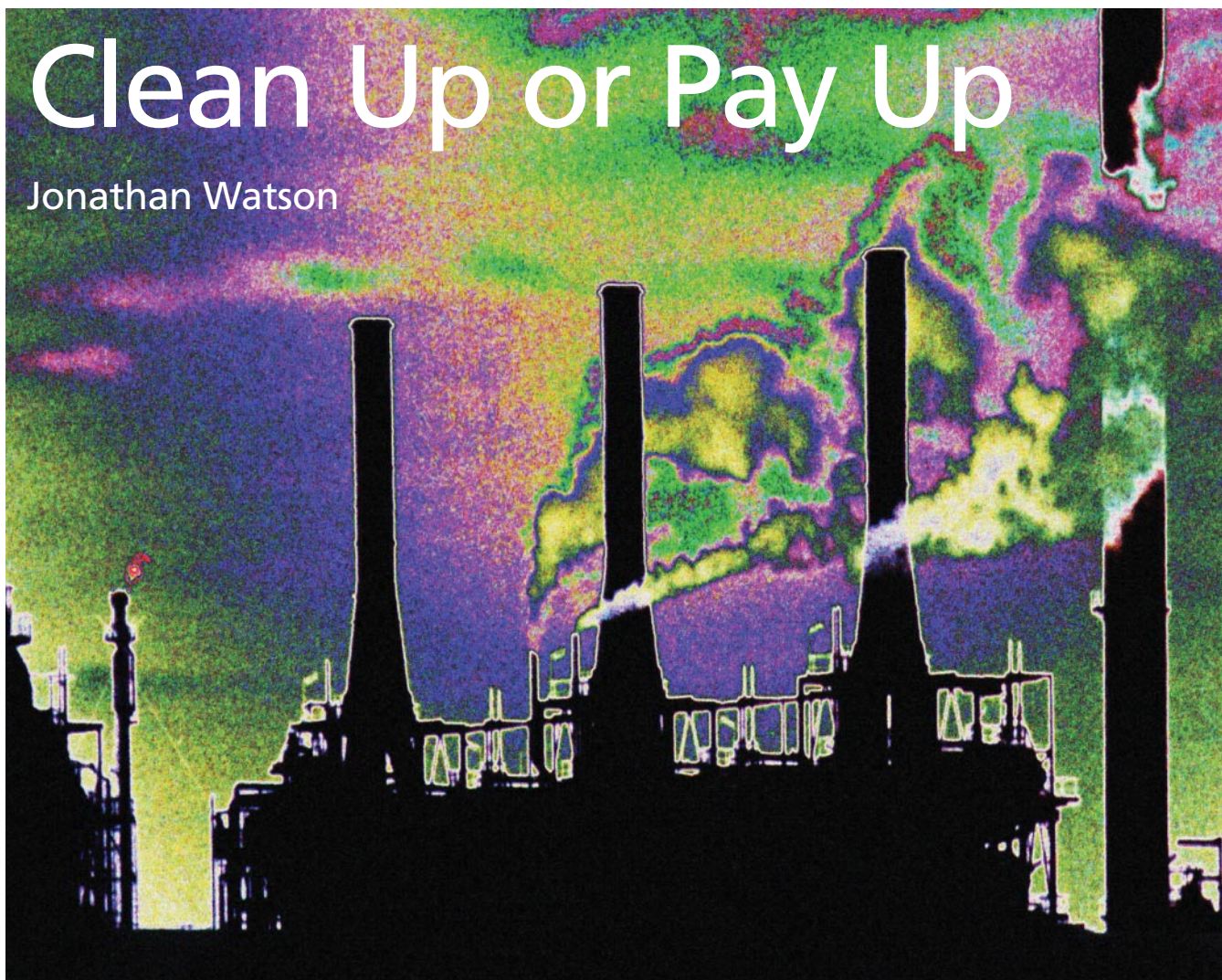


# Clean Up or Pay Up

Jonathan Watson



After years of wrangling, the EU Environmental Liability Directive finally came into effect last year. However, with some of the most radical measures removed from the law, how much impact will it really have?

**T**he EU Environmental Liability Directive, adopted in April 2004, establishes a legal framework based on the ‘polluter pays’ principle. Its aim is to ensure that environmental damage is prevented or repaired and that those who caused it pick up the clean-up costs, rather than the taxpayer. Initial inspiration for the measure came from the Seveso chemicals factory accident in 1976, the fire at the Sandoz plant in Basle in 1986 and oil spills such as the Amoco Cadiz, the Erika and the Prestige.

## Benchmark

The European Commission, which fought a long and bitter battle with industry, environmental NGOs, the European Parliament and EU Member States to get the legislation finalised, argued that the measure set a new benchmark in environmental law. ‘The new

Directive should be a strong incentive to prevent environmental damage from happening at all,’ said environment commissioner Margot Wallström.

