

Environmental Liability Directive; Implementation, Enforcement, and the Future

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Topics

- Environmental Liability Directive (ELD)
- Transposition into Member State (MS) law
- Incidents
- Cases
- Costs
- Industry awareness and concerns
- Future

Environmental Liability Directive

Key purposes

- to implement the polluter pays principle in respect of accidental pollution
 - “induce operators to adopt measures and develop practices to minimise the risks of environmental damage”
- to prevent and remediate environmental damage so as to lead to a reduction in the number of future contaminated sites
- to establish liability for environmental damage to species and natural habitats protected under the Birds and Habitats Directives in order to reduce the loss of biodiversity in the EU

Environmental Liability Directive

- Two categories of “operators”
 - Annex III: strict liability for preventing or remediating an imminent threat of, or actual, environmental damage to protected species and natural habitats, water and land
 - Non-Annex III: fault-based liability for preventing or remediating an imminent threat of, or actual, environmental damage to protected species and natural habitats

Environmental Liability Directive

- Threshold for land: significant risk of adverse effect on human health
- Remedial measures: land
 - Removal, control, containment or diminution of contaminants so that land no longer poses a significant risk of an adverse effect on human health
 - Remediation standard: lawful current use or approved use

Environmental Liability Directive

- **Threshold for water**
 - “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined [Water Framework Directive] of the waters concerned”
- **Threshold for protected species and natural habitats**
 - “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”

Environmental Liability Directive

Remedial measures: water, protected species and natural habitats

- *Primary remediation*: remediation and restoration to 'baseline' condition
- *Complementary remediation*: if damaged site cannot be fully restored, restoration of nearby site in addition to partial remediation of damaged site
- *Compensatory remediation*: losses between time that environmental damage occurred and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

Environmental Liability Directive

- Applies to incidents after 30 April 2007
- Exceptions
- Rights of non-governmental organisations and other interested parties
- Optional provisions include
 - scope of liability
 - defences
 - mandatory financial security
- Transposed into national law of all MS by June 2010
- Supplements existing MS law; does not replace it, but MS cannot apply less stringent law to ELD incidents

Differences between Member States

- Mandatory and optional defences (permit and state-of-the-art defences)
- Permit defence adopted (16 MS)
 - Belgium (regional level), Cyprus, Czech Republic, Denmark, Estonia (except GMOs), Finland (limited), Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Netherlands (limited), Portugal, Slovakia, Spain, UK (except GMOs in Scotland, Wales)
- State-of-the-art defence adopted (14 MS)
 - Belgium (regional level), Cyprus, Czech Republic, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Malta, Netherlands (limited), Portugal, Slovakia, Spain, UK (except GMOs in Wales)

Differences between Member States

- **Joint and several / proportional liability**
 - Proportional liability adopted (modified liability in some MS)
 - Denmark, Finland, France, Italy, Slovakia
 - Joint and several liability adopted
 - All other MS
- **Mandatory financial security**
 - Bulgaria, Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia and Spain
 - NB: not all brought in yet

Differences between Member States

- Extension of liability to nationally-protected species and natural habitats (14 MS)
 - Austria, Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden and UK (not Scotland)

Differences between Member States

- Transposition as stand-alone legislation or incorporation into pre-existing legislation
- Designation of one or more competent authorities
- Extension of strict liability for non-Annex III activities
- Adoption of more stringent provisions
- Threshold for water damage
- Defences adopted as defences to liability not costs

Incidents

France

- Spill of crude oil from underground pipeline into Coussouls de Crau nature reserve in 2009 (non-Annex III)
 - not covered by ELD unless operator was negligent
 - legislation in France subsequently changed to impose strict liability but not under ELD transposing legislation

Incidents

Hungary

- MAL, Zrt toxic sludge spill into surrounding area (Annex III)
 - Indemnification of MAL by Hungarian Government in exchange for government control of company due to MAL having insufficient funds to pay claims and to remediate environmental damage

