas of industry and environmental protection: in theory, all executive competence in these fields are devolved to the Regions. The CCS Act may thus be open to challenge on the grounds that it is unconstitutional.

In cases where the exploration licence is granted in areas already subject to other resource rights (for example, mining or petroleum rights), s.6 of the CCS Act allows the granting of storage site exploration permits, providing that storage is technically compatible with those resource activities.

Liability

The operator of the site is liable for any damage or leakage that might happen during the operational period. This responsibility is limited to twenty years following the closure of the site. After closure, liability is shifted to the government, as long as the operator has provided conclusive evidence that the storage site has been completely and safely sealed.

The shift of responsibility, however, is not automatic. A comprehensive dossier must be produced by the company, and the central government (the Council of Ministers responding

to a proposal by the Department of the Environment) has to declare by formal resolution that the responsibility has been assumed. The government may still recover costs incurred in the management of a closed site whenever there has been fault or negligence on the part of the operator, and if the operator has provided misleading or inaccurate information.

Carbon capture and CO₂ transport

Under the CCS Act, installations for carbon capture are subjected to the integrated pollution prevention and control regime, and require an EIA. With respect to transport of captured CO₂, the CCS Act only sets broad principles aimed at ensuring that access to the network of pipelines is open to third parties in a transparent and non discriminatory way.

Administrative sanctions

Like any other environmental statute in Spain, the CCS Act includes a comprehensive regime of administrative sanctions. Regional bodies have the power to inspect storage sites, but sanctioning powers are shared between regional and the national bodies. Infringements are divided into three categories: slight, serious and very serious. Serious offences would include performing exploration works without the appropriate licence whilst a very serious offence would be carrying out injections of CO₂ without a concession. Administrative sanctions are proportional to the infringements, and monetary penalties for very serious offences may go up to €5 million. Apart from monetary penalties, other sanctions may be imposed, the most severe being the withdrawal of the storage concession or revocation of the exploration licence. This system is compatible with the prevention, restoration and remediation obligations imposed on the operator by environmental liability legislation.

The CCS Act includes specific provisions on access to information concerning CO₂ storage sites (s.29), but the issue of public participation in the granting of storage concessions and site exploration licence is not addressed. However, in our view there is no loophole here, since the general law on public participation will apply (Act 27/2006).

Concluding remarks

The Spanish CCS Act is the result of the transposition process of the CCS Directive. Rather unusually, transposition has been accomplished well before the deadline (25 June 2011). It might be also said that the resulting statute is a full, simple and uncomplicated transposition of the Directive. There is no "gold-plating", but slight divergences do occur. Two examples: first, under s.14(k) of the CCS Act, the granting of the storage concession must include an EIA of the project, something which is not required by the Directive; second, Article 22(1) of the CCS Directive establishes that, with respect to third-party access to pipelines, member states shall ensure that they have dispute settlement arrangements in place, "...including an authority independent of the parties". In the CCS Act, the power to settle these disputes has been granted solely to the DITC, thus avoiding the possibility of establishing either an industry commission or other private arrangement.

¹ Ley 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbono.

² The statute does not apply to CO₂ storage of less than 100 tonnes for research or development purposes but calls for a specific administrative regulation to deal with this matter.