Environmental NGOs, however, were not happy. The European Environmental Bureau criticised the Directive as a ‘green light for polluters’, while groups such as Greenpeace regretted that it was ‘not nearly as ambitious’ as the Commission’s previous proposals. Over 15 years after discussions on an environmental liability regime first began, many believed that its final shape reduced its impact so much as to make it almost irrelevant.

The main reason for this is that the Parliament and the Member States simply could not agree on several key points. Many of the Directive’s provisions proved highly controversial, and ultimately the only way to get something on the statute book was to leave out

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the proposals that generated the fiercest protests.

One of these suggested there should be a mandatory requirement for companies to take out insurance against environmental damage. This was supported by environmental NGOs and MEPs, but Europe’s insurance industry argued that it would be impossible to enforce. ‘The insurance markets have no experience in this particular field and quantification of risks is currently impossible, which would mean insurance not being available for most businesses,’ said Jean-Louis Marsaud, director of European insurance association the CEA.

Ultimately, the conciliation committee – which is convened when Parliament and Member States cannot reach agreement on measures being drafted using the ‘co-decision procedure’ – decided that the only way around this was to make insurance voluntary. However, the Directive does require Member States to encourage insurance companies to develop schemes that will cover environmental damage, and orders the Commission to publish a report in five years’ time that will show whether this market has developed. If not, then compulsory insurance may be imposed to force the pace of change.

### **Disappointment**

The absence of this provision was the reason behind much of the disappointment with the Directive. Greenpeace, for example, said that the absence of guarantees on financial security ‘fails to shift the financial burden of environmental repair from the public purse to the companies responsible’.

The law also allowed Member States to enable polluters to avoid paying for environmental damage they had caused if they could show that they had explicit authorisation to carry out the activity that caused the damage. Similarly, polluters may also evade liability if they can show that all the information available at the time the damage was caused suggested that the activity behind it was harmless. The Directive leaves Member States free to accept these defences against liability, known as the ‘permit’ and ‘state

of the art’ defences, if they so choose. And in other limitations, the Directive does not cover nuclear pollution or marine oil pollution.

### **Limited effect**

Many members of the legal profession agree that the Directive was not nearly as troublesome for companies as it could have been. Ian Salter, a partner at Burges Salmon and the head of the firm’s environmental unit, tells IBN: ‘Including the permit defence was a big win for industry, as most industrial activities usually have some form of authorisation.’

Maria Cull of Herbert Smith adds that the amount of time taken to produce and then agree the final terms of the measure also limited its importance. ‘The Directive took so long to develop that many of its provisions have already been covered in many countries by other pieces of national legislation, such as contaminated land laws,’ she says.

However, leaving decisions on which defences apply in the hands of individual Member States is no use to multinationals operating across the EU’s single market, says barrister Darren Abrahams of Steptoe & Johnson: ‘These companies need regulatory clarity. The fact that some Member States will adopt some of the defences while others will not means that companies face a range of different thresholds for liability for the same activity or product, depending upon where in the EU the environmental damage occurs. This doesn’t make good environmental sense and it doesn’t make compliance any easier. It would have been better to agree a harmonised approach on defences for the whole EU.’

Another perceived weakness of the Directive is that it is not retrospective, so it cannot be used to prosecute companies that have polluted in the past. ‘This means it is something companies can prepare for,’ says Salter. It also makes it less stringent than some national laws such as the UK’s contaminated land regime, which does cover historic damage to the environment.

Despite the importance attached to the Environmental Liability Directive as it was being drafted, other EU environmental measures now

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seem to be more pressing for companies. These include the directives on integrated pollution prevention and control (IPPC), on waste from electrical and electronic equipment (WEEE) and on the reduction of hazardous substances (RoHS). 'IPPC is costing industry millions of pounds, and WEEE is expensive too,' says Cull. In addition, the European Commission has proposed a new system for registering and assessing chemicals in Europe, known as REACH, which Abrahams says is 'one of the biggest things to happen in EU environmental law in the last decade'.


#### **A damp squib?**

So is the Environmental Liability Directive a damp squib? Far from it, says Abrahams. 'There is now a common baseline – the Directive has filled gaps in national liability regimes.'

Professor Lucas Bergkamp of Hunton & Williams also argues that the Directive takes Member States into uncharted territory. 'The Directive imposes liability for three types of damage: land damage; water pollution; and damage to biodiversity. Water pollution was not covered in all the Member States, and biodiversity was not covered in any.'

Although the liability law may have less of an impact than some had initially hoped, it has played its part in pushing environmental issues up the corporate agenda. Abrahams says: 'Serious companies are taking the environment seriously. They are very protective of their brands and reputations, and often just want to be told how to comply.'

Bergkamp says that the most important development in recent years has been stricter enforcement of EU rules. 'Enforcement is probably the most significant concern for companies. In the past, there was a lot of EU law on the books but it was not always enforced vigorously. This is now changing rapidly.'

However, companies still have to wait to find out the exact nature of the liability regime they are likely to face in Europe in the coming years. Member States have until 2007 to transpose the Directive into national law, but none has progressed beyond the discussion stage so far. 

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