ENVIRONMENTAL MANAGEMENT INFORMATION IN MERCANTILE REGISTRIES.

- Environmental Law and the Mercantile Registry-

Manuel Ballesteros Alonso

Mercantile Register for Barcelona

Secretariat of the Environment at the Professional Association of Land, Mercantile and Chattel Goods Registers of Spain. Environment and Mercantile Registry Coordinator.

José Luis Salazar Máñez.

Managing Director.

Secretariat of the Environment and the Environmental Information and Studies Centre at the Professional Association of Land, Mercantile and Chattel Goods Registers of Spain. Speaker.

Seville 12-13 June, 2003

6th Conference European Commerce Registers´ Forum

Contents

Introduction 3
Environmental Law and Legal Registries 5
The Object of This Speech. The Environment and the Mercantile Registry 6
Recording of Administrative and Judicial Measures of an Environmental Origin in the Mercantile Registry 10
The Mercantile Registry and Eco-Audits 11
Environmental Information in Annual Accounts 14
Registry Publicity of Emissions Trading 21

Introduction

The ultimate objective of the activities aimed at integrating environmental information in registration information is to establish an effective way for public registries to lend their cooperation in guaranteeing environmental policies, following the recommendations of a project sponsored by the European Environment Agency (European Community) and conducted by the Professional Association of Land, Mercantile and Chattel Goods Registers of Spain. The outcome of the project was a report entitled "Environment and Registry Publicity. Land and Commerce Registry as an Instrument for Sustainability". This report has been published in Spanish and English, and it is available on Internet at www.registradores.org (click on "The Environment" and then "Expert's Corner") and www.eea.eu.int (European Environment Agency Technical Report No 88).

The field of mercantile registration has examined environmental management tools for voluntary use, such as the EMAS (Eco-Management and Audit Scheme), ISO 14001 and environmental labelling for products and services. It has also furnished support for improving and facilitating compliance with mandatory measures requiring environmental information to be posted with companies' annual accounts, as called for in current Spanish environmental legislation. One excellent means of publicising a business' participation in a voluntary eco-management scheme is for its products or services to bear an eco-quality label or emblem.

The land registration field, on the other hand, has generally worked along lines oriented towards analysing formulae for expanding the data provided at land registries to include information on protected natural areas, information on other declarations stemming from environmental rules and information that might prove useful for gaining a good grasp of the real environmental situation of property. Land registration has also taken into account potential improvements in the physical description of property (currently described in registration entries) by sharing the information available at the Environment Department and taking advantage of the technological advances available nowadays.

In every one of these cases, the end goal of the work and activities is to make registration offices places where specific environmental information can also be obtained and to provide better service for private citizens and businesses striving to discharge their environmental obligations, by raising all citizens' awareness of the need to contribute to sustainable development and by supporting the environmental authorities in their drive to enforce environmental information obligations under European Community environmental legislation (Directive on access to environmental information and the integration of the Aarhus Convention—United Nations Economic Commission for Europe—on access to information, public participation and access to justice on environmental matters).

Disuse or desuetude is commonly admitted in environmental law to be the greatest danger threatening legislation on environmental preservation and improvement. For this reason, one of the legal techniques that has to be strengthened in order to make environmental laws effective is citizen participation, so that it is the citizens themselves who stand guarantor for compliance by the official levels involved.

Of course, citizens can hardly participate if they do not hold adequate information. The public has to be at least generally abreast of environmental rules and their specific legal consequences. That makes publicity an instrument, a legal technique, that environmental law must use with zest in order to ensure its own efficacy.

Furthermore, it is also plain that the efficacy of any restrictions environmental legislation lays down, or the efficacy of any consequences environmental legislation has, for instance, often requires those restrictions or consequences to be vested with *erga omnes* effects. In other words, they are only efficacious if they affect not just the person the administration in question has been dealing with in a particular case, but everyone, because they have in a way been linked to the property or activity or business in question, regardless of who its owner is at any given time.

We could give numerous examples of the wisdom of vesting environmental limitations with *erga omnes* effects.

- For example, let us say there is a plot of land that for years has been the site of an industrial activity churning out pollution, and the administration lays on the land's owner the obligation to decontaminate that land; if that obligation is not made into a real right encumbering the property in question, it will not affect later owners of that property.
- Now let us imagine the administration has fined a certain business owner for failure to perform his environmental

activities correctly. If the business owner ignores the fine and transfers ownership of his business to another person, there will be no way of forcing the new owner to pay the fine.

Environmental Law and Legal Registries.

