AVOSETTA QUESTIONNAIRE

ENVIRONMENTAL LIABILITY DIRECTIVE

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I. Can you give some concise information about your national environmental liability system?

- Are there special provisions on civil liability for environmental damage?

Generally, the common law (ie judge made law based on cases) applies, with only contingent coverage of 'environmental' damage. Beyond the common law, Nuclear Installations Act 1965 imposes strict liability on civil nuclear installations (ss 7-10), as does Environmental Protection Act 1990 (s 73(6)) in respect of waste (where there has been a criminal offence). Both are limited to traditional forms of damage (property or the person). Merchant Shipping Act 1995 (ss 153-154) extends liability to some 'environmental' damage.

- Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage? Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution)?

The most important provisions apply to contaminated land (Part 2A Environmental Protection Act 1990) and water (Water Resources Act 1991, ss 161, 161A-D).

The contaminated land scheme requires clean up when contamination gives rise to 'significant harm' or 'significant possibility of such harm' (ie risk based) or significant pollution of waters. Liability basically rests on the person who caused or knowingly permitted the contamination, or if they cannot be found the current property owner or occupier. Liability extends to historic pollution.

The Water Resources Act gives the Environment Agency powers to require a polluter to prevent or restore damage, or to do so itself and recover costs.

These regimes are not limited to specific activities, unlike the Directive. Further provisions for remediation of harm can be found in many environmental licensing schemes, eg IPPC, Waste Management Licensing.

- Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

Yes, with the exception of Convention on Civil Liability for Bunker Oil Pollution Damage (2001); Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996); Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (1989).

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

- Has Directive 2004/35/EC already been fully implemented?

No. Responses to this questionnaire are clearly provisional. No response in this questionnaire means an issue has not been discussed by government.

- If not, is it under way?

Formal consultation began 1 December 2006 and closed 28 February 2007. Second consultation on draft legislation expected late summer/early autumn. (References below are to Department of Environment, Food and Rural Affairs (DEFRA), *Environmental Liability Directive: Consultation document on options for implementing in England, Wales and Northern Ireland*, http://www.defra.gov.uk/environment/liability/index.htm#1).

The Parliamentary Environment, Food and Rural Affairs Select Committee is to report on the Directive, and heard evidence from the minister on 13 June. This gives a good indication of current government thinking on implementation. Details are available at http://www.publications.parliament.uk/pa/cm/cmenvfru.htm

Have deficiencies of the Directive been identified during national discussions?

2.2. General approach of implementation:

- Has your country reduced the level of environmental protection as a consequence of the Directive ?

No intention to do so.

- Did your country opted for a comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act?

Legislation will be brought forward for consultation in autumn 2007.

- Did your country opted for amending several pieces of legislation?
- Did your country opted for a combination of these 2 approaches?
- Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?

Government's 'strong presumption' is for minimum transposition. Government is however consulting on the possibility that there may 'exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement' to go beyond the Directive – specifically by implementing consistently with existing strict liability provisions (paras 2.4-2.5). Note that in some respects existing liability provisions go further than the Directive (especially in application to all activities, defences), but in others the Directive goes further (eg complementary/compensatory remediation).

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

- How is the definition of environmental damage implemented?

Biodiversity damage - government's preferred approach is to apply a test of 'significant adverse effect on reaching or maintaining favourable conservation status', focusing on damage to Natura 2000 sites, 'but which takes account of the significance of the particular site or sites to the conservation status of the habitat or species over its natural range' (para 3.5). This has been criticised as too narrow an approach.

Water damage – government has observed that there is a potential divergence between a 'significant' adverse effect, and change in status under the Water Framework Directive. Guidance is to be provided 'setting out in more detail the criteria that the competent authority should consider in determining "significant adverse effect"', drawing on standards under Water Framework Directive (paras 3.10-3.11).

Land damage - government intends to use the same criteria as the contaminated land regime - contaminated land is "any land … in such a condition, by reason of the substances in, on or under land, that –(a) significant harm is being caused or there is a significant possibility of such harm being caused …". Reference to 'organisms and micro-organisms' will be added (for Annex III activities only). Note that 'significant harm or significant possibility of significant harm' is required for contaminated land, not obviously consistent with the Directive. In respect of human beings, 'significant harm' means 'death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions.'

