

15 July 2009

## TO ALL MEMBERS

Dear Sirs

### **Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage**

#### ***Background***

The Directive on Environmental Liability with regard to the prevention and remedying of environmental damage (the ELD) entered into force on 30 April 2004. The ELD requires EU Member States to implement and give force of law to the Directive by 30 April 2007. However, a number of Member States have only recently implemented the Directive and some Member States are yet to bring the necessary legislation into force to comply with it. As of 1 July 2009 the following Member States have communicated full transposition of the Directive to the European Commission: Italy, Lithuania, Latvia, Hungary, Germany, Slovakia, Romania, Sweden, Spain, Estonia, Cyprus, Malta, Bulgaria, the Netherlands, Poland, Czech Republic, Portugal, Denmark, Belgium, Ireland, France and Luxembourg. The UK has notified transposition for England and Wales, but the legislation is still awaiting adoption in Scotland and Northern Ireland.

The intention of this circular is to summarise the key provisions of the ELD, although it should be noted that, as with all Directives, Member States have a degree of flexibility with regard to how the objectives set out in the Directive are met in their domestic law. The ELD does not prevent Member States from enacting more stringent measures in relation to the prevention of and remedying of environmental damage than are contained in the Directive.

The fundamental principle of the Directive is that the operator (which includes shipowners) whose activity has caused environmental damage or the imminent threat of such damage is to be held financially liable. The purpose of this Directive is therefore to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.

For the purposes of the Directive, environmental damage is defined as 'damage to protected species and natural habitats or in a site of special scientific interest', 'damage to water' and 'land damage'. The Directive imposes strict liability on the operator for the costs of preventive and remedial actions for environmental damage arising from a specified range of "occupational activities", which includes the transportation by inland waterways or by sea of dangerous<sup>1</sup> or

<sup>1</sup> 'Dangerous goods' are defined as goods classified in the International Maritime Dangerous Goods (IMDG) Code, in Chapter 17 of the International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (IBC Code) and Chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk.



polluting goods<sup>2</sup> and the transboundary shipment of waste<sup>3</sup>.

The Directive provides for fault-based liability of the operator for damage, or any imminent threat of such damage, to protected species and natural habitats caused by all occupational activities other than those listed in the Directive. The Directive does not apply to cases of personal injury, damage to private property or to “economic loss”.

Under the Directive operators are required to:

- take the necessary preventive measures where environmental damage has not yet occurred but there is an imminent threat of such damage occurring
- inform the competent authority of all relevant aspects of the situation giving rise to an imminent threat of environmental damage whenever such a threat is not dispelled despite the preventive measures taken, and
- where environmental damage has occurred to inform the competent authority without delay and take all practicable steps to limit or prevent further damage and take the necessary remedial measures.

#### ***Linkage with the existing international liability and compensation regimes***

Environmental damage or any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the following international liability and compensation regimes where in force in the Member State concerned is excluded from the scope of the Directive and shall be governed by these regimes:

- the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC)
- the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund)
- the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention)
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention)

The 1992 CLC and 1992 IOPC Fund Convention governing liability and compensation for pollution damage arising from the carriage of persistent oil by sea is in force in all coastal EU Member States. The Bunkers Convention that covers pollution damage caused by spills of bunker oil is in force in only fifteen EU Member States and the HNS Convention is not yet in force internationally. Liability and compensation for environmental damage or any imminent threat of such damage arising from the carriage of hazardous and noxious substances by sea in the waters of an EU Member State, or the escape or discharge of ship's bunker oil in the waters of an EU Member State where the Bunkers Convention is not yet in force, will therefore be governed by the ELD.

The ELD does provide that shipowners will continue to retain the right to limit their liability in accordance with national legislation implementing the Convention on Limitation of Liability for

<sup>2</sup> 'Polluting goods' are defined as oils as defined in Marpol Annex I, noxious liquid substances as defined in Marpol Annex II and harmful substances as defined in Marpol Annex III.

<sup>3</sup> That requires an authorisation or is prohibited within the meaning of Council Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community.



Maritime Claims (LLMC), 1976 as amended by the 1996 Protocol. With the exception of Italy, Portugal and Slovakia, all coastal EU Member States are a State party to either the 1976 LLMC Convention or the 1996 Protocol. The costs for preventive and remedial actions taken pursuant to the ELD are not subject to limitation under the global limitation regime in Italy, Portugal and Slovakia and are potentially subject to unlimited liability in these jurisdictions.

### **Remedial Measures**

Where environmental damage has occurred within the scope of the ELD, operators shall identify remedial measures to be taken in accordance with the Directive and submit them to the competent authority for approval. A common framework to be followed in order to determine the most appropriate means to ensure the remedying of environmental damage is outlined in the Directive.

It is for the operator to propose remedial measures, although if the operator fails to do so then the authority will identify remedial measures. The competent authority may require the operator to undertake the remedial measures or they may undertake them themselves.

The measures must be evaluated using the best available methods and must be based on a list of criteria contained in the Directive. These measures include the effect of each option on public health and safety, the cost of implementing the option, the likelihood of success, the extent to which each option will prevent future damage. The authority will need to be satisfied that the measures that it determines are appropriate and that they are sufficient to restore the damaged natural resources or habitat to the state that would have existed before the damage occurred, or equivalent, through a combination of primary, complementary and compensatory remediation measures.

Primary remediation consists of those measures which return the damaged resources or impaired services to or towards the state that would have existed if the damage had not occurred. Complementary remediation consists of measures to compensate where primary remediation does not fully return the damaged natural resources or services to the condition that would have existed had the damage not occurred. Such measures can either be taken at the damaged site or an alternative site but where possible and appropriate the alternative site should be geographically linked to the damaged site. Compensatory remediation is any measure taken to compensate for interim losses that occur from the date of damage until primary or complementary measures have taken effect.

Whilst these compensatory measures do not consist of financial compensation to members of the public, the interpretation of restoration or reinstatement of damaged environments under the ELD is different to the scope of compensation available for environmental damage under the international liability and compensation regimes adopted by the International Maritime Organization (IMO).

The Directive does explicitly recognise that there must be one or more “identifiable polluter”, that the damage must be “concrete and quantifiable” and that there must be a “causal link” between the damage and the polluter(s).

### **Exemptions**

Operators shall be exempt from liability under the ELD where the operator proves that:



- the damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, or
- the damage resulted from compliance with a compulsory order or instruction emanating from a public authority.

A Member State may also allow the operator not to bear the costs of remedial actions where the operator demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

- the use of a product in the course of an activity which the operator demonstrates was not considered likely to cause the damage according to the state of scientific and technical knowledge at the time of the incident, or
- 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.

In addition, the ELD does not cover environmental damage or an imminent threat of such damage caused by armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character.

There are no compulsory insurance measures contained in the ELD. However, Member States are required to take measures to encourage the development of financial security instruments with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

The ELD contains a number of review clauses, including a requirement that the European Commission shall present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages and on the availability of insurance and other types of financial security before 30 April 2010. The Commission shall also submit a report to the European Parliament and the European Council before 30 April 2014 which shall include any appropriate proposals for amendments to the Directive as well as a review of the application of the international liability and compensation regimes and the right of the operator to limit his liability in accordance with LLMC.

The International Group will continue to monitor both the implementation of the ELD by EU Member States and the reports presented by the European Commission under the Directive's review clauses.

Yours faithfully  
A BILBROUGH & CO LTD  
(MANAGERS)

All Clubs in the International Group of P&I Clubs have issued similar circulars.