In advanced legal systems, *erga omnes* efficacy is vested in legal rights or situations through the institutions that provide publicity, because that is the procedure required by the principles of legal certainty and certainty of real estate and commercial trade, which are usually constitutional principles. Third parties can only be affected by things that have been duly and previously published in institutions set up for that purpose by the state. So, logically, in order for environmental restrictions to affect third parties, they must be made public in the proper public registries.

Furthermore, it is plain that environmental restrictions are gathering increasing economic importance. So if the institutions that provide publicity are to continue playing their role of informing interested third parties of the true status of property ownership and liens and the true economic status of companies, the records of these publicity institutions simply have to include the consequences of environmental law. Any state that does otherwise finds an ugly consequence; all the information on a given piece of property or company will wind up strewn into a number of scattered files or offices that any interested third parties will have to scour one by one, with the resulting unnecessary increase in pre-transaction information costs and the resulting decline in the efficiency of the economic system.

For all these reasons, land and mercantile registries, those publicity institutions par excellence, have a sure role to play on the stage of environmental law, where they can render a great service. Their usefulness is even greater when we factor in items such as: a) their long experience in the field of publicising legal rights and situations, b) the fact

that registries use the latest in information technologies, and c) in addition land and mercantile registries form a network blanketing all of Europe, with individual offices handily located for citizens.

Of course, the functions and the kind of cooperation the different registries can provide for environmental law are different in each case, because the functions and characteristics of the mercantile registry, the chattel goods registry and the land registry are different.

For instance, the **land registry** is a registry whose basic working unit is the tract (a portion of land) for which real estate rights or contracts (depending on the system) are registered. The **mercantile registry,** on the other hand, is a registry of persons, where the legal situations affecting merchants are registered, whether the merchants are natural persons, legal persons (companies) or other kinds of entities (such as pension or investment funds). And the **chattel goods registry,** in the Spanish legislative system, is a registry of titles of ownership of chattel goods (ranging from aircraft, ships and industrial machinery, to rights in stocks, crops or livestock as security, to ownership of or liens on company shares or shareholdings), where general contract conditions are also registered in a section of their own.

The Object of This Speech. The Environment and the Mercantile Registry.

The sole object of this speech is to analyse the uses that the mercantile registry and the chattel goods registry can have in the field of environmental law, ignoring for the moment the uses the land registry has to offer. The reason we have brought together these two registries, the mercantile registry and the chattel goods registry, in a single presentation when the two have such different features and contents is that in functional terms, both registries are presently kept in the same office, at the mercantile registry. However, due precisely to that fundamental diversity between the two registries, we will have to discuss them separately.

The **mercantile registry,** as said before, is a registry of persons, where juristic acts are registered that affect the legal life of business owners, be they individual merchants or business partnerships. Though trade lies at the origin of the mercantile registry, nevertheless, the fact is that the registry's sphere of functions has expanded, and right next to juristic acts affecting the life of business owners in general and business partnerships in particular, the mercantile registry now also records juristic acts affecting the life of many other persons and bodies of wealth that are not quite business owners yet have a growing importance in economic life, although sometimes they are not, strictly speaking, business partnerships either (for example, non-commercial savings banks, pension funds, investment funds and business groups). In the mercantile registry, therefore, a record is kept for each person acting in economic life, and in it are set down, and thereby made public, all the particulars a third party considering entering into dealings with the person may find of interest: share capital, structural changes, officers and bodies representing the company, attorneys-in-fact, judicial or administrative incidents in the company's life, etcetera. Registered persons post their accounts annually with the mercantile registry as well, thereby making their accounts public and legalising their books. The mercantile registry also performs other functions, such as assigning independent experts to valuate assets scheduled to be contributed to companies when required by law, and appointing auditors in other cases, also set down in the law, at the request of minority partners. This set of functions makes the mercantile registry what we might call the fundamental core of publicity of the life of commercial partnerships and other persons who are treated in law as if they too were commercial partnerships.

Taking into account this role the mercantile registry plays in business life, and looking at the environmental law side of the picture, the mercantile registry certainly has the potential to be a good instrument, probably the best, for publicising rules, restrictions, administrative or judicial or other proceedings rooted in environmental law and affecting

undertakings, and it can do so through the procedure of setting down for the record, in the legal history of the registered natural or legal persons or entities involved, all the environmental situations or proceedings for which publicity is considered necessary or advisable.

The effect publicity has as a legal institution is to create a presumption. The law takes it as read that certain particulars are known to everyone, even if in actuality those particulars are not or have not been known to all; and having presumed this knowledge, the law says that those particulars are enforceable against everyone. Now then, if we do not want that kind of presumption to be arbitrary, it cannot be based on utter make-believe. That is, the law cannot assume that everyone knows particulars that have never been made public at all. That is why the effects of publicity always have to be preceded by some kind of publication, which may vary from the publication of laws in Spain's gazette, the *Boletín Oficial del Estado* (thus clearing any obstacles to the rule that ignorance of the law is no excuse) to the publication of particulars in public registries in general and the land and mercantile registries in particular.

