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Questions and Answers Environmental Liability Directive

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1. What is environmental liability?

Human activities can cause severe damage to the environment. For example, in 1998 a dam containing toxic waste from a mine burst in the south of Spain, releasing a massive wave of toxic sludge that eventually reached the Doñana Natural Park. It poisoned soil and water and killed wildlife that came into contact with it.. Spanish authorities spent more than €250 million on clean-up operations, over a period of years.

In all EU Member States, there are national civil liability regimes that cover damage to persons and property. But they only seldom cover damage to the wider environment. Some national public law provisions allow public authorities to pursue polluters in cases of water or soil pollution. But the authorities usually have a wide margin of discretion whether to really act against the polluter. And when damage to the environment is not remedied, the costs associated with it are borne by society as a whole.

This situation did not induce those whose activities can put the environment at risk to take measures to prevent and minimise damage. It also ran counter to Article 174 of the EU Treaty, which became effective in 1993 (Maastricht amendments to the Treaty). This Article states that EU policy on the environment "*shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay*."

The new Environmental Liability Directive, which enters into force on 30 April 2007, specifically implements the "polluter pays principle". Its fundamental aim is to hold operators whose activities have caused environmental damage financially liable for remedying this damage. It is expected that this will result in an increased level of prevention and precaution. In addition, the Directive holds those whose activities have caused an *imminent* threat of environmental damage liable to taking preventive actions. Both aspects should result in a higher degree of environmental protection throughout Europe.

2. What are the main features of the Environmental Liability Directive?

For liability to be effective, polluters must be clearly identifiable. This means that potential polluters must know that they can be held financially liable; only this will induce them to be careful.

To this effect, the Directive provides for two distinct but complementary liability regimes. The first one applies to operators who professionally conduct risky or potentially risky activities. These activities include, among others, industrial and agricultural activities requiring permits under the 1996 Integrated Pollution Prevention and Control Directive, waste management operations, the release of pollutants into water or into the air, the production, storage, use and release of dangerous chemicals, and the transport, use and release of genetically modified organisms (GMOs).

These activities are listed in Annex III of the Directive. Under this regime, an operator can be held liable even of he has not committed any fault, though there are a few cases in which he can be exempted from liability (see next question.)

The second liability regime applies to all professional activities, including those outside Annex III, but an operator will only be held liable if s/he was at fault or negligent and if s/he has caused damage to species and natural habitats protected at EU level under the 1992 Habitats and 1979 Birds Directives.

This is one type of environmental damage that the Directive covers. In addition, it defines environmental damage as damage to waters covered by the 2000 Water Framework Directive (all water resources in the EU) as well as land contamination that risks harming human health.

Public authorities will play an important role under the liability scheme. It will be their duty to identify liable polluters and ensure that these undertake or finance the necessary preventive or remedial measures, which the Directive details.

Public interest groups, such as non-governmental organisations, will be able to require public authorities to act, if this is necessary, and to challenge their decisions before the courts, if those decisions are deemed illegal. This offers an additional safeguard.

Another important aspect is that duplication with *international* liability legislation that is effective in the EU (for example on nuclear activities and maritime safety) has been avoided, and so have overlaps with the civil liability regimes that exist in Member States. The latter means that so-called "traditional damage" - personal injury and damage to goods and property -, even if it is caused by "risky and potentially risky" activities covered by the Environmental Liability Directive, will be dealt with under national civil liability legislation. The Environmental Liability Directive only deals with damage to the wider environment.

3. In which cases are polluters exempt from liability?

The Directive allows potential polluters to invoke reasonable defences. For instance, environmental damage caused by *force majeure* (such as storms and armed conflicts) will not give rise to liability. For example, if a storm damages a chemicals factory and this leads to the release of dangerous substances into soil and water, the operator will not be liable.

Other defences are potentially available to operators, but their use is subject to several conditions, which must all be met. For instance, Member States may decide to exempt operators who have caused environmental damage if they demonstrate that the damage was caused by activities or emissions expressly authorised by the competent authorities and if they can also prove that they were not at fault or negligent.

Further, Member States can decide on exemptions from liability if operators demonstrate that their activities or emissions were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emissions were released or the activity took place.

4. Will the Directive only apply to few cases of environmental damage as a result of these exemptions?

On the contrary. The Directive should cover all significant cases of environmental damage that are not covered by other policy instruments. The defences are defined in such a way that negligent operators will always be liable.