Incidents

Poland

- over 400 incidents, many more than any other MS

Incidents

UK

- 1 water damage incident
 - release of raw sewage effluent from pumping station killed over 6,000 fish and lowered water quality in 5km stretch of river
 - primary remediation: restocking fish
 - compensatory remediation: habitat and access improvements to compensate for loss of several years services to anglers

Incidents

UK

- 10 land damage incidents (and 2 imminent threats)
- 4 imminent threats of damage to protected species and natural habitats
- 1 damage to nationally-protected species and natural habitats (site of special scientific interest)

Cases

Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (CJEU, Case Nos. C-378/08, C-379/08 and C-380/08, 2010)

- Operation of many petrochemical companies in Priolo Gargallo Region of Sicily since 1960s
- Italian authorities declared area to be “site of national interest for the purposes of decontamination”
- Clean up included removal of 2 metres of contaminated sediment from Augusta roadstead (sheltered anchorage), construction of hydraulic dyke to contain groundwater, and construction of physical barrier along shoreline next to companies’ facilities

Cases

ECJ concluded

- MS may establish rebuttable presumption of causal link between contamination and operator's activities if plausible evidence of link exists
- evidence to establish link may include location of operator's facility near contaminated site, correlation between substances used by operator and those identified at contaminated site
- operator may rebut presumption by showing its activities did not cause the contamination

Cases

ECJ concluded (continued)

- ELD applies to environmental damage caused by an emission, event or incident that took place after 30 April 2007 if damage is derived from
 - activities carried out after that date, or
 - activities that had been carried out but had not finished before that date

Conclusions

- **Implementation of ELD**
 - has resulted in patchwork of environmental liability legislation across European Union
 - harmonisation is minimal
- **Key issues to be resolved**
 - defences to costs or defences to liability
 - threshold for environmental damage to protected species and natural habitats
 - threshold for water damage
 - more/less stringent national laws

Costs

French report on ELD (April 2010)

- large spill of bleach from paper manufacturer (5 April 1997)
 - cost of remediating environmental damage would have increased from €42,700 to between €140,000 and €400,000
- release of herbicides, insecticides and fungicides as result of fire at manufacturing facility (6 August 1996)
 - cost of remediating environmental damage would have increased from slightly more than €10,000 to about €4 million

Industry awareness and concerns

- Environmental Risk Management, Harvard Business Review (forthcoming)
 - Survey by FERMA (89 respondents, of which 72% had 1,000 or more employees, and 41% had 5,000 or more; 65% had physical presence in more than 1 country, and 42% in 11 or more)
 - 22%: knowledgeable or very knowledgeable about ELD (mostly large companies)
 - 56%: organisation has been impacted by ELD

Industry awareness and concerns

- Environmental Risk Management (continued)
 - 31%: ELD has been instrumental in prompting environmental risk mitigation efforts
 - 52%: have obtained insurance or other financial security for ELD and other environmental risks
 - 65%: environmental initiatives have had positive or very positive effect on profitability
 - 67%: energy and resource conservation initiatives
 - 61%: crisis management and response plans

Industry awareness and concerns

- **Environmental Risk Management (continued)**
 - 56%: environmental rules in countries in which organisation operates have become more onerous in past 5 years
 - 74%: expect environmental laws to become more onerous
 - 51%: Europe imposes most stringent environmental laws
 - 35%: North America imposes most stringent environmental laws
 - 51%: high level of concern regarding European environmental laws
 - 34%: high level of concern regarding North American environmental laws

Future

- 30 April 2013: deadline for submission of reports from MS
- 30 April 2014: deadline for submission of report from European Commission
 - report to “include any appropriate proposals for amendment”

Websites

- European Commission Environmental Liability website
 - <http://ec.europa.eu/environment/legal/liability/>
- Implementation Challenges and Obstacles of the Environmental Liability Directive
 - <http://eldimplement.biois.com/>
- Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents
 - <http://elfund.biois.com/home>