Manual of
EUROPEAN
ENVIRONMENTAL
POLICY

Manual of European Environmental Policy

The following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.

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This section is the text of the Manual as published in 2012. It is therefore important to note the following:

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Institute for European Environmental Policy

Environmental liability

Formal references	
2004/35/EC (OJ L143 30.04.2004)	Directive on environmental liability with regard to the prevention and remedying of environmental damage
Proposed 23.1.2002 – COM(2002)17	
Amended by	
2006/21/EC (OJ L 102 11.4.2006)	Amendment
2009/31/EC (OJ L140 5.6.2009)	Amendment
Legal base	Article 192 TFEU (originally Article 175 TEC)
Binding dates	
Entry into force	30 April 2004
Formal compliance	30 April 2007
Commission report on insurance/financial security	30 April 2010
Member States report on experience applying the Directive	30 April 2013
Commission report on Member States experience and possible proposals for amendment	30 April 2014

Purpose of the Directive

The Directive is intended to establish a framework of environmental liability rules, based on the polluter pays principle, with the aim of preventing and remedying environmental damage. It acknowledges that certain liability rules already exist within the Member States and therefore leaves several key elements of the regime to the Member States' discretion while, at the same time, building in a series of reports on progress and reviews to monitor its effectiveness and, if necessary, trigger proposals for amendment. The Directive addresses only damage and damaging events which occur after the deadline for transposition at Member State level (30 April 2007) and it gives precedence to international convention regimes concerning marine and nuclear activities, subject to review of their effectiveness in 2014.

Summary of the Directive

The Directive imposes a strict liability obligation on the operator of a list of activities regulated under existing Community environmental laws (given in Annex III), to remedy or prevent three types of damage to the environment: damage to protected species and natural habitats (sometimes referred to as ‘biodiversity damage’), water damage and land damage. It also imposes fault-based liability on all other occupational activities for damage to species and habitats. These liabilities are imposed by means of public, administrative law, rather than private, civil law, meaning that enforcement is confined to actions brought by public authorities, with private individuals and groups limited to requesting action from those authorities. Provisions allowing direct legal action by private parties, for harm in the form of

personal injury, property damage or economic loss, which appeared in earlier drafts of the Directive, are expressly excluded, as are any private parties' claims to an interest in the wider environment, except in the form of requests for action by the authorities where enforcement has not occurred. Further provisions refer to defences and exceptions, preventive and remedial action, remedy selection, cost allocation and recovery, limitation periods, the role of the competent authority, financial security and trans-border cooperation.

Definitions (Article 1)

The scope of coverage for two of the three aspects of the environment that are subject to these rules is spelled out in Articles 2(3) and 2(5), respectively. 'Protected species and natural habitats' are defined as: (a) the species mentioned in Article 4(2) or listed in Annex I of the Birds Directive 79/409/EEC (see section on birds and their habitats) or listed in Annexes II and IV of the Habitats Directive 92/43/EC (see section on habitats and species); (b) the habitats of species mentioned in Article 4(2) or listed in Annex I of the Birds Directive, or listed in Annex II of the Habitats Directive, together with the natural habitats listed in Annex I of the Habitats Directive and the breeding sites or resting places of the species listed in Annex IV of the Birds Directive; and (c) where a Member State so determines, any other habitat or species, not listed in the Annexes, which the Member State designates for equivalent purposes to those laid down in the two Directives. 'Waters' are defined as all waters covered by the Water Framework Directive 2000/60/EC (see section on Water Framework Directive). There is no definition for land.

'Environmental damage' is defined separately for each of the three aspects of harm. Damage to protected species and habitats means any damage that has significant adverse effects on their reaching or maintaining favourable conservation status, with the significance of an effect determined in relation to the condition of the relevant feature before the harmful event occurred ('baseline condition') and against a series of criteria set out in Annex I. It does not include previously identified adverse effects resulting from an act which was expressly authorized under Article 6(3) and (4) or Article 16 of the Habitats Directive 92/43/EC, under Article 9 of the Birds Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, under equivalent legal provisions at national level. Water damage is defined as any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60/EC, of the waters concerned, with the exception of effects allowed under Article 4(7) of that Directive. Land damage is defined as any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or microorganisms.

The threshold for damage to species and habitats is further qualified by definitions of 'conservation status' in relation to each and by the inclusion in Annex I of additional criteria for deciding whether particular cases of damage count as significant. The definitions for conservation status are drawn directly from Article 1 of the Habitats Directive 92/43/EC. For habitats, conservation status means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions, as well as the long-term survival of its typical species. That status is deemed 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing;
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future; and

- the conservation status of its typical species is favourable.

For species, conservation status means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations, with that status taken as 'favourable' when:

- population dynamics data indicate that a species is maintaining itself on a long-term basis as a viable component of its natural habitats;
- its natural range is neither being reduced nor is likely to be reduced for the foreseeable future; and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

The one variation from the Habitats Directive criteria is that, in both cases (habitats and species), the geographical boundary within which conservation status is determined has been expanded under the Liability Directive to cover, not just the European territory of the Member States to which the Treaty applies (as specified in Article 2 of the Habitats Directive), but also alternatively, 'as the case may be', the territory of a Member State or the natural range of that habitat/species.