So, in the realm of environmental law, achieving the effects of legal publicity is good, but it is not enough. And it is not enough because, as I said at the beginning of this presentation, in the field of environmental law it is important for rules, for laws, for restrictions, for penalties to be not only legally but really, truly known, or known as well as possible, because we are talking about a law, or rather a branch of law, that in a way is still in its youth and has a special need for social support.

Therefore the place where environmental particulars are going to publicised has to be carefully chosen to ensure that the publicity thus garnered is not merely legal, but as actual as possible. And I have to repeat that the mercantile registry is an especially good place to gain actual publicity of companies' environmental particulars, because the publicity that is given in the mercantile registry is extra effective due to the synergies flowing from the concentration of functions at a single office or institution. And I am not even counting the fact that, in addition, many of the

environmental particulars that need to be or ought to be published are, as we shall soon see, nothing more than modulations of the legal particulars already made public today in the mercantile registry.

Reality is constantly changing and evolving. It cannot be frozen into a closed list. Therefore the catalogue of situations or actions of an environmental origin involving commercial businesspersons or other entities registered in mercantile registries, which perhaps we would do well to publicise through mercantile registries, must certainly be an open catalogue. Overall, perhaps we could, just in a rough approach, classify these situations into four groups:

a) **Administrative or judicial action.** That is, decisions taken by the administrative agencies or courts with competence in environmental issues.

b) **Eco-audits.** It could also prove expedient to use mercantile registries to give publicity to facts having to do with the performance of eco-audits, whether the goal is to make public the membership of a given company in voluntary eco-auditing schemes (EMAS or ISO) or to implement the consequences of its participation in such schemes.

c) **Recording of environmental particulars in the annual accounts of companies and other registered entities.** Certainly companies are having to deal more and more with accounting entries whose origin can be traced to environmental rules or needs. The annual accounts of persons registered in the mercantile registry are posted with the registry each year on pre-established forms, and as soon as they are posted, they become public. So, the idea would be for these officially approved forms to have a sufficiently separate spot for recording items of environmental origin or importance.

d) **Legal rights or situations of environmental origin that can be recorded in the chattel goods registry, especially**

emissions trading. International protocols envision emissions trading as an important instrument for preserving the environment. So, in order to make emissions trading possible, it is vital for emissions allowances to be outfitted with the publicity they need. And this could be done, as we shall see, through the chattel goods registry.

Let us take a separate, in-depth look at each of these groups.

Recording of environmental or judicial measures stemming from environmental actions in the mercantile registry.

These administrative or judicial actions may be 1) "preventive," such as actions calling for warnings or preventive measures, 2) "negative," such as actions lodging punitive proceedings or laying down firm penalties, or 3) "positive," such as actions whereby the competent administrations award environmental certificates or grant subsidies or public or private loans for certain environmental projects.

The wisdom, in certain cases, of registry "publicity" for such administrative and judicial acts is obvious and almost needs no comment, because publicity makes the measures known to the general public, including suppliers and potential customers of the company in question. Therefore registry publicity provides strong reinforcement and also amplifies the stringency of penalties, and for that reason registry publicity can magnify, for instance, the dissuasive effect of punitive rules. Likewise registry publicity augments the effects of "positive" actions, such as the issuing of environmental certificates, and can help boost the enhancement to the image the company presents to its clients.

It is clearly wise, then, for legislation to have provided for the possibility of making certain administrative or judicial measures regarding

environmental law eligible for entry in the mercantile registry, as that is the best publicity system for them.

In any event, it is our feeling that the authorities must make a point of acting prudently when singling out what measures ought to be accorded the “complement” or “reinforcement” of registry publicity and what measures can dispense with it. In some cases, a penalty for instance, that sort of publicity may make the punishment unnecessarily harsh, and in any event, it is not a good idea to pump up the list of items mercantile registries make public unless necessary, because too much quantity can muddy the clarity of the information provided and therefore hamper the efficacy of the system of preventive legal certainty that, after all, the mercantile registry is there to serve.

The legislative reforms needed to make it possible for this sort of particular or proceedings to be entered in the mercantile registry will not be very deep, and sometimes none may be necessary at all, because in many cases it will suffice to apply already existing rules regulating what administrative or judicial proceedings can be registered.

The Mercantile Registry and Eco-Audits.

