Transposition of the Environmental Liability Directive in Ireland

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1. Introduction

The purpose of this paper is to briefly outline the process of transposition of the EU Directive on Environmental Liability with regard to the prevention and remediying of environmental damage (the ‘ELD’) and consider the implications for Irish Law. The substantive provisions of the ELD are complex and a detailed analysis is beyond the scope of this paper. Accordingly, the focus of this paper is not on the substantive content of ELD but rather on its transposition into Irish law.

The ELD had a particularly troubled and protracted gestation period. Ultimately what emerged was a directive which is considerably more complex than a typical EU directive. The ELD is wide ranging in its ambit and overarching in its impacts. In essence it superimposes provisions that impose liability for environmental damage onto existing EU law that regulate activities that can cause environmental damage. The ELD reiterates the right of Member States to maintain or adopt more stringent provisions as provided for under Art.176 of the EC Treaty. Accordingly, it merely establishes a minimum “baseline” standard in respect of environment liability, which Member States are required to comply with, but may exceed if they so wish.

In many respects pre-existing Irish environmental legislation already met the requirements of the ELD. However in other respects the regime of liability imposed by the ELD is more onerous and broader in scope than that which existed under Irish law. Therefore the introduction of the ELD required the alignment of existing Irish law on environmental liability to ensure its compatibility with ELD.

2. Transposition

2.1 Transposition process

Member states were required to take appropriate steps to transpose the ELD into domestic law by April 30th 2007. Ireland along with a number of other member states did not meet this transposition date. Normally, this would be a source for justified criticism, However, it has to be accepted that the transposition of the ELD into Irish law was not a straightforward exercise. A consultation process in respect of the

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1 EU 2004/35/EC
3 For a detailed analysis of the background to the directive see McIntyre, ‘The New European Union Directive on Environmental Liability: Substantive Content and Practical Implications’. IPELJ Vol. 11, No. 3 2004
transposition of the ELD was commenced by the Department of Environment Heritage & Local Government (“DEHLG”) in 2007. It was preceded by a Regulatory Impact Assessment of the ELD. Following this initial consultation process a draft Environmental Liability Bill and Regulations were published accompanied by a further consultation process. The consultation process ended in September 2008. In December 2008 the European Communities (Environmental Liability) Regulations, 2008⁴ (“the ELD Regulations”) were published in purported transposition of the ELD. Enactment of the Environmental Liability Bill remains pending.

Although strictly not part of the process of transposition of the ELD, it should be noted that in August 2006 the Environmental Protection Agency (EPA) published a draft guidance document on Guidance on Environmental Liability Risk Assessment, Residuals Management Plans and Financial Provision⁵. This document relates to the assessment and management of environmental liabilities associated with activities licensed under the Integrated Pollution Prevention and Control (IPPC) and waste management licensing regimes designed to meet the requirements of the ELD.⁶ In essence it purpose is to provide guidance on the assessment and management of environmental liabilities to ensure compliance with licence conditions under the IPPC and Waste management licensing regimes having regard to the ELD. More specifically it indicates that in future IPPC and Waste Management Licences will contain conditions implementing the ELD.⁷ The document also provides guidance on methodology for quantification and costing of liabilities and the different financial instruments appropriate for each type of liability. Such guidance will be particularly useful in assisting companies prepare for the new regime of liability arising from transposition of the ELD.

3.0 The Environmental Liability Bill, 2008

The Environmental Liability Bill, 2008 (“the Bill”) was published in draft form in September 2008. It purpose is to set out the primary statutory framework for transposition of ELD. The Bill is supplemented by the ELD Regulations which are in fact the principal legal instrument of transposition of the ELD. The primary purpose of the Bill is to transpose a number of the discretionary elements of the ELD as it was considered to do so by way of secondary legislation could be open to challenge. Accordingly, the primary purpose of the Bill when enacted will be to impose those discretionary elements of the ELD which it is proposed to adopt.

3.1 Extension of habitats and species protection

The first of these discretionary elements relates to the extension of the habitats and species discretion as provided in Article 2(3)(c) of the ELD. It permits Member

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⁴ S.I. No. 547 of 2008.
⁵ EPA OEE-04-03, 17th of August 2006. The document may be accessed via the EPA website www.epa.ie.
⁶ As such the scope of the document is narrower than ELD which is not confined to IPPC and waste management licensing.
⁷ See Para 1.2.3.
States to extend the definition of protected species and habitats within the ELD by including other species and habitats over and above those listed in the Annexes of the Birds and Habitats Directives enjoying protection under domestic legislation.