Annex I was added during the co-decision procedure in recognition of continuing doubt about how to determine what would count as a significant adverse effect on favourable conservation status. It states that significance is to be assessed by reference to conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data, such as:

- the number of individuals, their density or the area covered;
- the role of the particular individuals or of the damaged area in relation to the species or to the habitat concerned, and the rarity of the species or habitat (assessed at local, regional and higher level including at Community level);
- the species' capacity for propagation, its viability or the habitat's capacity for regeneration; and
- the species' or habitat's capacity to recover within a short time, without any intervention other than increased protection measures, to a condition that, by virtue of species/habitat dynamics alone, will ultimately become equivalent or superior to baseline.

Any damage with a proven effect on human health must also be deemed significant. On the other hand, three types of effect are specifically ruled out as significant damage:

- negative variations that are smaller than natural fluctuations that are regarded as normal for the relevant species/habitat;
- negative variations due to natural causes or resulting from intervention that is part of the normal management of sites; and
- damage for which it is established that the species or habitat will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of species/habitat dynamics, to something equivalent or superior to baseline.

Four other definitions in Article 2 of the Directive are of particular interest. The concept of an 'operator', to whom liability under the Directive is primarily channelled, is defined as any natural or legal, private or public person who operates or controls the occupational activity or, where national legislation so provides, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity. Liability under the Directive is confined to 'occupational activities', which are defined in terms of any activity carried out in the course of an economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character. The Directive imposes liability, not only for remediation when damage has occurred, but also for preventive action where there is an 'imminent threat' of damage, which is defined as a sufficient likelihood that environmental damage will occur in the near future. The principal objective set for remedial action is to return the relevant site or environmental feature to 'baseline condition'; that is defined as the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available.

Activities subject to strict liability (Annex III)

Annex III lists the occupational activities that are strictly liable for remedial and preventive action when damage occurs or is imminently threatened. The list is based on activities which are subject to authorization, notification or permitting requirements under other Community environmental laws, as follows:

- Installations subject to permit under Integrated pollution prevention and control (IPPC) Directive 96/61/EC (see section on integrated pollution prevention and control).
- Waste management operations under the Waste Framework Directive 75/442/EEC (see section on Waste Framework Directive) and the Hazardous waste Directive 91/689/EEC (see section on Hazardous Waste), including Landfill Directive 1999/31/EC (see section on landfill) and Waste incineration Directive 2000/76/EC (see section on waste incineration) – Member States may decide not to include 'the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes'.
- Discharges to inland surface water, subject to authorization under the Dangerous substances in the Aquatic environment Directive 76/464/EEC (see section on dangerous substances in water).
- Discharges to groundwater subject to authorization under the Groundwater Directive 80/68/EEC (see section on groundwater).
- Discharge or injection of pollutants into surface water or groundwater subject to permit, authorization or registration under the Water Framework Directive 2000/60/EC (see section on Water Framework Directive).
- Water abstraction and impoundment subject to authorization under the Water Framework Directive 2000/60/EC.
- Manufacture, use, storage, processing, filling, release into the environment and onsite treatment of:
    - Dangerous substances as defined in the classification, packaging and labelling of dangerous substances Directive 67/548/EEC (see section on classification, labelling and packaging of chemical substances and mixtures).

    - Dangerous preparations as defined in the classification, packaging and labelling of dangerous preparations Directive 1999/45/EC (see section on classification, labelling and packaging of chemical substances and mixtures).
    - Plant protection products as defined in Plant protection products Directive 91/414/EEC (see section on authorization and marketing of plant protection products).
    - Biocidal products as defined in Biocidal products Directive 98/8/EC (see section on authorization and marketing of biocides).
- Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods, as defined in:
    - The transport of dangerous goods by road Directive 94/55/EC (see section on inland transport of dangerous goods).
    - The transport of dangerous goods by rail Directive 96/49/EC (see section on inland transport of dangerous goods).
    - The minimum requirements for vessels bound for or leaving Community ports Directive 93/75/EC (see section on maritime transport of dangerous goods).
- Installations subject to authorization under the air pollution from industrial plants Directive 84/360/EEC (see section on large combustion plants).
- Contained use of genetically modified microorganisms subject to Directive 90/219/EEC (see section on GMOs contained use).
- Deliberate release of genetically modified organisms (GMOs) subject to Directive 2001/18/EC (see section on GMOs deliberate release).
- Transboundary shipment of waste subject to authorization or prohibited under Regulation (EEC) No 259/93 (see section on shipment of waste).
- Management of waste from extractive industries under Directive 2006/21/EC.
- The operation of sites for the geological storage of carbon dioxide pursuant to Directive 2009/31/EC (see section on use of carbon capture and storage).

