



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

## **THE VI CONFERENCE OF THE EUROPEAN GMO-FREE NETWORK, BILBAO – 24/25 APRIL 2008**

### **INFORMATION PAPER PRODUCED BY THE WELSH ASSEMBLY GOVERNMENT ON THE TRANSPOSITION INTO UK LAW OF THE ENVIRONMENTAL LIABILITY DIRECTIVE - 2004/35/EC**

1. The Environmental Liability Directive (ELD) came into force in April 2004 and EU Member State governments had until April 2007 to implement it into national law. However, a number of Member States have not implemented the Directive to date and we in Wales aim to implement it into UK law by December 2008, with a strict interpretation of its GMO aspects.

#### The Aim of the ELD

2. The principal aim of the ELD is to establish a mechanism to prevent and remedy significant environmental damage, based upon the “polluter pays” principle. Certain ‘operators’ who cause a risk of significant damage to land, water or biodiversity will have a duty to avert such damage occurring or, where damage does occur, a duty to reinstate the environment. An operator will have to notify the appropriate ‘competent authority’ of any imminent threat of such damage or of actual damage to the environment caused by it while carrying out its business and of its plans to avert or repair the damage. It gives European Union Member State governments a wide degree of discretion in implementation. The ELD does not cover “traditional damage” (that is, economic loss, personal injury and property damage), but has the following key characteristics:

- it is based on the polluter pays principle, i.e. polluters should bear the cost of remediating the damage they cause to the environment, or of measures to prevent imminent threat of damage;
- polluters would meet their liability by remediating the damaged environment directly, or by taking measures to prevent imminent damage, or by reimbursing competent authorities who, in default, remediate the damage or take action to prevent damage;
- competent authorities would be responsible for enforcing the regime in the public interest, including determining remediation standards, or taking action to remediate or prevent damage and recover the costs from the operator;
- strict liability would apply in respect of damage to land, water and biodiversity from activities regulated by specified EU legislation; fault-

- based liability would apply in respect of biodiversity damage from any other activity, and
- where an operator is not liable, the Member State would have subsidiary responsibility for remediating that damage.

### What is covered by the Environmental Liability Directive

3. Environmental damage is defined in Article 2 of the Directive as:

- damage to protected species and natural habitats: “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such as habitats or species”. The species and habitats covered are those in the Wild Birds Directive and in the Habitats Directive and the effect on their status will often need to take account of the impact of damage on their status across the EU as a whole. It is important to note that the ELD does not protect particular sites as such, only damage to the species and their habitats wherever they may occur.
- Water damage: “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EEC, of the waters concerned”;
- Land damage: “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”, and
- Damage is defined as: “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”.

4. Certain types of environmental damage are excluded from the scope of the Directive and it also provides for “defences” against liability such that operators would not necessarily bear the cost of remediation in certain circumstances. For example where a third party was responsible, or where environmental damage occurred despite the operator complying with the conditions of a permit.

### Why is the Welsh Assembly Government proposing to take a stricter position on the GMO aspects of the Directive than other regions of the UK?

5. In relation to GMOs the ELD provides the liability regime that was promised during the negotiation of the EU Deliberate Release Directive (2001/18 - Recital 16). If environmental damage takes place as a result of using a GM organism, the company or person responsible should have to pay the costs of remediation.

6. The Commission had allowed scope for interpretation in the Directive and this has presented an opportunity for the Welsh Assembly Government to put its restrictive GM policy into practice. The policy of the Welsh Assembly

Government is to pursue the most restrictive policy on GM crop commercialisation in Wales that is consistent with Community law. We are therefore proposing to retain the option to reflect our restrictive stance in the transposition of the Directive.

7. A formal 1<sup>st</sup> stage policy consultation was undertaken in England and Wales in 2006. In the case of the ELD, this has meant that in England the Government proposes not to go beyond the minimum requirements of the Directive whereas in Wales we are proposing to exercise some of our scope for discretion, particularly on the GMO aspects. A number of options were considered from a legal and policy perspective in respect of GMOs and we propose to implement the following in Wales:

#### Permit and State of Knowledge Defences

8. *Article 8.4—“Permit” and “State of knowledge”*: Permit Member States to allow an operator not to bear the costs of remedial measures taken under the Directive where he demonstrates that he was not at fault or negligent where the damage was caused by :

(a) an expressly authorised event or emission despite complying with the permit conditions, or

(b) an emission or activity which he demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time of the emission or activity.

9. **In Wales, the Welsh Assembly Government is proposing to disapply the State of Knowledge and Permit Defences in respect of GMOs, which means that operators will need to bear the cost of remedial measures.**

#### Imposition of liability on GMO consent holders as well as the operators.

10. The Directive imposes obligations on “operators” which, in the case of GMOs, would normally be the farmers responsible for using GMO seeds and growing GM crops. However, Article 16 of the Directive provides that Member States are not prevented from maintaining or adopting more stringent provisions in relation to the prevention or remedying of environmental damage, including the identification of additional parties.

11. **On that basis, the Welsh Assembly Government is proposing to extend some of the obligations under the Directive to GMO permit and consent holders. This means that the GMO companies could potentially be required to take action to prevent and/or remediate any environmental damage that may be caused by their products.**

## Current position

12. The Welsh Assembly Government, again in conjunction with England, is currently undertaking a 2<sup>nd</sup> and final consultation on separate draft England and Wales ELD Regulations, which reflect our different stances on a number of issues, including the GMO aspects. The consultation commenced on 29 February 2008 and ends on 27 May 2008. Our favoured options to disapply the permit and state of knowledge defences in relation to the farmer and permit holder have therefore been included in the draft Regulations. This option also places a requirement on GMO permit holders to undertake remediation work in line with the polluter pays principle.

## Conclusion

13. The Welsh Assembly Government considers that the ELD provides an ideal opportunity for Regions and Member States to ensure those responsible for marketing and growing GMOs in the EU are also responsible for any environmental damage they may cause.

14. The following documents may be found on the Welsh Assembly Government's website to aid your further consideration:

- Consultation document
- Draft Regulations
- Draft Guidance
- Impact Assessment
- Directive 2004/35/EC
- Quick Guide (available shortly)

Available at the following link:

<http://new.wales.gov.uk/consultations/currentconsultation/envandcouncurrencon/s/implementenv/?lang=en>

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