The Bill proposes to confer the Minister with the power to make regulations which would allow the extension, for the purposes of the ELD, of the species and habitats listed in the Annexes of the Birds and Habitats Directives to other species and habitats covered specifically by Irish legislation.

This will enable the Minister to bring other species and habitats within the scope of the ELD, having due regard to the importance, significance and conservation status of those particular species or habitats. In practice this will result in the designated species and habitats being included within the meaning of protected species and natural habitats as defined in ELD Regulations.

3.2 Permit and State of the Art Defence

Article 8(4) of the ELD gives Member States the option to curtail its application by allowing operators an exemption to the costs of remedial action. Such remedial action is specified in Article 6 of the ELD, and transposed in the ELD Regulations. The draft Bill proposes to take up the option to apply the exemptions under Art. 8(4) of the ELD.

There are two elements to this exemption.

Firstly, an operator will be exempt from the cost of remedial actions taken pursuant to the ELD where s/he demonstrates to the EPA that s/he was not at fault or negligent and that the environmental damage was caused by an emission or event expressly authorised by, and fully in accordance, with the conditions of an authorisation conferred by or given under the relevant legislation specified in Schedule 3 to the Regulations, as applied at the date of the emission or event. This is generally referred to as the ‘permit defence’.

Secondly, an operator will be exempt from the cost of remedial actions taken pursuant to the ELD where s/he demonstrates to the EPA that s/he was not at fault or negligent and that the environmental damage was caused by 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. This is generally referred to the ‘state of the art defence’

However, the application of these exemptions is subject to an exception whereby it does not apply to the operator of the activity specified in the ELD Regulations where this relates to cultivation including field trials. The specified activities concern the cultivation of Genetically Modified Organisms.
There can really be no surprise that Ireland opted to avail of both exemptions in respect of the ‘permit’ and ‘state of the art’ defence as this was the subject of strong lobbying from industry. To some degree existing legislation already recognises the concept of a ‘permit defence’. However, as Scannell notes the ELD, “provides for the possibility of defence of compliance with a licence that is not always the position in Irish Law”. Accordingly, the of the “permit defence” will to some extent broaden the existing legal defences to environmental liability.

3.3 Requests for Action

Under Article 12(1) of the ELD, as transposed by the ELD Regulations third parties are entitled to request the EPA to take action in respect of instances of environmental damage or an imminent threat of such damage. Article 12(5) of the ELD provides Member States with the option of curtailing this provision by prohibiting the right of third parties to request action in cases of imminent threats and thus restricting third parties to request action in cases of environmental damage only. The Bill proposes to avail of this option.

Accordingly, a third parties' request for action in a case of an imminent threat of environmental damage can now only be treated as a request for action, where it appears to the EPA, that the request is not vexatious, frivolous, without substance or without foundation. A somewhat similar is found in s.152(1) of the Planning and Development Acts 2000-2007.

3.4 Adoption of discretionary provision of Annex III (Paragraph 2) of the ELD

Annex III of the ELD provides a list of activities which come within the scope of the Directive as outlined in Article 3(1) of the ELD. Annex III (paragraph 2) of the ELD provides that waste management operations come within the scope of the Directive. However, Annex III (paragraph 2) of the ELD provides Member States with the option to curtail its application by restricting those waste management operations to

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8 Thus for example s.84(3) of the EPA Act 1992 provides that it shall be a good defence to a prosecution any enactment other than Pt.IV of that Act that the act complained of is an unauthorised by a licence under Pt.IV of that Act.

9 P.1023 where cites s.13 of the Local Government (Water Pollution) Act, 1977.
specific operations and not those involving the spreading of sewage sludge. This option has been exercised in the Bill. Accordingly, the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes is excluded. It should be noted the Bill also proposes to insert a new Schedule 3 to the ELD Regulations.

4.0 The ELD Regulations

As previously noted the principal legal instrument for transposing the ELD into Irish law are the ELD Regulations. The ELD Regulations were signed on 16th of December 2008 and came into operation on April 1st 2009. In general terms the ELD Regulations very closely mirror the scheme of the ELD Directive.

4.1 Scope of ELD Regulations

The ELD Regulations apply to:

(a) environmental damage, or imminent threat of environmental damage caused by an occupational activity referred to in Schedule 3, and

(b) damage to protected species and natural habitats, or imminent threat of that damage, where an operator of an occupational activity (other than an occupational activity referred to in Schedule 3) acts or fails to act and he or she knows or ought to have known that his or her act or failure to act causes or would cause damage or imminent threat of damage to protected species and natural habitats.

