

LIABILITY FOR ENVIRONMENTAL DAMAGE



The implementation of the Environmental Liability Directive (ELD) in European Union (EU) Member States requires companies operating in the EU to take the action necessary to avoid causing significant damage to the environment and to rectify any significant damage that is caused. The remedial measures that are required under the ELD are generally broader than have been required under any previous environmental legislation.

The ELD is based on the precautionary principle and operators should take action to prevent environmental damage from occurring. Under the “polluter pays” principle the operator will be required to restore environmental damage where it has been caused. In either case, the environmental regulator must be notified and prevention or restoration plans agreed.

The regulation applies to those incidents that cause, or threaten to cause, damage to water resources or land contamination, which are the liability triggers of existing environmental legislation in many EU Member States. However, in addition the ELD has introduced an aspect of liability for damage to protected species and natural habitats, which has also been referred to as “biodiversity damage”.

As well as a requirement to clean up the environment back to its original baseline condition, there may be a need to improve or create an alternative habitat elsewhere, for example, if the damage is too severe to be restored, or if such restoration will take an extended period of time to be completed. This requirement applies not only to impacts caused by pollution

incidents, but conceivably extends liability to many other forms of environmental damage events, such as fire or flooding.

The ELD requires that Member States encourage the uptake of insurance and other forms of financial security for environmental damage. As a result, a number of Member States have introduced compulsory schemes for financial security, or plan to do so in the near future. The issue of whether to mandate compulsory financial security in all Member States is something that has already been reviewed by the EU and it is due to be reviewed again in 2013. As such, this is not something that will be allowed to slip off the agenda.

Insurance coverage for liabilities imposed under the ELD is typically not available under standard general liability insurance policies, although in certain countries an element of coverage may be sought through policy coverage extensions. The specialist environmental insurance market can provide a broad range of cover for environmental liabilities, including those implied under the ELD.

THE ENVIRONMENTAL LIABILITY DIRECTIVE

The full title of the ELD is “EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage”. The ELD originally set out a minimum requirement for Member States to apply when transposing the ELD into national legislation. Certain Member States chose to adopt more stringent measures.

In many Member States, the ELD applies to environmental damage caused by activities occurring after the date when the legislation was transposed, although liability for environmental damage caused prior to the transposition may apply when it relates to an activity that is still ongoing. It is important to note that the ELD does not displace an existing framework of environmental legislation in EU countries and as such, operators could face environmental liabilities under a number of different legislative regimes, not just from the implementation of the ELD.

DEFINING ENVIRONMENTAL DAMAGE

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

- Damage that has a significant **adverse effect on protected species and natural habitats**, also known as biodiversity damage. The significance of such effects is assessed against the baseline condition, taking into account factors such as the size of the population or habitat, its rarity value and its potential to recover naturally.
- **Damage to water resources** (e.g. pollution), including groundwater, rivers and other surface waters, such as coastal waters, where such damage significantly adversely affects the ecological or chemical quality or classification status of the water. Coastal water can include Territorial Waters and water of the Continental Shelf.
- **Land contamination** that creates a significant risk of human health being adversely affected.

PROTECTED SPECIES AND HABITATS

Protected species and habitats are defined under the ELD as including those listed in the Wild Birds Directive (Directive 79/409/EEC) and the Habitats Directive (92/43/EEC). The Habitats Directive protects over 1,000 plant and animal species and over 200 habitat types, including special areas and types of forest, meadow, and wetlands, etc. that are considered to be of European importance. In national legislation of certain Member States, the definition of “protected species and natural habitats” has been extended to include additional species and habitats of local and national importance.

OPERATOR DUTIES

Where there is an imminent threat of significant environmental damage, operators must immediately take all practicable steps necessary to prevent the environmental damage from occurring and must notify the relevant authority if such actions do not eliminate the threat. If environmental damage has already occurred, further damage must be prevented and the relevant authority notified.

Failure to do so, or failure to comply with a remediation notice served by the authority, is a criminal offence under the ELD, for which the operator, a director or other responsible employee may be held liable.

In the event that environmental damage occurs, the damaged environment, including the public amenity value apportioned to the resource, must be restored to “baseline” conditions by performing “primary remediation”. This may include, for example, the requirement to clean up pollution and undertake restocking of species affected by the event. In a case where the environment cannot be fully restored, for example if the habitat has been too badly damaged, the responsible operator may be required to provide an alternative habitat of equivalent “value”. Termed “complementary remediation”, this could include the creation of, or restoration of, a habitat at an alternative site. It may also be necessary to undertake interim measures, termed “compensatory remediation”, to compensate the environment in the period whilst other remedial measures are being undertaken.

An operator is not liable for preventative or remedial costs if they can demonstrate that the environmental damage (or threat of it) was caused by a third party, or as a result of complying with an instruction issued by a public authority. Provided the operator has not been at fault or cannot be considered negligent, Member States may also allow defences in cases where a potentially damaging activity has been authorised by the regulator (termed the “permit defence”), or where environmental damage was not expected to occur, based on the state of “scientific and technical knowledge” (termed the “state of the art” defence). Notwithstanding this, interpretation and implementation of the ELD with regards to this matter does vary between EU Member States, so it is important for companies to understand the regulations in each country in which they operate.