Council Regulation No 1836/93 of 29 June 1993 allows companies in the industrial sector to voluntarily join a Community eco-management and audit scheme. The regulation was affected by Decision 97/264/EC of 16 April on the recognition of certification procedures and Decision 97/265/EC of 16 April on the recognition of the international standard ISO 14001.

All companies participating in the Community eco-management and improvement scheme must adopt an environmental policy that defines the company’s aims and principles of action in environmental matters, run an environmental review of its sites, establish an environmental management

system, produce an environmental statement and conduct periodic environmental audits.

All these items must be checked by an independent, accredited environmental verifier. The EEC regulation states that each Member State must set up a system for accrediting environmental verifiers and send in a list of accredited verifiers to the Commission, which will compile and publish a complete list in the *Official Journal of the European Communities.* This list has already been published.

The regulation furthermore establishes that the companies participating in the eco-audit scheme are to be included in a register that the competent bodies have to keep for that purpose.

Since it was launched in 1995, the European Eco-Management and Audit Scheme, which usually goes by its initials as EMAS, has grown and sown hope as the number of EMAS-certified companies has swelled exponentially year after year. The same thing is happening, in greater numbers because of its wider realm of implementation, with the ISO environmental certification system, whose validity in the European Union is also admitted under Decision 97/265 of 16 April, which I have already mentioned.

The proposal on the table is to incorporate eco-audit particulars in the mercantile registry, or whatever the body in each of the Member States where the legal history of companies is registered, or at least to allow voluntary incorporation if business owners wish.

There would or could be several steps to incorporating that sort of information:

1) The fact that a given company or business owner has voluntarily joined the eco-audit scheme will have to be reported at the registry. To do that, the company or business in question would have to submit to the registry its application to participate in the scheme plus documents providing firm proof, under European Union law and the Member State's own law, that the company or business has in fact signed onto the eco-audit scheme.

2) The environmental auditor's appointment will have to be registered. The environmental auditor is an external verifier who has been chosen from the group of officially accredited environmental verifiers to check the extent of the company's compliance with its environmental commitments. Naturally an auditor's appointment cannot be registered without first confirming that the auditor is really included in the official lists of authorized auditors.

3) Eco-audits will have to be posted periodically with the mercantile registry by all participating companies whose participation and environmental auditor appointment have already been entered in the mercantile registry, as stated in steps 1 and 2. This information would be posted simply for the purpose of making the contents of the audits public. An eminently juridical organisation like the mercantile registry would have no business conducting a check of the audit's contents, which it is not competent to do. And the same guidelines and criteria as used for the annual posting of company accounts could be followed.

Certainly it may seem at first that posting all this information with the mercantile registry is pointless and even has the effect of duplicating the publicity these decisions have already been given through, for example, official journals' publication of the lists of companies participating in eco-audit schemes, lists of certified companies and lists of authorized auditors. Even so, the fact is that publishing this information in the mercantile registry does have certain incontrovertible advantages in terms of publicity:

- Because the centre of publicity of the legal and accounting life of undertakings is, remember, the mercantile registry, and therefore, from the standpoint of greater publicity efficacy and readier citizen access to information, it is wise to centralize all the information on companies as much as possible at a single point, so citizens do not have to make the rounds of different centres to gather information that they might otherwise obtain at a single spot.

- Because some of the particulars at issue, such as the name of the specific environmental auditor for a company or the contents of finished environmental audits, are not being given proper publicity at present.

Incorporating this information in the mercantile registry as proposed would, then, give publicity to particulars that have no publicity now, and at all events it would make it enormously easier to consult and see those particulars.

Environmental Information in Annual Accounts.

The negative environmental impact of the current model of economic development has become so great that society has been made more and more sharply aware and demanding of the need to work out instruments leading to a model of sustainable development. What started out as the banner of frequently marginal opinion groups has become policy for all parties and all governments, so much so that the issue of environmental respect and protection is now one of the pillars of European Union policy.

In their efforts to ensure environmental respect and preservation, governments have taken a wide range of differing measures. There are coercive measures that either place restrictions on company activity (such as barring companies from engaging in activities that are considered to produce pollution or requiring compliance with requirements that frequently have a high economic cost; or barring companies from overstepping certain pollutant emission levels and penalising violations) or force the players to bear the costs entailed in lessening the negative environmental impact of their economic activity (such as obliging them to adopt mechanisms to reduce emissions or to take care of cleaning up the environment polluted by their business activity).