The Directive puts in place, for the first time in the EU, a comprehensive liability regime for damage to the environment. In particular, it introduces a comprehensive regime for damage to valuable elements of biodiversity - protected species and natural habitats - on a scale that no Member State has imposed so far.

Implementation of the Directive by Member States will reduce the possibilities for polluters to take advantage of differences among Member States' approaches to avoid liability.

5. What about environmental damage caused by society generally and not individual polluters?

Such pollution - for example air pollution - is called "diffuse pollution". The Directive does not cover it because it would be ineffective and practically impossible to hold liable all those contributing to air pollution. For example, every car driver and every household using fossil fuels for heating is responsible for CO_2 emissions, which pollute the air and cause global warming. To tackle such problems, instruments such as taxation work better.

However, if a specific instance of air pollution causes damage to water, land, protected species or natural habitats, the Environmental Liability Directive can be invoked to demand that the polluter remedies the damage.

Another example of diffuse pollution not covered by the Directive is pollution by nitrates. They can be found in fertilisers and sanitary wastewater discharges and can contaminate groundwater and other water resources. Air pollution and nitrates pollution are of course dealt with by other EU legislation, such as the Air Quality and the Nitrates Directives, in order to limit them.

6. Which types of environmental damage are covered by international liability regimes and not the Directive?

Maritime oil disasters and nuclear accidents. Preference was given to international environmental liability arrangements for two reasons: either their scope is greater as they apply on a worldwide basis and legally bind more countries than only EU Member States (this is the case with conventions covering oil pollution), or their regime provides for additional guarantees, for example by operating with compensation funds.

Oil spills by tankers at sea are covered by the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

This regime channels liability to ship owners who have very few possibilities to exonerate themselves. The ship owner's civil liability is complemented by the IOPC Fund, which covers damage beyond the limit where the ship owner has to pay. This Fund has been reinforced with a supplementary fund, which provides almost €1 billion in additional money to remedy damage. In parallel, the civil liability regime of the ship owner is currently being reviewed under the auspices of the International Maritime Organisation (IMO), among other things in light of the experience gained from the 1999 Erika and 2002 Prestige accidents.

Nuclear activities are covered by several international civil liability conventions. These conventions, too, are based on strict liability. They mainly deal with traditional damage, but in addition allow governments to cover environmental damage, albeit in a less co-ordinated way. A protocol that aims to improve the regime of one important Convention (the Paris Convention) with respect to environmental damage has been negotiated under the auspices of the Nuclear Energy Agency of the OECD.

7. Why is damage to biodiversity limited to damage to species and habitats protected under EU legislation?

Liability for biodiversity damage is something new in Europe. This is why it is important to have a precise and workable definition of biodiversity.

The Directive covers damage to all species and habitats protected under the 1992 Habitats Directive as well as most threatened species and migratory birds protected under the 1979 Birds Directive. With EU enlargement, the Annexes of both Directives have been updated to include species and habitats from the new Member States.

Today, the Habitats Directive lists 229 habitat types, 1064 animal and plant species, and the Birds Directive identifies 193 vulnerable and threatened bird species. The Environmental Liability Directive covers, *inter alia*, protected areas under the Habitats and the Birds Directives - the so-called Natura 2000 network - which account for over 22,000 individual sites and cover almost 17% of EU-25 land area as well as 140 000 km^2 of marine area.

These protected species and areas represent biodiversity that has been found to be particularly rich and socially valuable in the EU. In 2014, that is seven years after the entry into force of the Directive in the Member States, this definition will be reviewed and, if appropriate, changed. But it is important to start with an effective and manageable system of liability for damage to biodiversity.

8. How is damage caused by GMOs covered?

The Directive will cover damage to protected species, natural habitats, water and soil (if the latter significantly risks causing harm to human health), if it has occurred during the contained use of GMOs, including their transport, or during their deliberate release into the environment, including their placing on the market.

The defences under the Directive also apply in the case of GMOs: if the release of the GMO was specifically authorised or if it was not possible to anticipate the damaging effect on the basis of the state of scientific and technical knowledge at the time, and if the operator was not negligent - all of which the operator has to prove - the competent authorities can exempt him/her from liability. For example, an operator would be negligent and thus liable if s/he does not follow the instructions provided by the GMO manufacturer or the competent authority authorising the release.