- Did your country included in the notion 'protected species and natural habitats' habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))

DEFRA consulted on including 'sites of special scientific interest', although preference is not to. Mandatory remediation of SSSIs under the Countryside and Rights of Way Act 2000 applies only if a criminal offence has been committed.

- Is land damage protected just in case of significant risk of adverse effect on human health?

'Significant harm' under the contaminated land scheme does apply beyond human beings, to 'any ecological system, or living organism forming part of such a system' (within particular protected locations), property such as crops or animals, and property in the form of buildings. But the intention of Government seems to be only to borrow the 'human beings' element of the definition of contaminated land.

- When is the conservation status of a natural habitat taken as favourable?
- What about the definition of "operator"? Are persons 'to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of the permit or authorization for such an activity or the person registering or notifying such an activity" included? (art. 2.6)

2.3.2. Scope

- Did your country opted for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

The preference of government is for minimal transposition. However, the possibility is raised that for reasons of simplicity and consistency with existing legislation, strict liability may apply to a wider range of activities in line with existing legislation.

2.3.3. Exceptions

- Which are the exceptions to the scope of the liability regime in your country? (art 4)

Government proposes adopting all exceptions, subject to an 'all reasonable steps' proviso to Art 4(1)(b) (para 3.43).

- What about the permit defence and the state of the art defence (art. 8.4)?

Government's preference is to apply the permit defence where the Directive goes beyond existing liability (existing liability in the UK generally provides no permit defence). The Welsh Assembly proposes to disapply permit defence in respect of GM activities (paras 3.60-67). Government proposes to apply the state of the art defence (para 3.68).

Both defences will apply *before* remediation takes place (ie no obligation to remediate), rather than as cost recovery after remediation. It appears that preventive measures will be required. There is no intention to provide for recompense by the State.

2.3.4. Preventive and remedial actions

- When are preventive (art 5) and remedial (art 6) actions taken by the operator?

The operator is required to prevent an imminent threat of damage, and if there is damage 'immediately' to take all practicable steps to control, contain, remove, or otherwise manage the pollutants or damage, to minimise the effects. In the longer-term, the operator is required to restore the environment. (para 1.7)

- Which is the role of the competent authority?
- Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ? Are these discussions public ?
- Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

DEFRA is to develop technical guidelines on Annex II.

2.3.5. Preventive and remedial costs

- Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?

Consulting on whether to leave this to the general law or specify particular means of security.

- Is there a special provision to give effect to art. 8.3, *in fine* (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial actions)? Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities ?

Government construes Art 8(3) as a defence, and proposes to implement unless there is a contractual relationship between operator and 3rd party. *Preventive* measures will be required of the operator, subject to cost recovery, but the preference is for Art 8(3) to apply *before* remedial measures are taken. Government seems not to be in favour of reimbursement by the competent authority in cases of unidentifiable third parties (paras 3.55-57).

2.3.5. Cost allocation

- Are there national provisions within the meaning of article 9?

Government is consulting on this. In the common law, it depends on whether damage is 'divisible' (proportionate liability) or 'indivisible' (joint and several liability). A complicated form of joint and several and proportionate liability applies to contaminated land – basically, certain 'appropriate persons' might be excluded from liability (eg for sale with knowledge). Their 'shares' are not deducted from the responsibility of the remaining 'appropriate persons', who are responsible for the entire damage, but in proportionate shares. Joint and several liability under the Water Resources Act.

2.3.6. Competent authority

- Which authority or authorities were designated for the purposes of article 11?

Environment Agency (land and water) and English Nature (biodiversity).

- Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)

Consulting on possibility of criminal offences

2.3.7. Request for action

- Which of the alternatives listed in art. 12.1. were chosen ?
- Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damager ? (art. 12.5)

Government's preferred position is not to apply article 12 in cases of imminent damage.

- What type of review procedure is available under national law ? (art. 13)

Disappointingly, there is no consultation on 'access to justice'. Normal judicial review will presumably apply. Standing is not a problem for environmental interest groups, but grounds for review are limited, and costs are a serious barrier.

2.3.8. Financial security

- How was article 14 implemented?

'There are no transposition or implementation options associated with this provision' (para 4.20)

2.3.9. National law

- Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)

As above – consulting on implementing in line with existing provisions, otherwise no.

- Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)

2.3.10. Temporal application

- How was article 17 implemented?

Consulting on this - there is no 30 year rule in existing national legislation.

2.3.11. Transboundary environmental damage

- How the system works in case of environmental damage in a transboundary context ?