May 2004

# The Environmental Liability Directive (Dir 2004/35/CE)

## *Recommendations for implementation*

**Summary:**

**The Environmental Liability Directive entered into force on 30 April 2004. Member States need to transpose it into national law within three years. CEFIC, EUROPIA and OGP urge the Member States to do so in a fair and harmonised way in order to avoid distortion of competition and legal uncertainty. In particular, Member States should:**

- **Exempt responsible operators from any liability if they act in compliance with permits and state-of-the-art knowledge;**
- **Apply proportionate rather than joint and several liability in multipartite cases;**
- **Ensure that the geographic scope of biodiversity damage, remediation targets and financial security schemes (to include self-insurance) are fair and harmonised throughout the Community;**
- **Ratify the HNS and Bunker Fuels Conventions and improve the liability schemes with regard to the ship owners' share of liability.**

## Introduction

The Environmental Liability Directive has a long history of preparation and discussion. Our industries have accepted their environmental responsibility and have not objected to the principle of a Directive regulating their liability. Our industries have, however, emphasised their expectation that a new environmental liability regime should be fair, focus on concrete objectives and contain legally clear definitions and concepts.

### Scope and requirements of the Directive

The Directive will apply to environmental damage, or the imminent threat of damage, caused by the operation of any of the activities listed in Annex III. These include:

- installations/processes covered by the integrated pollution prevention and control (IPPC) Directive;

- manufacture, use, storage, processing, filling, release to the environment and on-site transport of dangerous substances, dangerous preparations, plant protection products and biocides;
- transport of dangerous goods by road, rail, inland waterways, sea or air; wastewater discharges that require authorisation.

In relation to damage to biodiversity, the Directive will apply to all other occupational activities where there is fault or negligence.

Various activities and situations will be exempt from the scope of the Directive, such as national defence activities and damage triggered by an act of God or war. In addition, the Directive will not apply retro-actively, in other words, any damage caused by an emission or incident before the Directive comes into force will be exempt.

The Directive requires that measures are taken both to prevent damage to the environment and to remedy any damage that has occurred. “Environmental damage” is defined in relation to three elements: damage to biodiversity, that is damage to protected species and natural habitats, designated in accordance with the Birds and Habitats Directives (Directive 79/409/EEC and Directive 92/43/EEC respectively) or in accordance with equivalent national provisions; water damage; and land damage. With regard to biodiversity, damage is determined as “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”, with reference to the baseline condition and a set of specific criteria and thresholds set out in Annex I.

In the event that damage does occur, or in the case of an imminent threat of damage, the operator must promptly inform the competent authority and take all practicable steps to immediately control, contain, remove or otherwise manage the pollutants concerned. The competent authority will determine the measures to be taken in consultation with the operator and may in certain circumstances take them itself.

The operator carrying out the damaging activity will bear the costs of the measures taken, irrespective of who actually carries out the remedial/preventive work. The operator may also be liable to compensate for ‘interim losses’ – that is, the damage to natural resources or services that cannot be remedied immediately or at all. This will be in the form of so-called ‘complementary’ or ‘compensatory’ measures, to provide the equivalent natural resource or service, usually in another location.

**Key issues for transposition at national level**

In our view, the final text, which is based on the Council’s Common Position complemented by a number of amendments agreed with the European Parliament in conciliation, does not meet our industries’ expectation. On the positive side, a number of unfair amendments which had been proposed and supported by a majority in the EP Environment Committee were not adopted by the EP Legal Affairs Committee and the Plenary. On the negative side, diverse opinions and political compromise in the Council and EP Plenary have resulted in a text that leaves a lot of discretion to the individual Member States in the following crucial areas:

1. **Permit and State-of-the-Art Defences**

Our industries had urged decision-makers to balance the new strict liability regime by exemptions based on permit compliance and application of state-of-the-art knowledge, as suggested by the European Commission in its original proposal. These exemptions would not have been in contradiction to the “polluter pays” principle and would have left companies open to prosecution for negligent conduct or avoidable, and even unavoidable, accidents, etc.

As the Council could not agree a common line, Member States now have the option to accept permit compliance and state-of-the-art knowledge as defences and to relieve the operator - fully, in part or not at all - of restoration costs. In other words, responsible operators who act in compliance with their permits and apply state-of-the-art knowledge might be liable or face legal uncertainties depending on the detail to which Member States implement this provision.

A fair and clear transposition of the environmental liability regime in the Member States would require full recognition of permit and state-of-the-art defences.

2. **Proportional or joint and several liability**

Joint and several liability, which the Directive leaves as an option to Member States, would apply in cases where several parties have contributed to the same damage. This concept is inherently unfair as it can lead to one party having to bear liability for the entire damage, even if it is only responsible for a small proportion of that damage. In contrast, proportional liability obliges each responsible party to restore the part of the damage it caused. The option for Member States to decide whether to apply joint and several liability or proportional liability could create serious discrepancies between Member States and result in distortion of competition.

Only application of proportional liability in all Member States would create an effective, fair and harmonised regime, saving financial and other resources and helping the environment by avoiding lengthy procedures.

3. **Financial Security**

A positive aspect of the Directive is that it does not provide for mandatory insurance or a fund solution. Restoration funds are inappropriate because they have proved to be inefficient, causing an unnecessary administrative burden and delays and generating other significant additional costs without benefiting the environment. New insurance products may be developed over time but they require an evaluation of insurance risks and hence a clear definition of restoration measures. Any proposals for harmonised and mandatory financial security, which the Commission may propose within 6 years, should allow for financial guarantees such as self-insurance and should not be restricted to mandatory insurance.

4. **Biodiversity**

Our industries have supported limiting biodiversity protection to areas covered by the EU Wild Birds and Habitats Directives. This could not be agreed. Instead, Member States

have the option to extend the application of the Directive to areas protected by national legislation, following the same principles as the EU Directives. This can lead to significant distortions.

**5. Definition of Damage and Remediation targets**

Annex I and II on the assessment and remedying of damage leave a lot of discretion to the national authorities. Member States should transpose these Annexes in a manner that reflects the risks involved and ensures cost-effectiveness.

**6. Marine Oil Pollution**

The well established regimes of the International Conventions on Oil Pollution have proven to be effective. Incidents covered by these Conventions are therefore left outside the scope of the Directive, provided, however, the relevant Convention has been ratified and is in force in the Member State concerned. The application of the Directive in addition to the Conventions on the same incident would have caused legal confusion and might have delayed payment for legitimate claims. It is now important to ratify outstanding Conventions (HNS and Bunker Oil Conventions) and to improve the liability scheme of CLC, the 1992 Fund and the Supplementary Fund in order to achieve due involvement of ship owners. This would also form an incentive to prevent accidents by using higher quality ships.

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