

EU Environmental Liability Directive 101

WHAT IS THE EU ENVIRONMENTAL LIABILITY DIRECTIVE (“ELD”)?

EU ELD reference Directive 2004/35/CE is EU wide legislation with the objective “to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society...”

This simple objective however, creates significant and **new liabilities** for costs, damages and losses for operators and companies that cause damage regulated by the ELD.

Administratively the ELD is transposed into the National laws of each Members State. All member states have to ensure their National Law meets the minimum requirements of the ELD. Some countries have chosen to extend this minimum requirement, by for example, extending the definition of protected species or choosing not to put in-place optional permit and state-of-art defences. Because each country is different any insurance must respond to the specific national Law implementing the ELD (see *Insurance*).

WHEN DOES IT TAKE EFFECT?

It is in-place across the EU.

European Parliament and Council as EU Law adopted it on 21, April 2004 with a Transposition deadline that expired on 30, April 2007.

All EU countries have now adopted the ELD into National Laws. In some countries the adoption is backdated to 30, April 2007 and this should be an assumed date for the purpose of insurance retroactive dates.

HOW DOES IT WORK?

The legislation creates new responsibilities and liabilities for those operators and operations where the ELD has strict liability.

Responsibilities:

- Duty to report an environmental damage or suspected damage to the regulator
- Duty to prevent damage to the environment - PREVENTATIVE COSTS
- Duty to take action where there is an IMMEDIATE THREAT

Liabilities:

- Land Damage – significant harm to human health
- Water Damage – water as defined in Directive 2000/60/EC
- Damage to protected species and natural habitats – biodiversity

For the first two liabilities noted, the EU already has a substantial body of regulation and law, which generally take precedence over the ELD, except where the ELD alone picks-up the liability.

To Learn More

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The last area – damage to biodiversity – is new and through the ELD there are proscribed losses and damages in relation to restoring damaged environments. Specifically the process of restoring environmental damage can involve all of the following:

"Primary"	Remediation is any remedial measure, which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;
"Complementary"	Remediation is any remedial measures needed to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;
"Compensatory"	Remediation is any action taken to compensate for 'interim losses' of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;
"Interim Losses"	Means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions, provide services to other natural resources, or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.

WHO DOES IT AFFECT?

The ELD affects everyone. However, only those operations and operators falling within the descriptions provided in Annex III to the ELD have strict liability and will feel the full force of all the liabilities, costs, damages and losses under the ELD. All others have fault-based liability.

Annex III includes (See attached listing):

- All operations licensed under the EU Integrated Pollution Prevention and Control Regulations (IPPC);
- Waste and waste management;
- Mining, quarries, extractive industries;
- Operations with consents to discharge to water; and
- Transport of hazardous materials (licensed).

IS INSURANCE REQUIRED?

The ELD expressly encourages all Member States to develop a system for compulsory financial security. The following have committed to develop such systems in relation to the ELD:

- **Portugal** (1st Jan 2010)
- **Spain** (after 30th April 2010)
- **Greece** (2011 – still in the draft)
- **Hungary** (2010)
- **Romania** (2010)
- **Bulgaria** (1st Jan 2011)
- **Slovakia** (2012)
- **Czech Republic** (1st Jan 2013)

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Financial security can take a number of forms, including, bonds, escrow accounts, letters of credit, and a suitable insurance policy. The latter is often the most effective and financially efficient and can be preferred by the authorities.

It must be noted that the ELD is not the only regulatory regime in Europe that can require financial guarantees, others include:

- Integrated Pollution Prevention and Control permits
- Waste management – landfill (bonds)
- Mining and quarrying licences

The exact arrangements are country dependent (National Laws) and Aon has the strength to provide advice and guidance from both a strategic and local perspective.

BUT AM I INSURED?

Unless a specific environmental program is in-place with a dedicated trigger for environmental damage, written to respond to the National Law implementation in the country of risk, the answer is NO.

In addition to any compulsory financial security requirements, there are also significant gaps in standard programmes for environmental damage.

The main coverage gaps are:

- Cover for environmental damage and in particular the restoration process as described above
- Cover for environmental damage from gradual events
- Cover for environmental damage caused by events other than pollution such as fire

I AM A COMPANY WITH AN ANNEX III EXPOSURE IN PORTUGAL, SPAIN, HUNGARY AND ROMANIA. WHAT STEPS SHOULD I BE TAKING NOW TO ADDRESS THE COMPULSORY FINANCIAL SECURITY REQUIREMENTS OF THE LEGISLATION IN THES COUNTRIES FOR 2010?

The main action is to closely monitor the situation in each country and be prepared to take appropriate action as soon as the specific details for each country become known and published. Although they have committed to some form of financial security, none has produced or published any rules or guidelines for implementation. Spain is adopting an approach based on a 'template' financial risk exposure assessment which is currently being finalised and which will be published. It is likely that financial security will be phased in over a period of time from the dates above in accordance with, yet to be published, official timetables. Irrespective of any future requirements for financial security, companies have unlimited liability under the terms of the EU ELD and National Law implementation.

Aon's international broker network and experience, coordinated through our European environmental team, will enable the right policy wording with the right insurer for the circumstances to be negotiated.

Where insurance is placed, it is important that the Insurer:

- Has an environmental department?
- Is organised to respond rapidly to complex environmental claims?
- Can demonstrate a long-term commitment to environmental protection – note claims may take several years to settle, perhaps decades!

Without attention to these issues, it is unlikely that the insurer will be able to respond as and when required. Expert response not only helps to control and mitigate losses, but also by controlling the situation can assist the insured in mitigating indirect business losses including reputation.

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ELD ANNEX III – OPERATIONS WITH STRICT LIABILITY UNDER THE DIRECTIVE

1. The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control(1). That means all activities listed in Annex I of Directive 96/61/EC with the exception of installations or parts of installations used for research, development and testing of new products and processes.
2. Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Council Directive 75/442/EEC of 15 July 1975 on waste(2) and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste(3).

Those operations include, inter alia, the operation of landfill sites under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste(4) and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste(5).

For the purpose of this Directive, Member States may decide that those operations shall not include the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes.

3. All discharges into the inland surface water, which require prior authorisation in pursuance of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances, discharged into the aquatic environment of the Community(6).
4. All discharges of substances into groundwater which require prior authorisation in pursuance of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances(7).
5. The discharge or injection of pollutants into surface water or groundwater which require a permit, authorisation or registration in pursuance of Directive 2000/60/EC.
6. Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC.
7. Manufacture, use, storage, processing, filling, release into the environment and onsite transport of:
 - a. dangerous substances as defined in Article 2(2) of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labeling of dangerous substances(8);
 - b. dangerous preparations as defined in Article 2(2) of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labeling of dangerous preparations(9);
 - c. plant protection products as defined in Article 2(1) of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market(10);
 - d. biocidal products as defined in Article 2(1)(a) of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market(11).
8. Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21 November 1994 on the

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approximation of the laws of the Member States with regard to the transport of dangerous goods by road(12) or in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail(13) or as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods(14).

9. The operation of installations subject to authorisation in pursuance of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants(15) in relation to the release into air of any of the polluting substances covered by the aforementioned Directive.
10. Any contained use, including transport, involving genetically modified micro-organisms as defined by Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (16).
11. Any deliberate release into the environment, transport and placing on the market of genetically modified organisms as defined by Directive 2001/18/EC of the European Parliament and of the Council(17).
12. Transboundary shipment of waste within, into or out of the European Union, requiring an authorisation or prohibited in the meaning of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community(18).

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