

Environmental

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The European Union Environmental Liability Directive

What's the purpose of the Directive?

The Directive is intended to prevent damage occurring to water, protected species, natural habitats and land, and to increase the responsibility of operators to address such damage when it does occur.

The Directive establishes a liability framework for the following categories of environmental damage:

- Harm/damage to species and natural habitats protected under the 1992 Habitats Directive and the 1979 Wild Birds Directive, for example Sites of Special Scientific Interest, Special Areas of Conservation and Special Protection Areas
- Pollution of waters covered by the 2000 Water Framework Directive
- Land contamination that creates a significant risk to human health

Under the Directive, 'environmental damage' does not include contamination by Genetically Modified Organisms, nuclear hazards or maritime incidents; the latter being dealt with by separate legislation to be issued after 2007. Third party claims, for example for personal injury and property damage, will continue to be dealt with via the existing civil liability regime in each Member State.

In the UK, as in many European countries, the legislative regime for dealing with water and land contamination is already well established. The main difference between the Directive and existing regimes in many countries will therefore be the potential extent of remedial measures required.

When did the Directive come into force?

The Directive came into force on 30 April 2004 when it was adopted by the European Parliament and the Council of the European Union. Member States were given until 30 April 2007 to transpose the Directive

into national legislation. Most Member States are unlikely to meet this deadline, although a number had prepared draft legislation with implementation planned in the near future.

Who could be affected?

As with much environmental legislation, the Directive is based on 'the polluter pays' principle. Operators of certain listed activities will be strictly liable for environmental damage caused by their activities. The Directive does not apply retrospectively and will therefore apply only to environmental damage caused after the local legislation comes into effect.

Listed activities include Pollution Prevention and Control (PPC), permitted installations, many waste management activities, licensed discharges to surface water and groundwater, and operations involving the use of various dangerous substances. For such activities, strict liability for all three categories of environmental damage would apply. Operators of all other kinds of activities will be responsible for damage to protected species and natural habitats if such damage arises from their fault or negligence.

What happens if an operator causes environmental damage?

If an operator becomes aware that environmental damage has occurred, or has the potential to occur, as a result of their activities, they would be required to alert the regulatory authorities. The Directive provides an outline of the nature, but not the precise scope, of remedial measures that operators are expected to take to mitigate environmental damage caused. If the responsible operator does not implement adequate measures, the regulatory authority may step in to undertake the works and recover the costs of doing so from the operator. The Directive does not limit the financial liability of operators.



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Remedial measures required following environmental damage to water or protected species are divided into:

- Primary Remediation – returning the damaged natural resources to (or towards) their original 'baseline' condition
- Complementary Remediation – measures to be carried out if baseline conditions cannot be achieved through Primary Remediation, potentially including the creation of an alternative habitat elsewhere
- Compensatory Remediation – compensation for an interim loss until Primary or Complementary Remediation is completed. This does not include financial compensation to members of the public

Remedial measures required following environmental damage to land are intended to ensure that contamination no longer poses a significant risk to human health.

The Role of Environmental Insurance

The Directive does not dictate the mandatory use of insurance to manage liabilities, but requires Member States to "take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators... with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive" (Article 14(1)). The effectiveness of the Directive, including the uptake of financial security measures, will be reviewed in 2010, with the possibility of harmonised mandatory financial security being introduced thereafter. Certain Member States are, however, known to be considering making financial security mandatory from 2007, which could include the use of environmental insurance.

One of the difficulties currently faced by insurers in responding to the Directive is that the precise scope, and thus the potential cost, of complementary and compensatory remediation required by the Directive has not yet been defined – this will be down to the

individual Member States. Nonetheless, environmental insurers have all responded with insurance products and policy modifications designed to address the liabilities presented by the Directive. The following case study illustrates a recent example placed by Willis. The further development and uptake of such products will inevitably depend on how Member States implement the Directive. However, it is already clear that the Directive presents both a challenge and an opportunity for the Environmental Insurance Market, with many clients facing increased environmental liabilities under the Directive.

EU Environmental Liability Directive Case Study

Willis has recently successfully placed environmental insurance for a global manufacturing business with operations in many European countries. While the limited pollution coverage provided under the company's general insurance programme was the predominant driver of the enquiry, the client was also concerned about potential future liabilities that could arise under the EU Environmental Liability Directive. As the client was looking to lock into long-term coverage which would extend beyond 2007 when the Directive is due to be implemented by Member States, it was important to build in as much certainty as possible for this exposure from day one.

Willis placed a five-year insurance programme to cover a range of potential liabilities associated with both historic and current operational risks, regardless of whether they arise from sudden and accidental or gradual pollution incidents. Despite concerns expressed within the insurance industry that potential liabilities associated with the Directive cannot be quantified at the current time, Willis was able to negotiate specific cover for the exposures of most concern to the client (exposures which would typically fall outside the scope of general and environmental insurance programmes). This included cover specifically for complementary and compensatory remediation as defined by the Directive.



"Environmental insurers have all responded with insurance products designed to address the liabilities presented by the Directive."

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