

EU Environmental Liability Regime In Force

On April 30, the first ever EU-wide environmental liability regime came into force. A broad range of activities and products already regulated by EU law will now become subject to strict liability. This means that an operator will become liable without committing any fault or negligence. The key test is whether the “operator” (a liable party) *caused* the damage in question. An operator includes any person operating or controlling the activity in question and the holder of a permit or authorization for such an activity. Not all of the environment is covered - the regime covers damage to protected species and natural habitats, water and land (or imminent threat of such damage). It does not cover “traditional damages” (economic losses or personal injury claims). Only very narrow defenses and exemptions will apply. There will be no mandatory central fund, insurance or financial security requirements. The new rules provide a common baseline for environmental liability across the EU but do not set a ceiling, so each of the 25 EU Member States will be able to adopt stricter standards (creating inevitable difficulties for multinational corporations).

STRICT LIABILITY ACTIVITIES	
The key activities subjected to strict liability are all defined by reference to existing EU regulatory measures:	
1.	Manufacture, use, storage, processing, filling, release into the environment and onsite transport of: <ul style="list-style-type: none"> • dangerous substances; • dangerous preparations; • plant protection products; and • biocidal products.
2.	Any deliberate release into the environment, transport and placing on the market of genetically modified organisms (“GMOs”) and any contained use, including transport, involving genetically modified micro-organisms (“GMMs”).
3.	Operation of IPPC permitted installations.
4.	A wide range of waste management operations , including collection, transport, recovery and disposal of waste and hazardous waste and operation of landfill sites and the incineration plants. Transboundary shipment of waste within, into or out of the European Union.
5.	Authorized discharges into the inland surface water and groundwater of dangerous substances and water abstraction.
6.	Transport of dangerous goods or polluting goods by road, rail, inland waterways, sea or air.
7.	Operation of air pollution permitted installations.

WHAT PARTS OF THE ENVIRONMENT ARE COVERED?

It is not *any* damage to the environment that will trigger liability. Only certain parts of the environment are covered. There are three main categories:

1. Protected Species and Natural Habitats:

- **Regularly occurring migratory birds and their habitats;**
- **Protected birds and their habitats for whom “Special Protection Areas” have been designated;**
- **Protected animal and plant species and their habitats for whom “Special Areas of Conservation” have been designated;**
- **Strictly protected animal and plant species and their breeding sites or resting places;**
- **Natural habitats designated as “Special Areas of Conservation”;**
- **Additional Member State designated habitats or species (for an equivalent purpose to the Birds and Habitats Directives); and**
- **Special Protection Areas and Special Areas of Conservation, which comprise the “Natura 2000 Network” and account for an estimated 14% of the EU.**

2. Waters:

- **Those covered by the [Water Framework Directive](#).**

3. Land:

- **Where contamination creates a significant risk of human health being adversely affected.**

WHO IS LIABLE?

An “operator” is “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 authorization for such an activity or the person registering or notifying such an activity”.

DEFENCES

Each Member State will be able to choose whether the two limited defences may be relied on by operators (i.e., these defences will *not* be included in the legislation of some Member States - this will be a political choice). Where the defences apply the operator will not have to pay for the cost of remedial action (as long as it was not at fault or negligent). The defences are:

- **Where the emission or event causing the environmental damage was fully in accordance with an authorisation or applicable national laws (the so called “*permit compliance defence*”); or**
- **Where the emission or activity or manner of using a product 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 (the so called “*state of the art defence*”).**

POINTS TO WATCH

National implementation needs to be watched closely because Member States will be able to:

- **Apply more stringent rules;**
- **Choose which defences apply;**
- **Choose how to apportion responsibility where two (or more) parties are liable;**
- **Widen the territorial application of the Directive to additional protected sites and species; and**
- **Take advantage of the ambiguities in the Directive, which may lead to differing interpretations as to its minimum requirements.**

Companies should now be thinking about how to build compliance programmes in order to limit potential exposure to liabilities.