Possible "traditional damage" through GMOs, that is personal injury and damage to goods and property, is not covered by the Directive. Compensation for such damage is governed by the civil liability systems in the Member States. So, if the presence of GMOs prevents an organic farmer from selling his/her crop as organic, s/he should sue for compensation under the civil liability system in his/her country.

9. Which remedial measures do liable polluters have to take?

The Directive envisages different remedial measures depending on the type of damage: soil can usually be decontaminated; damage to protected species and natural habitats as well as water might be more complex to restore.

This is why the Directive demands the decontamination of soil - ie land - until it no longer poses any significant risk to human health.

Regarding damage to protected species and natural habitats as well as water, the competent authorities have discretion in deciding which measures the responsible operator has to take, considering the remedial options available to restore the damaged natural resources either on the spot or elsewhere.

When a damaged site itself cannot be restored, another site nearby of equivalent environmental value has to be enhanced. Similarly, a site located even further away from the damaged site, but which fulfils the same environmental role, could be improved.

When deciding between these options, the authorities have to consider various factors. These include the effect of each option on public health and safety, benefits for the overall environment, costs and implementation time, the likelihood of success, the possibility of future and collateral damage, distance to the damaged site, and social, economic and cultural concerns and other relevant factors specific to the locality. But the remedial measures have to compensate adequately for the environmental damage caused.

10. Are citizens entitled to compensation if they are affected by environmental damage?

The Directive does not envisage compensation to members of the public. Its purpose is to prevent environmental damage from occurring and, if it occurs, to ensure that it is remedied. If environmental damage creates harm to members of the public or affects their goods and property, they can sue under national civil liability laws. That said, the Directive will contribute to protecting human health through prevention of environmental damage and de-pollution of contaminated sites.

11. What exactly are the roles of public authorities and citizens and NGOs?

The obligations of the competent authorities are to identify liable polluters and determine which remedial measures they have to take. Operators can be required to disclose to the competent authority the relevant data and information to help establish the facts of a case. At the end of this process, the competent authority should be in a position to reasonably assess whether an operator is liable.

Citizens who are affected by environmental damage (or the imminent threat of it) as well as non-governmental organisations promoting environmental protection will have a right to require the competent authorities to act. To this end, they have to submit to the authorities their observations with reasonable supporting evidence. The authorities are obliged to respond to the request for action. If the alleged environmental damage has occurred (or is about to occur) and if the polluter is liable under the Directive, the authorities must require the polluter to take action to remedy (or prevent) it.

Should the authorities refuse to act, and should the individual or NGO concerned consider that this refusal is illegal, they can start judicial review proceedings before a court. If they are successful, the court will order the competent authorities to demand action from the polluter.

However, the Directive allows Member States not to apply these procedures in cases where there is only an imminent threat of damage, but no damage has actually occurred.

12. Why are citizens and NGOs not allowed to sue polluters directly?

The Directive is based on the premise that public authorities are "the guardian" of the environment as the environment is a public good. The Directive therefore provides for, and regulates, the relationship between public authorities and potential or actual polluters.

In this context, it seemed important to ensure that the public concerned and NGOs can challenge the actions or inactions of the competent authorities (see question above). But in light of this safeguard, no compelling need was felt to allow the public to sue the polluter directly.

One additional aspect is that allowing citizens to sue polluters would have required the EU to harmonise national laws in the field of civil justice, which is a complex and delicate issue.

13. Will the Directive create costs and harm the competitiveness of EU industries?

The Directive operates with the concept of "financial expenditures" rather than "costs" because its major impact will be to shift the costs that arise to society in general from environmental damage to those who cause the damage. As the Directive is expected to prevent damage, these overall costs may even become lower.

When the Commission proposed the Environmental Liability Directive in 2001, it estimated the financial expenditures that the Directive will entail based on US experiences from similar liability schemes. According to this estimate, expenditures in the EU, including those by the liable parties as well as those by the competent authorities, would amount to €1.5 billion per year. This amount is less than 1.5% of the annual expenditures associated with environmental protection in the EU.

However, this estimate is based on conservative assumptions. In addition, unlike the proposal, the Directive no longer requires Member States to remedy damage for which no polluter can be held liable through other means. Therefore, the actual expenditures are likely to be less than €1.5 billion per year.