Exceptions and defences

Article 4 sets out a number of circumstances in which the Directive will either not apply or only apply under certain conditions:

- where the damage or threat of damage is caused by either (a) an act of armed conflict, hostilities, civil war or insurrection or (b) a natural phenomenon of exceptional, inevitable and irresistible character (often referred to as the ‘act of war’ and ‘act of God’ exceptions);
- any damage or threat where liability would come under any of five international conventions covering marine oil and hazardous substance pollution, and the onshore carriage of dangerous goods, as set out in Annex IV;
- where national legislation protects the operator's right to limit his liability under either The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI) 1988;
- cases covered by the Treaty establishing the European Atomic Energy Community (EURATOM) or any of five international conventions governing liability for nuclear activities, as listed in Annex V;
- where damage or threats are caused by diffuse pollution – unless a causal link can be established between the damage and the activities of individual operators; and
- activities the main purpose of which is to serve national defence or international security or whose sole purpose is protection from natural disasters.

In addition to those exceptions to the entire regime, Article 8 contains two clauses offering further defences to, or protection from, liability, the second of which is subject to Member State discretion:

- under Article 8(3), an operator is not required to bear the cost of preventive or remedial action where he can prove that the damage or threat:
    - was caused by a third party and occurred despite appropriate safety measures being in place; or
    - resulted from compliance with a compulsory order or instruction from a public authority, other than an order or instruction in response to an emission or incident caused by the operator's own activities; and
- under Article 8(4), Member States may allow the operator not to bear the cost of remedial actions where he can demonstrate that he was not at fault or negligent and that the damage was caused by:
    - an emission or event expressly authorized by, and fully in accordance with the conditions of, an authorization granted under national laws which implement the Community legislation listed in Annex III (the compliance or permit defence); or
    - an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place (the state-of-the-art defence).

Preventive and remedial action

Where damage has not yet occurred but there is an imminent threat of damage, the Directive (Article 5) obliges the operator of the activity posing the threat to take the necessary preventive measures without delay. No rules or guidelines are given on the nature of preventive action. Member States must require operators to inform the competent authority of all relevant aspects of the situation, where appropriate and, in any case, whenever the preventive measures do not succeed in removing the threat. The competent authority has the discretionary power to:

- require the operator to provide information on any imminent threat or suspicion of such a threat;
- give instructions to the operator on the nature of the preventive measures to be taken; or
- take the necessary measures itself.

The authority has both a power (Article 5(3)(b)) and a duty (Article 5(4)) to order the operator to take the necessary preventive action.

Where environmental damage has occurred, the operator is obliged (Article 6) to inform the competent authority without delay of all relevant aspects of the situation and to take:

- all practicable steps immediately to control, contain, remove or otherwise manage the contaminants and other damaging factors in order to mitigate the harm; and
- the necessary remedial measures, in accordance with rules set out in Article 7 and Annex II.

The competent authority has the power to:

- require the operator to provide supplementary information on any damage;
- take, require the operator to take or give instructions to the operator on steps to mitigate the harm;
- give instructions on the necessary remedial measures; or
- take those measures itself.

The authority has both the power (under Article 6(2)(c)) and a duty (under Article 6(3)) to order the operator to take the necessary remedial action.

In the case of either an imminent threat or actual damage, where the operator fails to comply with his obligations, cannot be identified or is, for some reason, not required to carry out the necessary measures (because, for example, of the one of the exceptions or defences), the authority may take the action itself, but is not under a duty to do so and, in the case of remedial action, should only do so as a last resort.

Remediation rules

The procedure for deciding the appropriate remedial measures is specified in Article 7 and Annex II. Where damage has occurred, operators must identify potential remedial options, in accordance with rules set out in Annex II, and submit them to the competent authority for approval. The authority must then select the appropriate remedy, in accordance with Annex II and in cooperation with the operator. In so doing, the authority must invite interested parties, as defined in the request for action provisions specified in Article 12(1) (see below), and anyone who owns the land where remedial action will take place, to submit their views and must take those views into account. Where several instances of damage have occurred which preclude simultaneous remedial action at all of them, the authority is entitled to set priorities, taking into account the nature, extent and gravity of each case, as well as the possibility of natural recovery and any risks to human health.

Annex II sets out a common framework to be followed for remedy selection. It deals mostly with damage to water and protected species and habitats. In those cases, the environment is to be restored to its baseline condition by means of three types of remediation:

- primary remediation – meaning remedial measures which directly return the damaged natural resources or impaired services to, or towards, baseline condition;
- complementary remediation – meaning either development of alternative natural resources or measures taken at a different site, to compensate for the fact that primary remediation has not fully restored the damaged features; and
- compensatory remediation – meaning actions taken to compensate for ‘interim losses’ of natural resources or services that arise between the date when the damage occurs and the time when primary remediation is fully achieved, the actions to consist of additional improvements to protected natural habitats or species, or water, at either the damaged site or elsewhere.

Annex II specifies that interim losses mean losses which result from the inability of damaged natural resources or services to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect – it explicitly excludes any financial compensation to members of the public.

Where primary remediation does not achieve full restoration to baseline, complementary remediation must be undertaken, as must compensatory remediation to deal with interim losses. Any significant risk to human health must also be removed.