FINANCIAL SECURITY REQUIREMENTS

The ELD requires Member States to “take measures to encourage the development of financial security instruments”, such as insurance, with the aim of enabling companies to cover their responsibilities and potential liabilities under the ELD. Certain Member States have already introduced compulsory financial security schemes, whilst others are proposing to do so in the future. These are summarised below (as per September 2012):

COUNTRY	FINANCIAL SECURITY REQUIRED?
Austria	No
Belgium	No
Bulgaria	Yes The scheme was introduced in 2011 by Liability for Prevention and Remedying of Environmental Damage Act.
Cyprus	No
Czech Republic	Yes As of 01/01/2013 a compulsory scheme is approved for environmental risks analysis and subsequent financial back-up.
Denmark	No
Estonia	No
Finland	No
France	No
Germany	No Though Environmental Liability Act 1990 requires operators of certain hazardous activities to hold environmental insurance.
Greece	No But there is an intended compulsory scheme, which has been deferred.
Hungary	No Compulsory scheme was planned to commence by 2011, but it seems that this has been deferred.
Ireland	No But permitted activities require financial security under separate legislation.
Italy	But there are separate requirements under the legislation of the Veneto Region in terms of general pollution liability and the national legislation related to strict financial guarantees (bonds) required for waste management or such specific hazardous activities.
Latvia	No
Lithuania	No
Luxembourg	No But the growing trend is for the authorities to impose to companies in their operating permit for certain activities to evidence appropriate insurance for their potential environmental liability.
Malta	No
Netherlands	No
Poland	No But authorities can request financial guarantee when issuing permits.
Portugal	Yes Financial security is mandatory for the activities specified in Annex III of the Directive. Guidance regarding limits, deductibles, etc. is still awaited.
Romania	No However, legislation states that compulsory scheme will be introduced.
Slovakia	Yes From 1 July 2012 bank guarantee or other form of payment security is required.
Slovenia	Yes Bank guarantee or other form of payment security is required after environmental damage has occurred.
Spain	No But compulsory scheme planned for implementation following completion of risk assessment procedures. The current estimate is 2013, which is delayed compared to the original target. The delay is due to finalisation of the risk assessment process required in order to set the magnitude of security/provision required. Our understanding is that the risk assessment process for “Annex III” activities is split into two: 1/ For “Seveso Directive” operations (i.e. the higher risk end of the spectrum) a site-specific risk assessment is required. 2/ For other Annex III operations, the process for setting the level of security/provision is on the basis of a sector-specific rather than site-specific risk assessment.
Sweden	No
United Kingdom	No

The European Commission will periodically review progress on the issue of financial security, although the Commission currently has no plans to implement an EU-wide compulsory financial security requirement. This matter will be reviewed in 2013, with the possibility that a harmonised scheme will be introduced thereafter.

Notwithstanding that requirements to prove adequate financial security have not yet been implemented in most EU countries, an operator will be required to show that adequate financial resources are available for remediation should an environmental damage event occur.

ENVIRONMENTAL INSURANCE

The new liabilities implied under the ELD will not typically be covered under a standard general liability insurance policy, and indeed may even be specifically excluded. Certain general liability insurers, however, are able to provide specific wordings designed to extend policies to provide an element of cover for ELD liabilities. The specialist environmental insurance market can provide a broad range of cover for environmental liabilities, including those inferred under the ELD.

In addition to providing cover for the full scope of primary, complementary and compensatory remediation that may be required under the ELD, it is possible to obtain environmental insurance cover for necessary preventative measures. Furthermore, coverage is not limited to environmental damage caused by pollution incidents, but will generally include other triggers, such as remediation required following the physical destruction or disturbance of habitats.

The environmental insurance market is able to offer local policies in an increasing number of EU Member States although cover can be arranged under the EU Freedom of Services provisions where the insurer is located in any EU Member State.

UNDERWRITING INFORMATION REQUIREMENTS

The information required to obtain insurance coverage for ELD liabilities will vary, depending on the nature of the insured's business. Typical underwriting information requirements will include the following:

- Description and turnover of business operations undertaken by the insured, including activities at third party sites and any transportation activities
- Location details of sites operated by the insured.

Much of the information required is likely to be contained in property and/or casualty insurance market presentations. In certain cases this may need to be supplemented by additional environmental information.

Insurance survey reports and site investigation information may also provide some of the relevant information required and the underwriting process is typically iterative, therefore requiring a response to additional information requests by underwriters. Despite this, there has not, to date, been any significant insurer requirement for environmental reports to establish a baseline benchmark for ELD liabilities.

For further information please contact your Marsh representative, or any member of the Environmental Practice on +44 (0)20 7357 2608

The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such.

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HOW MARSH CAN HELP

At Marsh, we recognise that finding the 'right' insurance solution to cover key environmental exposures is crucial in ensuring that your business is adequately protected. Our team of environmental specialists has extensive experience of advising clients on all aspects of environmental insurance.

Services provided include:

- Preparation of feasibility study, outlining the potential role of environmental insurance in managing the specific environmental risks of your business.
- Benchmarking studies to determine the approach of peers and companies in related industry sectors.
- Review of existing insurance programmes to advise on adequacy of cover for environmental risks.
- Transactional due diligence to advise on the adequacy of cover held by, or proposed for, a target business or property.
- Market presentation and insurer negotiations tailored to your requirements, resulting in suitable quotes and successful placement.
- Quantification of environmental liabilities and assessment of insurability.
- Assistance in obtaining appropriate scope for land remediation and environmental improvements.
- Virtual data room facilities.