As a consequence of the application of such environmental protection rules, businesses have been forced to shoulder the economic cost of some of their environmental impact (through expenditures or investments) and to assume risks in the form of fines, penalties, third-party damages, and so on, pursuing the finality of environmental protection. The long and short of it is that environmental legislation has certain economic consequences, and logically those consequences ought to and in fact do have their own impact on company accounting ledgers. Now then, although this has been the situation for quite some time, accounting records of expenditures, investments and provisions of environmental origin have in fact regularly been mixed in among the rest of the financial information, because they belong to different accounting statements. So it is not always easy, and sometimes it is frankly impossible, to look at the public accounts of a company and from there draw conclusions about what kind of environmental commitment the company in question has made, or what weight and repercussions compliance with environmental legislation is having in the company's economic structure and operation.

Nevertheless, the trend of legislation is of course to pin down the origin and finality of such accounting entries. Why? Well, not mainly (and not only) to improve the administration's supervision of company compliance with environmental legislation, but also to render more effective the principle of transparency, under which a company's accounts must give a true picture of the company's wealth and management. Also there is the fact that, according to current majority doctrine, proper environmental management of a company is considered tantamount to proper economic management, or at least, adequate management of the environmental aspects of business activity is considered a major signal of the company's own management efficiency.

While so far in this presentation we have been only been voicing wishes, talking about how nice it would be if certain particulars having environmental bearing were to be recorded in the mercantile registry, now that we are discussing environmental information in annual accounts, we

can talk about actual facts. As we shall now see, legislators have already laid down specific terms calling for items of environmental origin or bearing to be set down separately in companies' accounts.

Rules on Special Sectors.

Here in Spain, the first legislative step towards that kind of specification of the environmental nature of certain accounting items or entries in annual accounts was taken by Royal Decree 437/98 of 20 March approving the adaptation of the General Chart of Accounts for the Electricity Sector, which included a point in the notes on the annual accounts requiring information about costs, investments, provisions or contingencies of an environmental nature to appear separately.

After that, other adaptations of the General Chart of Accounts have been made along the same lines calling for other kinds of companies to provide a note with the very same contents in their notes on the accounts. This applies, for example, to companies holding concessions on motorways, tunnels and other toll roads (Ministerial Order of 10 December 1998) and sanitation and water supply companies (Ministerial Order of 10 December 1998).

General Applicability of Environmental Information Rules to Companies.

The importance of the rules we have been discussing looms even higher if we bear in mind the fact that they are applicable not only to the special sectors we said before, but to all Spanish companies and even not-for-profit entities. And that is not only by analogy, since the environmental impact of business activity is common to all business activity and is not just limited to the companies in the sectors we have mentioned. The rules' general applicability is expressly established in the royal decree containing the adaptation of the General Chart of

Accounts for the Electricity Sector (Royal Decree 437/98 of 20 March, which I have already mentioned), which in its introduction says,

"Among the specialities provided for in the legal text there stands out . . . the inclusion of information on business actions having an effect on the environment. This latter aspect, despite being introduced in this sector-specific adaptation, **is considered generally applicable,** because it is understood that the information to which it refers, albeit established herein for the electricity sector specifically, implies no more than a series of details in regard to the contents of the General Chart of Accounts; fundamentally details of the information to be included in the notes on the annual accounts, likewise inasmuch as certain aspects relative to environmental impact are the object of risk and expense provisions".

That approach was ratified by the Ministry of the Economy's Order of 30 April 1999 amending the Order of 14 January 1994 approving the forms for submitting annual accounts for posting with the mercantile registry, where it was stipulated that the notes on the accounts (both normal and short form) must contain a note of environmental information.

The **Ministry of Justice's Order of 8 October 2001 (*Boletín Oficial del Estado,* 9 November),** now in force, approving the forms for submitting annual accounts for posting with the mercantile registry, hews to the same line.

Recently the **Accounting and Account Auditing Institute's Decision of 25 March 2002 (*Boletín Oficial del Estado,* 4 April)**, as indicated in its preamble, implemented the environmental accounting aspects incorporated in Spanish accounting law by Royal Decree 437/1998 of 20 March, to which I have already referred so many times. Rule One of this Decision states, "This Decision shall be applicable generally for the recognition, valuation and information of the environmental issues necessary in order for individual and, as applicable, consolidated annual accounts to offer a true picture of the wealth, financial situation and results of the account renderer". And its preamble clarifies that "general applicability" means the decision is also applicable to not-for-profit entities.

I must also quote the **European Commission Recommendation of 30 May 2001,** which, as we have seen, lags a bit behind Spanish legislation, at least in part. The Recommendation "recommends that the Member States . . . ensure that for accounting periods commencing within 12 months from the date of adoption of this recommendation and for all future accounting periods, companies covered by the fourth and seventh company law directives (Directives 78/660/EEC and 83/349/EEC respectively) apply the provisions contained in the annex to this recommendation in the preparation of the annual and consolidated accounts and the annual report and consolidated annual report". And likewise the Proposal for a Decision submitted by the Commission to the European Parliament and the European Council establishing the Sixth Community Environment Action Programme for the 2001-2010 period expressly envisages the incorporation of environmental particulars in companies' annual financial statements.