In identifying remedial options, primary remedial measures may include both active restoration and natural recovery. Complementary and compensatory measures should first explore restoration of natural resources and/or services of the same type ('resource-to-resource' or 'service-to-service' equivalence approaches); where those are not possible, alternative resources or services should be provided, allowing, for example, a reduction in quality of resources to be offset by an increase in quantity. Where this latter process is invoked, alternative valuation techniques are to be used, with the competent authority having the power to prescribe the method. Reasonable remedial options should then be evaluated, using the following criteria:

- the effect on public health and safety;
- cost of implementation;
- likelihood of success;
- the extent to which future damage will be prevented and collateral damage avoided;
- relative benefits to each component of the natural resource or service;
- sensitivity to relevant social, economic and cultural concerns and other local factors;
- the length of time needed for completion;
- the extent to which restoration to baseline will be achieved; and
- geographical linkage to the damaged site.

There is flexibility to choose primary remedial measures that either do not fully restore to baseline or do so only slowly, provided the losses thereby incurred are compensated for by means of other actions. That will allow, for example, authorities to decide that equivalent natural resources can be achieved at lower cost by carrying out remedial actions at a different site, provided the result is genuinely equivalent. The authority also has the power to decide that no further remedial measures are needed, even where neither baseline nor an equivalent result has been achieved, if (a) the measures already taken have removed any significant risk of further adverse effects on health, water or protected species and habitats and (b) the cost of continuing remedial measures to reach baseline would be disproportionate to the environmental benefits so obtained.

Annex II says much less about land damage. As a minimum, contaminants must be removed, controlled, contained or diminished to that the contaminated land, taking account of its current use or approved future use at the time when the damage occurred, no longer poses any significant threat to human health. Broad criteria for assessing such risks are given. The Annex also specifies that, if land use is changed, all necessary measures must be taken to prevent any adverse health effects and that, where no land use Regulations exist, the use assigned to the site should be based on the nature of the area and its expected development. In all cases, a natural recovery option is to be considered.

Cost allocation and recovery

The basic principle of the Directive is that the responsible operator or operators will bear the costs of the required preventive and remedial action. Subject to the defences in Article 8(3) and (4) (third-party intervention, compulsory order of a public authority and, if Member States decide to adopt them, compliance and state-of-the-art – see above), the competent

authority is entitled to recover the costs it incurs, if necessary by taking security over the operator's property or other guarantees. Those costs are defined broadly (Article 2(16)) as including any costs that are justified by the need to ensure proper enforcement of the Directive, including the costs of assessing environmental damage and threats of damage, and determining the remedial options, as well as administrative legal and enforcement costs, the costs of data collection, monitoring and supervision, and other general costs. The authority is, however, entitled to waive recovery of its full costs where the expenditure required to do so would outweigh the recoverable sum or where the responsible operator cannot be identified.

Article 9 of the Directive leaves the rules for allocating costs among defendants in multiple party cases to national Regulation. There are traditionally two ways of dealing with the allocation of costs in such circumstances: joint and several liability or proportionate liability. 'Joint and several liability' means that where a group of operators are liable for the cost of remediation, each member of that group is also responsible for the whole amount, irrespective of their actual contribution to the damage. 'Proportionate liability' means that each operator bears a proportion of the costs that are clearly identifiable as their contribution to the damage. It is therefore important to know that it depends on the Member State, in which the environmental damage occurs, to stipulate what kind of allocation model applies and in particular how liability between the producer and the user of a product will be spread.

Limitation and temporal application

Two limitation periods are provided for in the Directive: a maximum of five years from the date of completion of remedial or preventive measures or from the date when the responsible party has been identified, whichever is the later, for the competent authority to initiate cost recovery proceedings; and a long stop of 30 years from the date when the emission, event or incident which resulted in the damage occurred, for the enforcement of liability.

The Directive also only applies to causative events after the deadline for national transposition (30 April 2007). It does not apply: to damage caused by an emission, event or incident that took place before that date; nor, somewhat obscurely, to damage caused by an emission, etc, which takes place after that date 'when it derives from a specific activity that took place and finished before' that date (Article 17).

Competent authority

Member States are required (Article 11) to designate the competent authority or authorities which are responsible for fulfilling the duties specified in the Directive. Those duties include establishing which operator has caused the damage or threat, assessing the significance of the damage and determining the appropriate remedial measures. Member States must ensure that the designated authorities have the power to require third parties to carry out necessary remedial and preventive measures. Where such measures are imposed on someone, the authority must state the exact grounds on which that Decision has been made, notify the Decision forthwith to the operator concerned and inform him of the legal remedies available to him under national law, as well as the time limits to which such remedies are subject.

Request for action and review

Articles 12 and 13 provide for a system allowing interested parties to request enforcement action from the competent authority, receive a reasoned response from that authority and have access to independent judicial or administrative review of the authority's Decisions. Access to this process is granted to natural or legal persons:

- affected or likely to be affected by environmental damage; or
- having a sufficient interest in environmental Decision making relating to the damage; or
- alleging the impairment of a right, where the administrative law of the Member State requires that as a precondition.

Any such parties can submit observations to the competent authority concerning damage or threats of damage and request the authority to take enforcement action under the Directive. The meaning of 'sufficient interest' and 'impairment of a right' is left to the Member States, but the Directive provides that any non-governmental organization promoting environmental protection and meeting any requirements under national law must be deemed to have a sufficient interest for the purposes of (b) and to have rights capable of being impaired for the purposes of (c). Requests for action must be accompanied by information and data supporting the observations. Where they provide plausible evidence that damage has occurred, the competent authority must consider the request, give the relevant operator a chance to make known his views, then, 'as soon as possible and in any case in accordance with the relevant provisions of national law', inform the party making the request whether it has decided to accede to or refuse it, providing reasons for that Decision. This system must be instituted for cases of environmental damage, but Member States may decide not to apply it in cases of imminent threat. On receipt of the authority's Decision, the interested parties must have access to a court or other independent and impartial public body which is competent to review the procedural and substantive legality of the authority's Decisions, acts or failure to act under the Directive.

