



ENVIRONMENTAL LIABILITY DIRECTIVE

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Regulation of Agrochemicals in Europe

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TOPICS COVERED

- 1. Key issues of scope and definition for PPP sector.**
- 2. PPP challenges.**
- 3. Implementation status.**
- 4. What to do next?**

**KEY ISSUES OF SCOPE & DEFINITION
FOR PPP SECTOR**

OUTLINE

*Directive 2004/35/CE on environmental liability
with regard to the prevention and remedying of
environmental damage*

- **Strict Liability (and causation)**
- **Multiparty liability**
- **Environmental Receptors**
- **“Triggers”**
- **Duty to Prevent**

STRICT LIABILITY

Directive applies **strict liability regime** (*no fault or negligence necessary*) to **key PPP activities**'':

Manufacture

Processing

Filling

Onsite transport

Storage

Use

Release into the environment

[Article 3(1) and Annex III para. 7]

STRICT LIABILITY

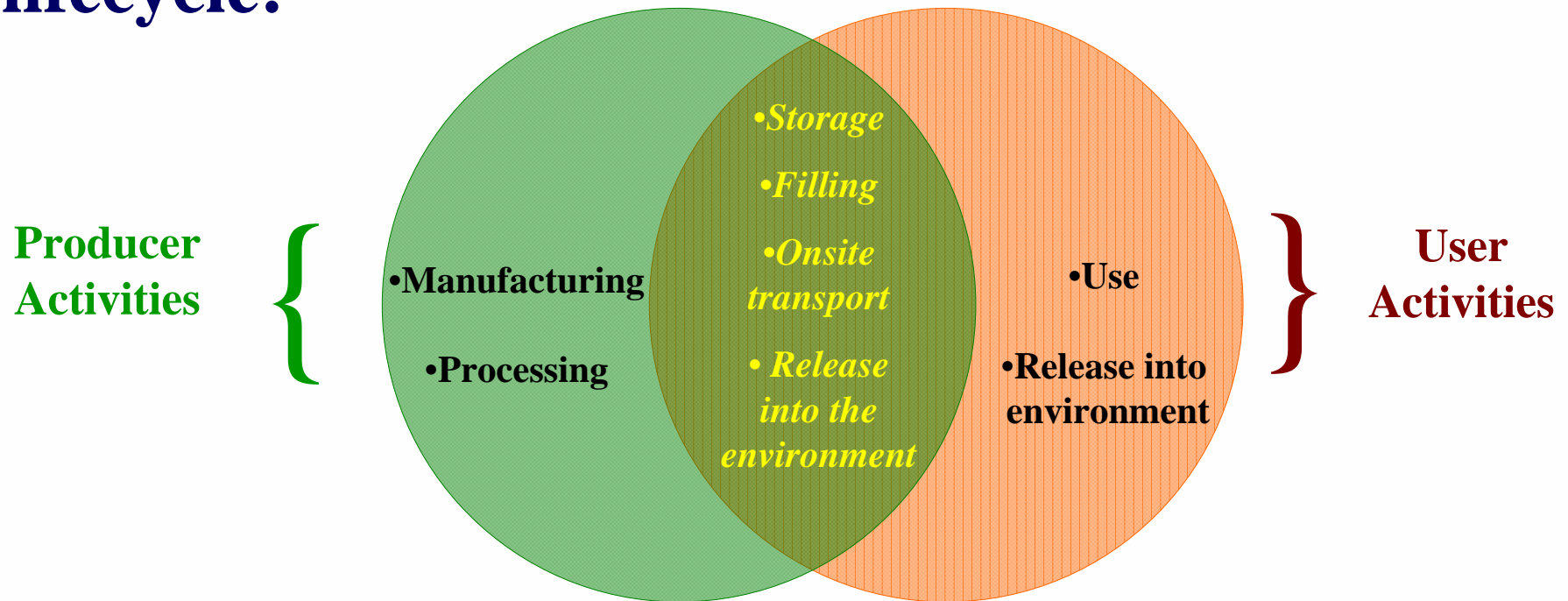
Applies only to “occupational” PPP activities:

‘...any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character.’ [Article 2(7)]

Directive focussed on professional applications (does not cover recreational gardening for example).

STRICT LIABILITY

In identifying who is liable, some activities more obviously relate to certain points in the PPP lifecycle:



[Article 3(1)(a) and Annex III para. 7]

STRICT LIABILITY

However, the activity (of itself) is NOT definitive in determining who is liable under the Directive.

CAUSATION is the crux of strict liability:
who caused the environmental damage/imminent threat thereof?

In every case MUST analyse the “chain of causation”.

STRICT LIABILITY

So, for **diffuse pollution**:

‘This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.’ [Article 4(5) see also Recital 13]

This is NOT a general exemption for PPP use. Simply a restatement of the central *causation* principle.

MULTIPARTY LIABILITY

Liability NOT limited to one “operator”.

‘operator’ means any natural or legal, private or public person who operates or controls the occupational activity
or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.’

An incident of damage can be caused by several operators (collectively) e.g. manufacturer of PPP and farmer using it.