Schedule 3 of the ELD Regulations lists out a comprehensive list of activities which are subject to controls, consents or licensing under almost every piece of environmental legislation. Accordingly almost all activities which require licensing are covered. However, it is important to note that the Bill proposes to amend Schedule 3 of the ELD Regulations.

Also central to the operation of the ELD Regulations is the definition of the term “operator”. The term “operator” is widely defined and includes the person who operates and controls an economic activity or the person to whom decisive economic

\[\text{Art.(1) 2.}\]
power over the activity has been delegated and includes the holder of a permit or licence in respect of such operational activity.\textsuperscript{11}

4.2 \textit{Environmental Damage}

Central to the operation of the ELD Regulations is the definition of “Environmental Damage”. The ELD Regulations define “environmental damage” as:

(a) damage to protected species and natural habitats,
(b) water damage, or
(c) land damage;

There are also separate definitions of “land damage” and “water damage”. Land damage is defined as:

“any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;

The term “water damage” is defined as:

“any damage that significantly adversely affects the ecological, chemical or quantitative status or ecological potential, as defined in the Water Framework Directive, of the waters concerned, with the exception of adverse effects where Article 4(7) of the Water Framework Directive applies”

Also relevant to the definition of “environmental damage” under the ELD Regulations is the term “protected species and natural habitats” which is defined as:

(a) the species mentioned in Article 4(2) of the Birds Directive or listed in Annex I thereto or listed in Annexes II and IV to the Habitats Directive, and

(b) the habitats of species mentioned in Article 4(2) of the Birds Directive or listed in Annex I thereto or listed in Annex II to the Habitats Directive, and the natural habitats listed in Annex I to the Habitats Directive and the breeding sites or resting places of the species listed in Annex IV to the Habitats Directive;

\textsuperscript{11} Art. 12
\textsuperscript{12} Article 4(1).
4.3 Exemptions from the ELD Regulations.

There are a number of exemptions from the application of the ELD Regulations. They do not apply to environmental damage or an imminent threat of such damage caused by—

(a) an act of armed conflict, hostilities, civil war or insurrection, or

(b) a natural phenomenon of exceptional, inevitable, and irresistible character.

The ELD Regulations do not apply to environmental damage or an imminent threat of such damage arising from an incident in respect of which liability or compensation is provided for in certain specified international conventions. Nor are the Regulations applicable to damage or imminent threat of such damage arising from certain specified nuclear risks.

Arguably a more significant exemption is contained in Article 4(5) which provides that where environmental damage or imminent threat of such damage is caused by pollution a diffuse character, the ELD Regulations do not apply unless it is possible to establish a causal link between the damage and the activities of an operator.

4.4 Imminent threat of Environmental Damage - Obligations of operator

One of the key elements of the regime introduced by the ELD Regulations relates to circumstances where there is an imminent threat of Environmental Damage. Thus in circumstances where environmental damage has not occurred, but an operator of an occupational activity is (a) is aware, or (b) ought reasonably be expected in the circumstances to form the opinion, that there is an imminent threat that it will occur he or she shall without delay take necessary preventive measures.\(^\text{13}\)

Furthermore where the operator forms, or ought reasonably be expected in the circumstances to form, the opinion that preventive measures taken pursuant to paragraph do not dispel the imminent threat of environmental damage, he or she shall as soon as possible inform the EPA.\(^\text{14}\) It is important to note that these obligations are mandatory and self-executing. Failure to comply with either of these obligations is an offence.\(^\text{15}\)

\(^{13}\) Article 7(1).
\(^{14}\) Article 7(2).
\(^{15}\) Article 7(3).
These provisions are amongst the more significant of the measures introduced by the ELD Regulations. They go somewhat further that existing legislation in that the duty to carry out immediate preventive measures is a ‘self-executing’ duty, which is not reliant on any pro-active intervention by a competent authority. Legal obligations of this nature do not generally exist under current Irish environmental legislation, which usually require a proactive intervention, by the relevant enforcement authority (typically by way of service of statutory notice) requiring measures to prevent pollution to be undertaken.

4.5 Imminent threat of Environmental Damage - obligations of EPA

Where the EPA is aware that there is or may be an imminent threat of environmental damage it must issue a direction to an operator who has informed them of such a threat pursuant to Regulation 7(2) or to any other operator who it considers appropriate. The Direction may require the provision of specified information; require the operator to take specified preventative measures. It is an offence to fail to comply with such a direction. The EPA is also empowered to take preventative measures itself.