Financial security

Although there is no provision for compulsory financial security, Member States must take measures to encourage the development of financial security instruments and markets, including financial mechanisms to deal with insolvency, with the aim of enabling operators to obtain financial guarantees to cover their liabilities under the Directive (Article 14). In order to monitor how this voluntary approach is working, the Commission is required to present a report, before 30 April 2010, on the effectiveness of the Directive in terms of actual remediation and on the availability at reasonable cost, and the conditions, of insurance and other financial security products for the activities in Annex III. The Commission report must also consider specific aspects of a possible compulsory regime: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report and of an extended impact assessment, including cost-benefit analysis, the Commission is required, if appropriate, to submit proposals for a system of harmonized mandatory financial security.

Relationship with national law

Article 16 of the Directive reiterates the provisions of Article 193 TFEU (Article 176 of the EC Treaty), that the Directive does not prevent Member States from maintaining or adopting more stringent provisions on prevention and remediation of environmental damage. It cites as examples, the identification of additional activities to be subject to the prevention and remediation requirements and of additional responsible parties.

Cooperation between Member States

Where damage affects or is likely to affect several Member States, those Member States are required to cooperate in ensuring the appropriate preventive or remedial action. A Member State on whose territory damage has occurred must provide sufficient information to other potentially affected Member States. Where a Member State identifies damage within its borders which has been caused elsewhere, it can report the issue to the Commission and any other Member State concerned, make recommendations for preventive or remedial action and seek to recover the costs it has incurred on any such actions.

Reports and review

Article 18(1) requires the Member States to report to the Commission on their experience in applying the Directive by 30 April 2013. The information to be included in these reports is specified in Annex VI. That requires that they include a list of instances of environmental damage and instances of liability under the Directive, with detailed information on each instance, including type of damage, date of occurrence, date of discovery, date when proceedings under the Directive were initiated, the type of activity of the liable parties, whether there has been resort to judicial review, the outcome of the remediation process and the date of closure of the proceedings. Member States may also include any other information they think is useful for proper assessment of the Directive, such as costs incurred with remediation and prevention measures (broken down between those paid directly by the liable parties, those recovered ex post facto and those unrecovered, with reasons for the last), the results of actions to promote financial security and an assessment of the administrative costs incurred to implement and enforce the Directive.

On the basis of the Member State reports, the Commission is required to report to the European Parliament and the Council before 30 April 2014. Its report must include a review of how the exclusion of the international convention regimes (marine, nuclear and liability limitation) is working; the application of the Directive to damage caused by GMOs; its application in relation to protected species and habitats; and any legal instruments that may be eligible for inclusion in Annexes II, IV and V. The report must also include any appropriate proposals for amending the Directive.

Development of the Directive

The Commission proposed the Directive in 2002, but the debate that led to it had been taking place, in one form or another, at least since the early 1980s. A series of discrete initiatives was launched during that period, most petering out before reaching the statute book. Provisions for strict liability for environmental damage were included in the initial drafts of what became in 1984 the trans-frontier shipment of hazardous waste Directive 84/631/EEC

(see section on shipment of waste). These were deleted before that Directive was adopted, in return for a commitment to accept proposals from the Commission for a separate liability measure by 1988. In the event, the Commission launched a proposal for a Directive on civil liability for waste in October 1989 (COM(89)282). Following debate in the Council of Ministers and the European Parliament, it produced an amended proposal in June 1991 (COM(91)219), but that was effectively shelved by the end of that year.

It was replaced by a separate initiative towards a horizontal Directive on liability for damage to the environment caused by a wider range of activities, which ultimately led to the current Directive. A Green Paper on Remedying Environmental Damage was published in March 1993 (COM(93)47), with comments invited from interested parties by the end of September that year. Over 100 submissions were received, including some from Member State governments. The responses showed deep divisions between industry groups, many of which argued that a Directive in this field was inappropriate and potentially damaging, and environmental groups and others, which saw EU rules invoking strict liability as overdue. The Member State responses were equally divided, with significant opposition stated by both Germany and the United Kingdom, whose hostile stance was supported later on by France, which did not submit a formal response at that time. In addition to the written consultations, the Commission convened a joint public hearing with the European Parliament, in October 1993, and sponsored expert seminars in London, Paris and Frankfurt. The consultative Economic and Social Committee produced an Opinion in February 1994 (CES 226/94) and the European Parliament adopted a Resolution in April 1994 (OJ C128/165), both supporting a Directive. Significantly, the Parliament's Resolution cited for the first time a new Treaty Article (Article 138b), giving the Parliament the right to request legislative initiatives from the Commission, rather than merely respond to them. Over the following years, the Parliament referred to that Resolution repeatedly when the Commission's annual work programme failed to include proposals for a liability Directive.