MULTIPARTY LIABILITY

Directive provides:

‘This Directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product.’ [Article 9]

‘...Member States may take into account, in particular, the specific situation of users of products who might not be held responsible for environmental damage in the same conditions as those producing such products...’ [Recital 22]

Beware “Deep Pockets” approach over “Polluter Pays”.

ENVIRONMENTAL RECEPTORS

Only parts of the environment are covered:

Protected Species and Natural Habitats

- *migratory birds - regularly occurring species and their habitats;*
- *protected birds and their habitats - for whom “special protection areas” have been designated (under Annex I, Birds Directive);*
- *protected animal and plant species and their habitats - for whom “special areas of conservation” have been designated (under Annex II, Habitats Directive);*
- *strictly protected animal and plant species and their breeding sites or resting places (under Annex IV, Habitats Directive);*
- *designated natural habitats - designated “special areas of conservation” (under Annex I, Habitats Directive); and*
- ***additional Member State designated habitats or species (for an equivalent purpose to the Birds and Habitats Directives).***

AND Waters covered by the Water Framework Directive and ***Land*** where contamination creates a significant risk of human health being adversely affected.

Clear need to define potential PPP industry risk exposure.

“TRIGGERS”

For those parts of the environment covered – what is the trigger for liability?

Not every effect is covered.

“Damage” is a ‘*measurable* adverse change’. [Art. 2(2)]

Consider non-target species’ “dips” after spraying.

“TRIGGERS”

Protected Species and Natural Habitats

Threshold: ‘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, taking account of the criteria set out in Annex I’ [Art 2(1)(a)]

Annex I lists damage which ‘does not have to be classified as *significant damage*’, including: ‘damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.’

“TRIGGERS”

Waters

Threshold: ‘*damage which...significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential*’ as defined in the Water Framework Directive.

Land

Threshold: ‘*any land contamination that creates a significant risk of human health being adversely affected as a result of direct or indirect introduction, in, on or under land, of substances, preparations or micro-organisms*’.

“DUTY TO PREVENT”

‘Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures’. [Art. 5(1)]

‘...in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible.’ [Art. 5(2)]

Need for working practices (at all stages in PPP lifecycle) to reflect this and notification mechanisms to be in place.

DEFENCES?

‘The Member States may allow the operator not to bear the cost of remedial actions [i.e. not preventative]...where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event; [“permit defence”]

(b) 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.’ [“state of the art defence”]

[Art. 8(4)]

PPP CHALLENGES

OUTLINE

Two fundamental conflicts arise:

- **Manufacturer v User**
- **Research based manufacturer v Generic**

MANUFACTURER v USER

Multiparty liability creates unavoidable tensions between manufacturer and user.

Inevitable questions:

- **what *caused* damage (PRODUCT OR USER)?**
- **(IF BOTH) in what *proportions*?**

A “*not me but him*” scenario will often result.

Apply the “*BUT FOR*” test.

MANUFACTURER v USER

Manufacturers forced into **shifting responsibility onto users** in as much as is possible (*commercially sensitive*).

Manufacturers need to aim to ensure that following **terms of use** ensures that no damage occurs.

i.e. damage only occurs when user misuses (the *misuse* breaks the chain of causation).

MANUFACTURER v USER

Implies *possible need for* stricter:

- Labelling
- Handling requirements
- Contractual terms (distributors, users etc.)
- Product stewardship (at end of life)

Each company will have to assess **where to draw the line on the *risk continuum***. Influence of insurers may be felt here.

RESEARCH BASED MANUFACTURER v GENERIC

Assuming that a manufacturer is (wholly or partly) responsible:

Evidential problems may arise between producers concerning whose product it is that actually caused the damage?

Are further mechanisms needed to distinguishing between products?

IMPLEMENTATION STATUS

IMPLEMENTATION STATUS

Deadline 30 April 2007 but...

Notification to Commission

Full	Partial	Imminent
Italy Lithuania Latvia Hungary Germany Romania Slovak Republic Sweden Spain Estonia Cyprus Malta	Austria Belgium Czech Republic Poland	Bulgaria Denmark

WHAT TO DO NEXT?

INDIVIDUAL COMPANIES

1. Review **manufacturing & use practices** (location of facilities and use of products in sensitive areas, handling practices, notification protocols, etc.)
2. **Speak with insurers** (where available).
3. **Review commercial terms**, terms of use, distribution agreements, stewardship programmes etc. with liability Directive in mind (*shifting responsibility*).
4. Consider if further **product identification mechanisms** are needed.
5. Factor this into **due diligence** for acquisitions.

PPP INDUSTRY

1. **Follow transposition of Directive and lobby on inclusion of defences and treatment of multiparty liability. (EC Env. legislation only creates common baseline – not full harmonisation).**
2. **Assess total exposure in EU (water, land, species and habitats).**
3. **Organise mechanism for gathering and feeding information into the Commission’s 2010 review (Member State report in 2013) of this Directive (financial security and effectiveness of scheme) to influence “round II”.**



QUESTIONS?

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