Contents of the Environmental Information to Be Set Down in Company Accounts.

The Order of 8 October 2001 approving the forms of annual accounts for posting with the mercantile registry contains a certain heading 18 for the normal Notes on the Accounts and a heading 10 for the short-form Notes, and states that the contents of the environmental information must be as follows:

"18. Environmental information (see note at the end of this heading)

Information shall be facilitated on:

- Description and features of the most significant systems, equipment and facilities incorporated in the tangible fixed assets, whose end is the minimization of environmental impact and the protection and improvement of the environment, stating the nature, assignment, likewise the book value and corresponding

accumulated depreciation of the said systems, equipment and facilities, provided that this may be found individually for each.

- Expenses incurred during the fiscal year whose end is the protection and improvement of the environment, separating expenses of an ordinary nature and those others of an extraordinary nature, stating in all cases their assignment.
- Risks and expenses covered by the provisions for environmental proceedings, with special statement of those stemming from litigation in progress, indemnities and other: These shall be indicated for each provision:

  · Initial balance.

  · Allocations.

  · Applications.

  · Closing balance.
- Contingencies related with the protection and improvement of the environment, including risks transferred to other entities, system for evaluating the estimate and factors on which it depends, stating any effects on the wealth and the results; where applicable, the reasons preventing this evaluation shall be stated, likewise the maximum and minimum risks.

· IMPORTANT: This heading is not standardised. It must be set down on a separate sheet and inserted in the proper section of the Notes on the Accounts".

"10. Environmental information (see note at the end of this heading)

Information shall be facilitated on:

- Description and features of the most significant systems, equipment and facilities incorporated in the tangible fixed assets, whose end is the minimization of environmental impact and the protection and improvement of the environment, stating the nature, assignment, likewise the book value and corresponding accumulated depreciation of the said systems, equipment and facilities, provided that this may be found individually for each.

- Expenses incurred during the fiscal year whose end is the protection and improvement of the environment, separating expenses of an ordinary nature and those others of an extraordinary nature, stating in all cases their assignment.
- Risks and expenses covered by the provisions for environmental proceedings, with special statement of those stemming from litigation in progress, indemnities and other: These shall be indicated for each provision:

  · Initial balance.

  · Allocations.

  · Applications.

  · Closing balance.
- Contingencies related with the protection and improvement of the environment, including risks transferred to other entities, system for evaluating the estimate and factors on which it depends, stating any effects on the wealth and the results; where applicable, the reasons preventing this evaluation shall be stated, likewise the maximum and minimum risks.

· IMPORTANT: This heading is not standardised. It must be set down on a separate sheet and inserted in the proper section of the Notes on the Accounts".

How Environmental Information is Incorporated in the Annual Accounts.

We have already seen how, under the laws and regulations I have just mentioned, environmental information forms a part of the annual accounts, appearing in the notes. As stated in the Order of 8 October 2001, in the final note to headings 18 and 10 that I have just quoted, this must be done by setting down the environmental particulars "on a separate sheet", and then inserting the sheet in the proper section of the notes on the accounts.

Requiring a separate sheet to be included certainly tends to stress the importance of environmental information, making it independent of the rest of the notes as well as more accessible and transparent, and avoiding the problem, which I have already mentioned, of mixing up information on environmental aspects with the rest of the numbers in the company accounts.

Based on all the above, standardised environmental information forms have been put together to accompany companies' annual accounts. Companies already started using them in 2002 for their accounts for the year before, 2001. These forms can be obtained at the Web page of the Professional Association of Registers (www.registradores.org).

Registry Publicity of Emissions Trading.

The **Kyoto Protocol** was adopted in 1997 in the Third United Nations Framework Convention on Climate Change. The protocol's importance lies in the fact that it sets limits on greenhouse gas emissions in industrialised countries. Under the protocol the European Union undertook to reduce its emissions of six of these greenhouse gases by 8% from 1990 levels between 2008 and 2012. At the recent Earth Summit in Johannesburg it was announced that the protocol has been ratified by enough developed countries that it can take force despite the lack of support from the US.

The Kyoto Protocol established a series of international mechanisms called "flexibility mechanisms", without which the protocol would be hard put to succeed. The object of these mechanisms is to make application of the protocol less of a burden. One of these mechanisms is what is called "emissions trading".

Emissions trading allows companies to trade with the greenhouse gas emission allowances assigned to them by their national authorities.

These allowances are termed “quotas”, “permits” or “ceilings”. The total amount of allowances assigned to the companies in a given state adds up to the overall limit on emissions their state is allowed.