In the light of the strong differences of opinion on this subject, and the dire warnings given by its opponents of serious potential damage to the European economy, the Commission decided to do further research into the subject, commissioning in 1994 two large studies on, respectively, the legal and economic implications. Those studies eventually reported in 1996. They were followed by a new round of consultations, which showed little sign of the disagreements waning. Towards the end of 1996, the then Environment Commissioner, Ritt Bjerregaard, floated the idea of Community accession to the Council of Europe's Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano Convention), which had been opened for signature in June 1993 and signed by six Member States, but not ratified by anyone. Although supported by some Member States, notably the Netherlands which had led the Council of Europe negotiations, that idea seemed to provoke even more opposition among other Member States, as well as raising doubts about the Community's legal competence to accede to such a Convention in the absence of pre-existing EC law in the field, so it was soon downgraded as an option.

With both the Commissioner and DGXI (now DG Environment) of the Commission still uncertain about the value of proceeding against such powerful opposition, Mrs Bjerregaard decided to limit the next step to a discursive ‘orientation’ debate at the College of Commissioners, to see whether there was sufficient support within that forum to take the initiative further. That took place in January 1997, with the College proving surprisingly solid in favour of further work towards a Directive, despite strong indications that the Council of Ministers would reject any legislative proposal at that time. The College decided that

progress should remain slow, however, opting for a White Paper, rather than full legislative proposals, as the next step. Further studies, on contaminated sites and damage to protected species and habitats, were then commissioned, and another round of consultations with stakeholders and Member State experts was convened. A White Paper was ready for approval at the beginning of 1999, but was derailed by the resignation *en masse* of the Santer Commission and a Decision not to proceed until a new Commission was in place.

The White Paper on Environmental Liability (COM(2000)66), based on an amended version of the 1999 text, was finally approved in February 2000. That recommended development of a Directive which would draw heavily on the Lugano Convention's civil law approach (i.e. private actions for compensation and damages – as opposed to public/administrative law actions brought by public authorities) and include a broad scope of coverage, encompassing both environmental damage (contaminated sites and harm to 'biodiversity') and 'traditional' damage (personal injury and damage to property). This led to more consultations and studies. It attracted continuing hostility from several industry groups, but significantly less opposition among Member States, partly as a result of changes of government in key countries since 1997.

In July 2001, following re-structuring within DG Environment under the new Commissioner, Margot Wallström, a short working paper was published showing an important change of direction. The civil law approach was abandoned in favour of a Directive based entirely on public law and deleting all reference to the civil harms of personal injury and property damage. That met less hostility from industry groups, though it was still criticized by them for being too severe on aspects such as biodiversity damage and defences. It was also criticized by NGOs which saw the abandonment of civil law as limiting their access to justice in this field. It led directly to a DG Environment draft in November 2001, which formed the basis for the Commission proposal in January 2002 (COM(2002)17), although only after important changes were made to the draft during inter-service consultation (with other DGs and Commissioners), substantially softening the liability rules by inserting extra defences and protections for defendants.

The 2002 proposal was taken up immediately by the Council, under the Danish Presidency, but consideration in the Parliament was delayed by six months or so because of a dispute between the Environment and Legal Affairs Committees over which should have the lead on this subject. Ignoring the Parliament's difficulties, the Danish Presidency made the issue such a high priority that the Council's first reading text was largely completed in the first half of 2002. Less progress was made in the second half of that year, under the Italian Presidency, but the pressure in the Council returned with the Greek Presidency at the beginning of 2003. Because of this enthusiasm in the Council and because of its own internal disputes, the first reading in the Parliament contributed little to the eventual text. The battle between the Committees had started in 1993–1994, at the time of the Green Paper, when the Environment Committee had the lead, and continued with the White Paper in 2000, when Legal Affairs managed to get it. In 2002, the Committee of the Presidents of the Parliament decided that the lead should remain with Legal Affairs but that, under the 'enhanced Hughes procedure' within the Parliament's rules, the Environment Committee be allowed to contribute an opinion which should be reflected, on environmental aspects, in the Legal Affairs Committee's report to the plenary. In the event, the two committees took sharply opposing positions on the Commission proposal; the Legal Affairs Committee passed on very little of the Environment Committee's opinion to the plenary session, but that plenary, in May 2003, ultimately adopted a resolution which fell somewhere between the two committees' views.

Importantly, however, the voting was extremely close, with the Parliament dividing along political lines and many elements of the resolution being adopted or rejected by tiny majorities. That allowed the Council to reject almost all the Parliament's proposals, except where they coincided with the Council's own text which had been drafted earlier (much of it nearly a year earlier).

During second reading, when an absolute majority is required in the Parliament for approval of further amendments, the sharp political divisions continued, focusing on issues like the defences and exceptions (especially compliance and state-of-the-art), the scope of species and habitat damage, interim losses, compulsory financial security, a duty on competent authorities to remediate where no liable party would do so (known as 'subsidiary responsibility'), apportionment of liability in multiple party cases, limitation periods, and coverage of marine pollution, nuclear events and damage caused by GMOs. At the plenary session, in December 2003, only four amendments were approved. All of them were then rejected by the Council of Ministers, leading to a conciliation process in which the only significant change was a minor tightening of the provisions to review the financial security position.