4.6 Where environmental damage has occurred - Obligations of operator

In circumstances where environmental damage has occurred the operator who (a) is aware, or (b) ought reasonably be expected in the circumstances to form the opinion, that his or her occupational activity caused the damage is obliged to inform the EPA without delay. An operator is also obliged to take all practicable steps to immediately control, contain, remove or manage contaminants or causes of damage where he or she is aware, or ought reasonably be expected in the circumstances to form the opinion, that to do so would prevent—

(a) further environmental damage,
(b) damage to human health, or
(c) further impairment of services.

Failure to discharge either of these obligations is an offence. These provisions do not represent an entirely radical departure in that existing environmental legislation already makes provision for notification of pollution incidents, most notably under the IPPC and Waste Management Licensing regime where conditions to this effect are imposed. However, the obligations under the ELD Regulations are somewhat wider in nature.

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16 Article 8(1).
17 Article 8(2).
18 Article 8(3).
19 Article 9(1).
20 Article 9(2).
21 Article 9(3).
4.7 Where environmental damage has occurred - obligations of EPA

Where the EPA is aware that environmental damage has occurred it is obliged to issue a direction to an operator who has informed it pursuant to Regulation 9(1) or to any other operator who it considers appropriate to provide information to it and/or to take specified remedial measures or identify necessary remedial measures to be taken.\textsuperscript{22} The EPA may also give instructions to be followed by the operator in taking such remedial steps. An operator who does not comply with a direction issued to him or her within the time specified in the direction is guilty of an offence.\textsuperscript{23}

The EPA may, “as a means of last resort”, take necessary remedial measures where environmental damage has occurred where it considers that it is appropriate for any of the following reasons—

- (a) the operator fails to take the remedial measures required pursuant to Regulation 11, or comply with a direction issued pursuant to paragraph (1) within the time referred to in the direction,
- (b) the relevant operator cannot be identified, or
- (c) it is satisfied that the operator has a defence referred to in Regulation 17(4)(a) or (b).\textsuperscript{24}

4.8 The determination of remedial measures

A key feature of the ELD Regulations is that it provides that the determination of remedial measures shall be decided by the EPA following submissions from the operator, the owner or occupier of the lands in question and a person who has sufficient interest in decisions made by the EPA or environmental NGO’s. \textsuperscript{25} In deciding what remedial action to take the EPA must at all times have regard to the framework of remedial measures set out in Schedule 2 of the ELD Regulations. The EPA having decided which remedial measures to take it must issue a direction to the operator who caused the environmental damage notifying them of the proposed measures.\textsuperscript{26} A direction may be appealed to the District Court in which district it was served within seven days from date of service.\textsuperscript{27}

These provisions are of some significance and are novel in an Irish context. Whilst existing legislation permits enforcement authorities to order remediation measures\textsuperscript{28} it

\begin{itemize}
\item \textsuperscript{22} Article 10(1).
\item \textsuperscript{23} Article 10(2).
\item \textsuperscript{24} Article 10(3.)
\item \textsuperscript{25} Article 11.
\item \textsuperscript{26} Article 13.
\item \textsuperscript{27} Article 13(3).
\item Notably s. 57 and 58 of the Waste Management Acts 1996-2005.
\end{itemize}
does not specifically permit NGO’s or the general public with any rights to make submissions on the nature of such remediation measures. The inclusion of statutory rights in this regard is one of the more significant aspects of the ELD Regulations.

4.9 Submissions and request in respect of Environmental Damage

The ELD Regulations allow certain designated persons to submit observations to the EPA request that it perform its functions under the Regulations in relation to an instance of environmental damage or imminent threat of environmental damage. This is generally referred to as “a request for action”. The persons who may lodge such a request are persons who:

(a) are affected or likely to be affected by the instance of environmental damage, or
(b) have a sufficient interest in the decisions relating to the environment made by the EPA or any other person.

The term “sufficient interest” is defined as meaning a person who can satisfy the EPA that he or she is a member of an organisation that promotes protection of the environment, and has acted to promote protection of the environment during the period of 12 months prior to the request. The request must also be accompanied by a report containing all data and information relevant to the environmental damage.

The EPA is obliged to consider and such request, read the accompanying report and consult with the operator of the activity in question. The Environmental Liability Bill will permit the EPA to dismiss such a request if it considers it to be frivolous or vexatious. The EPA is obliged to decide whether it will accede to a request for performance. It must notify the person who submitted the observations and requested the performance in writing of its decision, giving reasons for it and advising the person of the period for bringing review or other legal proceedings in relation thereto pursuant to Regulation 16. There is no right of appeal in respect of such decision and if challenged by way of judicial review it must be done within eight weeks of the decision.