Given the amount of expenditures involved, effects on the competitiveness of EU industries are not likely to be significant. Furthermore, awareness that they can be held liable for environmental damage will induce companies to adopt cost-efficient preventive measures to minimise impacts.

This does not preclude that some companies in sectors subject to high environmental risks will have to assume a relatively large share of the expenditure burden (for prevention, insurance and damage remediation). Nonetheless, experience from the US, with its long-established liability regime, shows that even such high-risk sectors have been able to absorb the burden without any significant impact on competitiveness.

14. Will the Directive stifle innovation in the EU?

This, too, is unlikely since Member States can decide that damage that could not be foreseen on the basis of the best scientific and technical knowledge available at the time when it happened does not give rise to liability.

In fact, given that the Directive will induce operators of risky or potentially risky activities to be more careful, it will contribute to innovation: it will encourage them to develop and use environmentally safe technologies and processes.

15. Does the Directive require operators to take out insurance?

This was a big issue during the decision-making process in the European Parliament and the Council.

Firstly, it is important to stress that insurances are not the only way to get financial security. There are other forms of financial security, for example bank guarantees, the pooling of funds, financial guarantees given to a subsidiary by the parent company, etc.

Secondly, the problem in the EU is that financial security products purely related to environmental damage do not exist yet on a large scale. This is a consequence of the fact that polluters have usually not been required so far to remedy environmental damage. Therefore there has been no demand for insurance policies covering it, to stick with this example of a financial security product. At this moment, it is still difficult for insurance companies to develop such products on a large scale as information on damage incidents and on remediation costs is not yet widely available.

Consequently the Directive does not require operators to take out financial security products. However, operators will now be exposed to liability and information on damage incidents and costs to remedy the damage will become available. It is to be expected that financial security products will start to emerge. The Directive requires the Commission to report in 2010 on the availability of such products and their costs and conditions. On the basis of this report, the Commission will be in a position to decide whether the Directive should be amended.

16. Is there a financial limit on the amount that liable polluters will be required to pay to remedy environmental damage?

No. Limiting the amount of damages would reduce the incentive for potential polluters to take due care and prevent damage since they would know that, whatever the consequences of their actions, their financial responsibility would not be greater than the limit.

On the other hand, if the Directive set such a high limit that it would cover all likely cases of environmental damage, it would force potential polluters to insure against the full limit, once financial security products become available. This would unnecessarily raise insurance costs, which are likely to be the bulk of the costs associated with the Directive.

The Directive, however, allows the public authorities in charge of its implementation to decide, on a case by case basis, to cap the liability of the responsible operator. This can be done when the remedial measures already taken ensure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats, and when the cost of the remedial measures to complete the restoration of the damaged environment would be disproportionate to the environmental benefits.

17. What happens if the polluter has no money - will Member States and hence tax payers have to pay?

The Directive does not require Member States to remedy environmental damage if the polluter cannot be identified or is insolvent. The competent authorities will decide themselves whether this so-called “orphan damage” is to be remedied or not. Of course, if the state itself or a state-owned body is the polluter, the State will have to pay, like any other polluter.

18. Which Member States already have environmental liability schemes?

In most Member States there are public law provisions that allow public authorities to pursue polluters in cases of water or soil pollution. But the authorities usually have a wide margin of discretion whether to really act against the polluter. Only a few Member States, for example Sweden and Denmark, have enacted a more general regime dealing with compensation for damage to the environment.

With regard to damage to protected species and natural habitats, there are almost no rules ensuring remediation. One of the rare examples of such a rule is the Belgian federal law, which provides for compensation for damage caused to Belgian coastal waters and to the biodiversity they host.

19. Will the Directive oblige Member States that have more stringent rules to weaken them?

No. According to the EU Treaty and a specific article of the Directive, Member States may adopt or maintain national provisions that give a higher level of protection to the environment.

20. Which Member States have implemented the Directive?

The Directive must be transposed by Member States into their national law by 30 April 2007.

The Directive will not apply retroactively, which means that operators will not be held responsible for damage they caused before the Directive enters into force.

To date, only three Member States have transposed the Directive: Italy, Latvia and Lithuania. Work is progressing in the other Member States.

The Commission will take action, including legal proceedings, to ensure that all Member States implement the Directive as soon as possible.