Implementation of the Directive

Information on the measures taken by the Member States to transpose Directive 2004/35/EC can be found in their national execution measures.

The Member States were required to bring into force laws, Regulations and administrative provisions to comply with the provisions of the Directive by 30 April 2007. As Most Member States did not meet this transposition deadline, the Commission has initiated enforcement actions (see section below for more details). The delays in transposition were among others due to the framework character of the Directive leaving much discretion to the Member States and leading to lengthy debates at national level regarding the options to be taken. Also the fact that some Member States needed to fit the new legislation into existing environmental liability legislation and the fact that the Directive included challenging technical requirements such as the different types of remediation, the need for economic valuation of environmental damaged resources and services and the lack of binding thresholds for key terms such as 'significant damage' played a determining role in these delays.

When looking at the transposition and implementation measures taken by the Member States, one gets a picture of an uneven and diverse implementation across the EU[1]. This results from the flexibility given to Member States for implementing the Directive. Despite the diverse implementation, the majority of Member States decided not to go beyond the minimum requirements of the Directive. In fact, most Member States only introduced strict liability for the operators of risky or potentially risky activities listed in Annex III of the Directive, only cover EU-protected biodiversity, introduced permit and state-of-the-art defences without subsidiary state liability and did not propose new mandatory insurance schemes. As a result, it is uncertain whether the Directive will achieve its main objective to prevent and restore the environment.

A major implementation issue in many Member States is how to deal with numerous liability rules already existing which are more stringent than the Directive (e.g. fewer defences, wider definition of the liable party, more demanding clean-up objectives), while at the same time

taking on board certain aspects of the Directive which are broader than current national law (e.g. liability for damage to species and habitats outside protected sites, compensation for interim losses).

In accordance with Article 14(2) of the Directive, the Commission published a report on the effectiveness of the Directive in terms of actual remediation of environmental damages and on the availability at reasonable costs and on conditions of insurance and other types of financial security (COM(2010)581). The report was due by April 2010, but was delayed until October 2010. In view of this reporting obligation, a first exploratory study was carried out by a consultant in 2008 which was followed by a more comprehensive study in 2009[2].

As to the effectiveness of the Directive in terms of actual remediation of environmental damages, the report concluded that it was not possible to assess this due to insufficient data, in particular due to the limited number of incidents treated under the Directive at the beginning of 2010 – only 16 cases were identified by the Commission and national experts – and the incomplete information available on actual cases at that time. This lack of information and practical experience resulted among others from the three-year delay in transposing the Directive.

The report further concluded that Member States had only taken limited actions so far as to encouraging the development of financial security instruments and markets. Mostly Member States had merely been conducting discussions with insurers and/or their trade associations. In most Member States national environmental liability markets developed at the initiative of the insurance sector, even in those Member States where mandatory financial security had been established. Focus had been on insurance products, despite the existence of and experience gained with a wide range of alternative products of financial security (such as bonds, bank guarantees, funds, etc) that are suitable to cover liabilities related to the Directive. It should however be noted that some alternative instruments are more suitable for large operators with many operations rather than for SMEs.

Only eight Member States have decided to introduce mandatory financial security in the period 2010-2014. However, the introduction of mandatory financial security is delayed in all three Member States where it was planned to be put into practice in 2010. The other Member States rely on voluntary financial security.

Enforcement and court cases

On 1 June 2007, the European Commission sent a first written warning, a so-called ‘letter of formal notice’, to 23 Member States for not transposing the Directive before the formal deadline had elapsed on 30 April 2007. Subsequently final warnings, so-called ‘reasoned opinions’ were sent to those Member States which did not provide the Commission with a sufficient response. In June 2008 the Commission decided to refer the nine most recalcitrant Member States to the Court of Justice for failing to transpose the Directive into domestic law. The nine Member States were Austria, Belgium (concerning the Brussels Capital Region only), Greece, Finland, France, Ireland, Luxembourg, Slovenia and the United Kingdom[3].

So far, the European Court of Justice has condemned seven Member States for failure to adopt within the prescribed period the laws, Regulations and administrative provisions necessary to comply with the Directive. Between December 2008 and June 2009 following

Member States have been condemned: United Kingdom (C-417/08), Austria (C-422/08), Greece (C-368/08), Luxembourg (C-331/08), Slovenia (C-402/08), Finland (C-328/08) and France (C-330/08).

Next to these judgements against Member States the European Court of Justice has issued its first preliminary rulings on the Directive. In the cases C-478/08, C-479/08 and C-378/08 the Court ruled that the competent authority may establish a rebuttable presumption that there is a causal link between the diffuse pollution that must be remediated and the activities of one or more operators. In order to establish this presumption that authority must investigate the origin of the contamination and must have plausible evidence for this presumption. The fact that the operator's installation is located nearby the polluted area and that there is a correlation between the pollutants identified and the substances used by the operator may serve as plausible evidence. Unless the operator is able to rebut the presumption by providing evidence that its activities did not cause the damage or that it is otherwise not liable under the Directive, it is liable for the remediation of the damage. This implies that the burden of proof in respect of diffuse pollution is on the operator, not the competent authority[4].