The emissions trading mechanism allows companies to emit more than their assigned allowance if they can find other companies that have emitted less than their allowed quantity and therefore can and are willing to sell their left-over allowance. The overall result from the environmental standpoint is the same as if both companies, the buyer and the seller, had consumed their full allowances, but with the important difference that both the seller and the buyer benefit from the system’s flexibility. Thanks to the exchange mechanism, both companies reduce their costs of adhering to emissions limits (since the seller receives payment for the allowances it has given up and the buyer saves itself the unforeseen cost outlay of respecting its original emission limits). Furthermore the emissions trading system will ultimately promote business competition leading to the establishment of ecologically rational technologies, as it pegs a marketable economic value on lowered emissions. Undischarged emissions are transformed through this procedure into a corporate asset.

In March 2000 the European Commission approved a Green Book on Emissions Trading that brought up a raft of issues with an eye to opening debate on emissions trading. The Green Book has in the end been used as the basis for **a Proposal for a Directive of the European Parliament and of the Council published very recently, in March 2002, in the *Official Journal of the European Union.***

The proposal deals with establishing a greenhouse gas emissions trading scheme for the period running between the start of 2005 and the end of 2007, that is, for the period just before the Kyoto Protocol commitments take force in the Union.

The system that the proposal establishes is for the Member States, through designated authorities, to assign a given number of greenhouse gas emissions free of charge to companies. Companies may trade with those allowances. At the end of the year the companies must surrender to

the competent authorities a quantity of allowances equivalent to their real emissions, for cancellation. And if they fail to do so, they may be penalised. Companies may obtain the allowances they need through their original assignment from the authorities or through buying any extra allowances they need from other companies.

Allowance ownership and tracking is to be recorded in an electronic inventory.

If emissions are traded between companies of the same nationality, their transfers inflict no change on the total amount of emissions for each of the Member States of the Union. If, on the other hand, emissions are traded between companies from different States, this will mean that the seller's Member State is lowering its emission capacity and the buyer's Member State is increasing its own. Which, logically, implies that the agreement distributing the emissions burden should be modified and that modification should be reflected in national inventories. So then, actually, although in the first phase this will not be so, before emissions trading can get off to a definitive start, a prior agreement will have to be reached among the Member States for the distribution of their burden under the Kyoto Protocol commitments, in order to gradually reduce greenhouse gas emissions.

Furthermore, the proposal limits emissions trading to certain greenhouse gas emitting sectors and certain gases only. In a way we might say that this proposal is intended as a pre-rehearsal for a system that will later be extended to embrace other emissions and other sectors.

Obviously the efficacy of the system for commercialising emissions allowances will depend largely on the provisions regulating it and the strictness and control measures of the procedure for applying it. The whole object behind enforcement and strict control is to foster trust in the commercialisation system and to make it work effectively to achieve the desired environmental objectives.

In addition, in order for an emissions commercialisation system to work well enough, there must be an adequate system of supervision,

tracking and information. Severe penalties must also be planned, whose dissuasive effect will convince undertakings to avoid breaking the rules, because compliance is cheaper.

Now is not the time for delving into a deep study of emissions trading, nor for studying the proposal. What is of interest here is that, under the proposal,

- "Allowance" means the entitlement to emit a tonne of carbon dioxide during a specified period.
- Allowances are allocated by Member States to each operator and for each installation.
- Allowances are acknowledged as being transferable.
- Allowances issued by each Member State are recognized in all the other Member States.
- Member States will create and keep an inventory for an exact accounting of the issue, ownership, transfer and cancellation of allowances. The proposal says that this inventory will consist of separate accounts where the allowances each person holds will be registered.
- Any person can hold allowances.
- Apart from these national inventories, the Commission will designate an Administrator to keep an independent transaction log recording the issue, transfer and cancellation of allowances.
- The Administrator will run an automated check on transactions, and if the Administrator detects irregularities, Member States will not allow the transactions in question into their inventories until the irregularities have been solved.

From what we have seen so far we can deduce, and this is fundamental for my point, that allowances are acknowledged as transferable, and therefore as economic assets belonging to the company. Which means that not only can they be transferred, but also, logically, it ought to be possible to use them to obtain financing not by sale (which might not be an interesting option for the owner) but as security for loans. If

allowances are transferable, we have to consider the idea that they can be mortgaged or pledged. And not only consider this idea, but admit that it would be handy, from the economic and business standpoint, if emission rights could be the object of real security interests, because it is useful for companies to be able to mobilize their assets to the maximum in order to obtain resources. Furthermore we have to agree that, since allowances have an economic value and indubitably form part of the company's wealth, they can be used to secure the company's creditors and therefore they can be made the object of seizure, as in court injunctions and administrative attachments.