29 Save perhaps indirectly where such measures are made on foot of court proceedings instigated by a NGO or the general public who in such circumstances would clearly be entitled to make submissions as to the appropriate remediation measures.
30 Article 15(1).
31 Article 15(2).
32 Article 15(3).
33 Article 15(5).
34 Article 15(6).
35 Article 16.
These provisions are amongst the more significant of the ELD Regulations. As a general proposition enforcement authorities enjoy an almost absolute statutory discretion in respect of their enforcement functions and thus are legally unaccountable for the non-exercise of their statutory enforcement functions. Furthermore, in general members of the public and environmental NGO’s have no role in the activities of enforcement authorities. Whilst it remains to be seen how these provisions will operate in practice the conferring of a statutory right to request enforcement action is a significant step. It may also impose significant additional burden on the EPA and it remains to be seen whether it has the resources to deal with this issue.

4.10 Liability for prevention and remediation costs

Article 17(1) of the ELD Regulations provides that an operator whose occupational activity causes the imminent threat of environmental damage or the environmental damage shall be liable for the costs incurred in carrying out, the preventive or remedial measures required in respect of the imminent threat or damage, as appropriate.

The EPA is also entitled to recover its costs from the operator as a simple contract debt. In such proceedings it is a defence for the operator concerned to prove that the imminent threat of environmental damage or environmental damage was caused—

(a) by the act or omission of a third party and that the operator has appropriate safety measures in place in relation to the occupational activity, or
(b) by the operator or a third party complying with an order or instruction of a public authority duly issued by that body in the performance of its statutory functions, where the order or instruction did not relate to an emission or incident arising from the occupational activity of the operator.

Existing Irish legislation makes provision for the recovery of costs by a prosecuting authority on foot of enforcement proceedings. Whilst such costs are generally granted they require an application to the court, which although generally acceded to are not granted as a right. However, the scope of the costs recoverable under ELD appears somewhat wider than under existing legislation. In this regard it is important to note the definition of “costs” in the ELD Regulations which is defined as follows:

“costs” means costs which are justified by the need to ensure the proper and effective implementation of these Regulations including the costs of assessing
environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs;

Accordingly, it would appear that a much greater level of costs may be recoverable under the ELD Regulations than under existing legislation and this may prove to be one of the most significant impacts of the ELD Regulations.

4.11 Retrospective Application of ELD Regulations

It appears the ELD Regulations do not have retrospective application. Article 5 of the ELD Regulations provides they do not apply to—

(a) damage caused by an emission, event or incident which takes place before 1 April 2009.

(b) damage caused by an emission, event or incident which takes place after 1 April 2009 when it derives from a specific activity that took place and finished before the said date, or

(c) damage, if more than 30 years have passed since the emission, event or incident resulting in the damage occurred.

Whilst these provisions are clear, the application of the 30 year limit in Article 5(c) may give rise to issues surrounding the determination of when the ‘event’ or ‘incident’ resulting the damage actually occurred.

An action by the EPA under the ELD Regulations against an operator for recovery of costs, cannot be brought after the expiration of 5 years from the date on which the preventive or remedial measures required pursuant to the Regulations have been completed or the date (if later) on which the EPA became aware of the identity of the operator as appropriate.36

4.12 Offences

36 Article 19.
As noted failure to comply with a number of provisions of the ELD Regulations is an offence. Penalties range from €3,000 and/or six months imprisonment on summary conviction and €500,000 and/or three years imprisonment on conviction on indictment.37 A person guilty of an offence under Regulation 23(8) or (10) is liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 6 months or both.38

It is important to note it is expressly provided that it is a defence in proceedings for an offence under Regulation 7, 8, 9, 10 or 12 for the person charged with the offence to prove that the person took all reasonable steps to avoid the commission of the offence. This is an important provision and will make the successful prosecution of such offences more challenging.39

5. CONCLUSIONS

Transposition of the ELD presented significant challenges and opportunities in Ireland. The ultimate manner of transposition is relatively cautious and this is perhaps unsurprising give the complexities involved. However, it is clear the Bill when enacted and the ELD Regulations introduce significant but not radical change to the regime of environmental liability. It must be acknowledged that the transposition of the ELD has significantly altered and expanded the scope and nature of liability for environmental damage and in this regard it will impose some additional burden on industry.

The provisions of the ELD Regulations in respect of NGO’s although limited have the potential to confer such organisations with an important role in the area of enforcement of environmental law. An additional burden will also be imposed on the EPA and it remains to be seen whether it will have sufficient resources to discharge this additional burden.

37 Article 24(1).
38 Article 24(3).
39 Article 24(2).