In the cases C-478/08, C-479/08, C-379/08 and C-380/08 the Court ruled that the Directive allows the competent authority to change substantially the remedial measures that were initially chosen in accordance with the procedure as described in Article 7 and which have already been implemented. However, the competent authority needs to fulfil certain conditions such as giving the operators the opportunity to be heard and including in its Decision the grounds upon which its choice is based.

Further developments

The Commission concluded in the above mentioned report on implementation that due to a lack of practical experience with the application of the Directive, there is not sufficient justification currently for introducing a harmonised system of mandatory financial security. Therefore the Commission has decided to re-examine the option of mandatory financial security at a later stage, possibly before the general review of the Directive planned for 2014. Within the context of this general review, the Commission will in the short term launch evaluations of following issues/measures: the extension of the Directive's scope in order to fully cover the marine environment; the issue of diverging national transposing legislation which might create difficulties, for instance to financial security providers who have to adapt generic products to diverging national contexts; the uneven application of the permit defence and the state-of-the-art defence by Member States; the uneven coverage of national liability regimes of damage to non-EU protected biodiversity; and the extent to which actual financial ceilings set for established financial security instruments are sufficient to deal with large scale incidents.

As part of its current review of the EU's regulatory frameworks and practices for offshore oil and gas exploitation, the Commission is considering to extend the scope of the Directive to fully cover the marine environment, i.e. all marine waters under the jurisdiction of EU Member States, up to 200 or 370 nautical miles (see among others Communication COM(2010)560 ‘Facing the challenge of the safety of offshore oil and gas activities’). Though the Directive is interpreted as governing offshore oil and gas operations, it only covers the territorial waters - up to 12 nautical miles off the shoreline. As part of this review, the Commission is also re-considering the option of introducing a requirement for mandatory financial security. In this regard it is examining the sufficiency of actual financial ceilings for

established financial security instruments with regard to potential major accidents that involve responsible parties with limited financial capacity. The extension of the scope of the Directive to fully cover the marine environment has been put forward in the Commission's proposal for a Regulation on safety of offshore oil and gas prospection, exploration and production activities (COM(2011)688), which was issued in September 2011.

Related legislation

The Directives and Regulations listed below are related to Directive 2004/35/EC as the occupational activities which are subject to authorization, notification or permitting requirements under these Community environmental laws are strictly liable for remedial and preventive action when damage occurs or is imminently threatened:

- IPPC Directive (96/61/EC) (see section on integrated pollution prevention and control (IPPC)).
- Waste Framework Directive (75/442/EEC) (see section on Waste Framework Directive).
- Hazardous waste Directive (91/689/EEC) (see section on hazardous waste).
- Landfill Directive (1999/31/EC) (see section on landfill).
- Waste incineration Directive (2000/76/EC) (see section on waste incineration).
- Directive on dangerous substances in the aquatic environment (76/464/EEC) (see section on dangerous substances in water).
- Groundwater Directive (80/68/EEC) (see section on groundwater).
- Water framework Directive (2000/60/EC) (see section on Water Framework Directive).
- Directive on classification, packaging and labelling of dangerous substances (67/548/EEC) (see section on classification, labelling and packaging of chemical substances and mixtures).
- Directive on classification, packaging and labelling of dangerous preparations (1999/45/EC) (see section on classification, labelling and packaging of chemical substances and mixtures).
- Plant protection products Directive (91/414/EEC) (see section on authorization and marketing of plant protection products).
- Biocidal products Directive (98/8/EC) (see section on authorization and marketing of biocides).
- Directive on transport of dangerous goods by road (94/55/EC) (see section on inland transport of dangerous goods).
- Directive on transport of dangerous goods by rail (96/49/EC) (see section on inland transport of dangerous goods).
- Directive on minimum requirements for vessels bound for or leaving Community ports (93/75/EC) (see section on maritime transport of dangerous goods).
- Directive on air pollution from industrial plants (84/360/EEC) (see section on large combustion plants).
- Directive on contained use of genetically modified microorganisms (90/219/EEC) (see section on genetically modified organisms: contained use).
- Directive on deliberate release of GMOs (2001/18/EC) (see section on genetically modified organisms: deliberate use).
- Regulation on transboundary shipment of waste ((EEC) No 259/93) (see section on shipment of waste).

- Directive on management of waste from extractive industries (2006/21/EC) (see section on waste from extractive industries).
- Geological storage of carbon dioxide Directive (2009/31/EC) (see section on use of carbon capture and storage).

References

1 De Smedt, K (2009) Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive, *European Energy and Environmental Law Review*, February 2009, 2–18.

2 Munchmeyer, T, Fogleman, V, Mazza, L, and Mudgal, S (2009) *Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues*. Bio Intelligence Service, Report for the European Commission (DG Environment), http://ec.europa.eu/environment/legal/liability/pdf/ELD%20Study%20November%202009.pdf

3 European Commission (2008) Press release, Environment: Commission takes nine Member States to Court over environmental liability, IP/08/1025, Brussels, 26 June 2008, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1025&format=HTML&aged=0&language=EN&guiLanguage=en

4 Fogleman, V (2010) First Environmental Liability Directive cases from European Court of Justice, *Commercial Risk Europe*, 4 June.