

# Recent European Developments in the Management of Contaminated Land- A Legal Perspective

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## Soil Framework Directive Proposal "SFD"

### Purpose & Scope

- Protect & Remediate Soil**
  - N.B. Natural Resource
  - Threat – Contamination
- Economic Competitiveness**
  - contamination costs the EU approximately €2.4-17.3 billion per annum. (Commission Communications and Impact Assessment SEC (2006) 620)
- Fill Gap in EC Environmental Protection Legislation**
  - Direct regulation of protection of soil
  - Minimise adverse Cross-border impacts on soil

### STATUS

- Sept. 2006 Draft
- December 2007 Blocked
- December 2008 in force?

### Content

**Soil Definition**  
forms the top layer of the earth's crust situated between the bedrock and the surface, excluding groundwater

**Contaminated sites**  
Presence of dangerous substances at a level that poses significant risk to human health or the environment, taking into account current and future use

**Identifying and assess**

- Annex II list "soil polluting substances"
- Test soil for concentration of dangerous substances
- Risk assessment

**Inventory**  
How to remove from inventory?  
Mechanism for prioritising high risk sites?

**Remediation of Inventory sites**

- Standard of remediation: no significant risk to human health or environment; having regard to current/future use of site
- Responsibility: polluter & State (inhibit voluntary clean up?)
- State funding – orphan sites (public purse burden?)
- National Remediation Strategy : roadmap : timeline, funding allocation.

**Soil Status Reports**

- Buyer beware/ feed into inventory
- Onerous - €€€/time when conveying land
- Far-reaching – potential to apply to most land transactions

## Environmental Liability Directive "ELD"

### Purpose & Scope

**What is ELD?**

- adopted 2004, must be implemented in Member States by 30 April 2007
- EU Environmental Liability Regime for the prevention and remediation of environmental damage
- at a reasonable cost to society
- based on the polluter pay principle
- largely an administrative tool – enforced by regulatory authorities

### Land Damage Provisions

**Land Damage Article 2.1 (c)**  
"Is 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"

**Risk Assessment**  
Annex II.2: Risk assessment taking account of (a) characteristics and function of the soil; (b) type and concentration of the harmful substances, preparations, organisms, or micro-organisms; (c) their risk and the possibility of their dispersion.

**Remediation**  
Who responsible? (1) Operator (polluter) whose activities (Annex III) cause damage (2) option to make other persons responsible (e.g. owner/occupier) (3) State option to remediate - a "last resort"  
Type of liability: Strict + Defences :- 3rd party; permit (optional); state of art (optional)  
Standard of remediation: land no longer poses significant adverse risk to human health , having regard to current/future approved use  
Temporal limit on liability for remediation: not retrospective, not cover damage after 30 years from date of contamination incident.

**Operator/Polluter Duties**

- Notify authorities of land damage
- Submit remedial plan to authority for approval : in accordance with Annex II.2 & in consultation with authority/public
- Remediate : preliminary (self-executing) and long-term measures (as agreed with authority)
- pay remedial costs (assessment, legal, enforcement, supervision etc)

**Regulatory Authority Powers & Duties**  
Power: inquiry, require /take remedial action, carry out risk assessment; issue necessary instructions.  
Duty : identify responsible person; assess/approve remedial plan, order responsible operator to remediate, recover costs (via financial guarantees)

**Public Role**

- Pushing regulatory authority action – notify possible contamination; request action; seek review of their decisions.
- Participation in decision-making process e.g. appropriate remedial plan

**Remediation Procedure**

### Land Damage Provisions

## Interaction & Conclusion

### How do they interact

**ELD**

- Identify & Assess
- Identify Responsible person
- Identify Remedial measures
- Remediation by (1) Operator (2) Others (3) State- As last resort
- State Recovers costs

**SFD**

- Identify & Assess
- Identify Responsible person
- Polluter or State Remediates
- State Funding Mechanism
- Soil Status Reports

- Id & Assess: SFD more prescriptive, SFD no notification requirement
- ELD detailed procedure for identifying remedial measures – SFD omits this
- Responsible person: ELD more flexibility
- ELD no state funding mechanism, no provision for soil status report.
- SFD : no provision for recover of costs by State

### Soil Framework Directive – Proposal Contaminated Soil provisions

**Pros**

- aims – towards more effective soil protection and remediation across the EU
- Identification procedure and inventory system
- Imposes remediation requirement on polluter
- Requires adoption of national soil remediation strategy
- Requires est. of system for soil status reports "innovative"

**Cons**

- A moderate concretisation of the overall objective and guiding principles of the Thematic Strategy on Soil Protection
- Too prescriptive?
- Expensive to implement – cost outweigh benefit?
- Some provisions lack clarity as to extent envisage e.g scope of definitions
- Uncertainty- practicable workability e.g. identification procedure
- Uncertainty as to its relationship with other regimes e.g. ELD.

### Conclusion

**Environmental Liability Directive**

**Pro**

- Complements other regulatory regimes to ensure compliance with environmental law, by establishing a system of liability for contaminated soil
- Member States must ensure it has in place more comprehensive & uniform duties and powers ,in respect of land damage e.g.
  - positive duty on operator/polluter to notify & remediate land damage.
  - Regulatory authority duty to recover costs
  - Public role in pushing regulatory authority action.

**Con**

- Gaps in application: not cover contamination predating 31 April 2007; nor where causal link between operator activity (Annex III) and contamination cannot be clearly est.; or where contamination is a result of armed conflict, nuclear etc. No remediation action for "orphan" damage
- Scope of land damage limited : to human health risk.
- Where operator fails to remediate, there is no obligation on regulatory authority to take remedial action- only a power.