Now then, apart from admitting the usefulness of mortgaging or pledging allowances, and agreeing that that is what the terms of the proposal lead to and that therefore it would be good for the Member States to legislate in that direction, we have to stop and ask ourselves whether allowances can be mortgaged or pledged pursuant to our current Spanish legislation. The only legal mechanisms that might be applicable to the case are chattel mortgages and pledges without bailment, which are regulated in the **Act of 16 December 1954 and the Regulation of the Registry of Chattel Mortgages and Pledges Without Bailment of 17 June 1955.** Of course, because of their dates, these provisions do not even remotely envisage the possibility of using emissions allowances as security, but that is not an insurmountable obstacle for applying some of the precepts set up in the 1950's to allowances.

At first glance allowances do not look eligible as a basis for chattel mortgages, because the chattels that can be mortgaged are listed in article 12 of the Act on Chattel Mortgages and Pledges Without Bailment, and allowances cannot be held equivalent with any of the cases provided for in the Act. However, if we study the matter a bit more closely, perhaps we could envision emission rights as subject to mortgaging if we treated them like industrial machinery. Industrial machinery is defined in article 42 of the Act as "the machines, instruments and utensils installed and intended by their owner for the operation of an industry and that directly contribute to

satisfying the needs of the operation itself". Paragraph 2 goes on to add, "steam boilers, furnaces that do not form part of the building, chemical facilities and other fixed material elements attached to the operation of the industry shall also be considered machines".

Clearly allowances share some of the characteristics mentioned in article 42 and other articles regulating chattel mortgages (the chattels must be intended for operation, identifiable, fixed, not form part of the building, etc.), although it is also clear that the article was written exclusively with machines and utensils in mind, and that emissions allowances are not machines or utensils, not by any stretch of analogy. So, in order not to bend legislation unduly, the best course would be to dictate an express rule establishing that emissions allowances can be mortgaged.

Nevertheless, regardless of what I have just said, current legislation certainly permits allowances to be pledged without bailment under article 53-1 of the Act on Chattel Mortgages and Pledges Without Bailment, which admits that "other chattel goods that can be identified by their inherent features" can be mortgaged.

So, if allowances are assets that can be traded and can be used in the legal operations I have just mentioned, the proper registry for registering these and other acts (apart from the administrative registry to which the proposal refers) is the proper legal registry. In Spain that is the chattel goods registry kept by mercantile registers, where the books of the registries of chattel mortgages and pledges without bailment are held.

The chattel goods registry was created by the sole additional provision of Royal Decree 1828/1999 of 3 December. The chattel goods registry is kept on a province-by-province basis, with one registry for each province, in the charge of the mercantile registers and the Central Mercantile Registry. The procedures involved are totally computerised, and one of the sections of the chattel goods registry is called "Registrable Chattel Goods"; allowances could be classified into this section. Furthermore, the chattel goods registry could be used to register not only liens on allowances, but transfers of allowances as well.

The registration of allowances in the chattel goods registry, apart from the fact that it is required by current legislation whenever allowances are encumbered, has the virtue of vesting in all registered operations the effects of that substantive publicity that is so characteristic of legal registries, plus the virtue of implementing the publicity of administrative registries along with the publicity of the chattel goods registry itself, which, because it forms part of the territorial network of land and mercantile registries, always has offices handily located for citizens. Furthermore the totally computerised organisation of the chattel goods registry fits in neatly with the terms of the proposal where it calls for the necessary coordination with administrative registers of allowances.

We have already seen, in fact, when we conducted our brief examination of the contents of the proposal, that the proposal called for national inventories of allowances, that is, national administrative registries of allowances, and that those national inventories are linked to a central Community administrative registry depending upon the Commission.

Now then, the existence of national or Community administrative registries must not be seen as making the registration of allowances and juristic acts involving allowances in the chattel goods registry any less expedient. Indeed, there are other assets that also have to be set down twice in registries that perform different functions; for example, ships and aircraft have to be entered in administrative registries and the chattel goods registry. For allowances, it would be necessary for either legislators in the implementation of the Directive or the chattel goods register involved to work out the necessary measures to avoid a lack of coordination between the two registries.

Manuel Ballesteros Alonso.
Mercantile Register for Barcelona

Secretariat of the Environment at the Professional Association of Land and Mercantile Registers of Spain. Environment and Mercantile Registry Coordinator.

José Luis Salazar Máñez.
Managing Director.
Secretariat of the Environment and the Environmental Information and Studies Centre at the Professional Association of Land, Mercantile and Chattel Goods Registers of Spain.

Seville, 12-13 May 2003