Book Reviews

THE EU ENVIRONMENTAL LIABILITY DIRECTIVE: A COMMENTARY

Lucas Bergkamp and Barbara J Goldsmith (eds)


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This edited collection of essays focuses upon a single, yet significant, EU directive – the Environmental Liability Directive (the ELD).1 Adopted in April 2004, the purpose of the ELD is to establish an environmental liability framework, based on the 'polluter pays' principle, to prevent and remedy environmental damage to protected species and natural habitats, water and land.2 The ELD involves some novel and complex legal, administrative, technical and economic issues and the book sets out to provide guidance, at both a theoretical and practical level, to ensure predictability and effectiveness in its application.

The contributing authors have a wide breadth of experience and include legal experts, economists, specialist environmental consultants and scientists. The input from non-lawyers gives the book a refreshing perspective, particularly in controversial areas such as the valuation of environmental damage. Amongst the contributing legal commentators are leading authorities on the ELD and environmental liability.

The book is separated into three Parts. Part I examines the scope, substance and procedure of the ELD. Part II explores emerging issues and practices in the ELD's application. Part III considers its future. The background material provided in Part I is rich and illuminating. It does, however, draw largely from work which has already been published in this field. As a result, whilst Part I provides a valuable overview and consolidation of existing commentary for students, researchers and practitioners new to this area, it does not, in general, extend the boundaries of current thought on the ELD. Contributions from non-lawyers in Part II provide valuable insight into the analysis of the regime. A real strength of this part of the book is the application of the ELD to 'real' situations through the use of hypothetical case studies. Not only does this contextualise some of the core provisions of the ELD, but it also highlights areas where disputes are likely to arise. In the absence of case law on core provisions of the ELD, case studies offer the next-best alternative to clarifying the mechanics of the framework. Part III examines, through analysis of the transposition of the ELD in Belgium, the Netherlands and Germany, how successfully the ELD has achieved its objectives. This analysis, whilst limited in jurisdictional scope, was fruitful owing to the advanced levels of the environmental liability regimes in these countries. This Part also raises some important considerations for operators and other stakeholders, such as the role of public authorities and insurers in ensuring an effective implementation of the ELD. It emphasises that a truly effective regime can only be achieved through collaboration.

There is, however, advice proffered in Part III which does not appear to sit comfortably with the editor's stated aim of providing guidance with a view to ensuring an effective application of the regime. The relevant section is titled "How companies can manage ELD exposure".

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2 ELD, Art. 1.
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Commentators have long argued against such
use of the corporate form on policy grounds. Operators, or more accurately their parent companies, who can utilise limited liability to avoid financial liability have little economic incentive to operate prudently and may engage in overly risky environmental practices. Moreover, where these companies are capitalised thinly then, in the absence of financial security (e.g., insurance or parent guarantee), there is a real risk that there will be insufficient assets to meet a large-scale financial liability. The possibility of such use of the corporate form not only counters the very aim of the ELD - to prevent and remedy environmental damage - but has the potential to render an innovative and potentially powerful regime ineffective. Whilst such 'structural solutions' may have been provided by corporate lawyers and in-house counsel for decades, it does not seem to fit within a book which, for all intents and purposes, seeks to comment upon and, by doing so, improve the efficacy of the framework implemented under the ELD. This may be perceived as frustrating to those scholars and practitioners dedicated to generating more environmentally responsible behaviour in corporations.

In light of the purpose of the ELD - to prevent and remedy environmental damage - some substantive issues are underemphasised and underdeveloped in the book. For example, as Bergkamp and van Bergeijk observe in Chapter 3 (Scope of the ELD Regime) the definition of the term 'operator' in Article 2(6) is 'critically important because it identifies the group of potentially liable persons.' However, the book dedicates, in total, just over three pages to elucidating the meaning of 'operator'. In a one-sided argument in favour of a narrow interpretation to Article 2(6), Bergkamp and van Bergeijk argue that broader interpretations which captured parent companies would incentivise parents to 'discontinue corporate environmental and health programmes and compliance auditing, which might be deemed indicia of "control".' The authors suggest that cost considerations may prevent subsidiaries from establishing their own programmes thus resulting in less effective corporate environmental management and increased environmental impacts. However, no evidence, empirical or theoretical, is used to support this assertion. Could it not, in fact, be the case that the very opposite result may arise? For example, those parent companies at risk of being deemed to be an operator may adopt robust pollution prevention regimes to minimise the risk of environmental damage. In the absence of empirical evidence, determinations of the individual responses by operators and their parent companies must remain at a theoretical level. Nevertheless, a balanced consideration of the full spectrum of arguments for and against a particular interpretation of the term 'operator' can only benefit the development of the jurisprudence in this important area. At the very least, the possibility of utilising broader definitions must be considered if we are to counter flagrant use of the corporate form to avoid liability.

A further concern relates to the consideration of financial security in the book. Two arguments raise problems within a limited liability regime. First, in Chapter 15 (Practice to Date and Path Forward), Bergkamp and Goldsmith imply that

3 At pp. 336-337 [15.14].
4 Ibid.
6 Under Art. 2(6), 'operator' is defined as '... any natural or legal, private or public person who operates or controls the occupational activity or; where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity'.
7 At p. 52 [3.04].
8 At p. 53 [3.06].
insurance should not be made a mandatory requirement. However, this recommendation does not take into consideration the fact that as a shareholder's liability is limited, there is little incentive for the company to purchase adequate financial security voluntarily. This is because part of the price paid for the product would cover losses—the deficit between the actual asset level of the company and the coverage limit—which would not have to be paid if the product was not purchased. Secondly, in Chapter 6 (Financial Security and Insurance), Bergkamp, Herbatschek and Jayanti argue that market-based financial security is likely to provide greater social benefits than mandatory government-imposed requirements or alternatives such as extending the possibilities for piercing the corporate veil. However, one of the problems with market-based products is that their provision will be dictated by market conditions. There is always the risk that insurers, for example, may retreat from a market in an economic downturn or where risks cannot be assessed accurately. Moreover, market-derived 'carve-outs' aimed at reducing moral hazard, such as limitations, exclusions and deductibles, may undermine the success of the regime. Whilst these concerns may point towards the requirement for mandatory financial security, such a regime would not, as the book highlights, be without its problems. These problems, however, must be addressed if the ELD is to fulfill its regulatory potential by removing incentives to undertake environmentally dangerous activities in an irresponsible manner. The ELD, through the mechanisms of 'operator' liability and an associated financial security regime, must be able to guard against strategic use of the corporate form given that, as Bergkamp and Goldsmith rightly acknowledge, 'an operator's potential exposure is enormous though it may be low probability'. If not, society will be left to foot the bill.

This edited collection of essays offers a valuable contribution to the existing research on the ELD. It will also be warmly received by those practising in and researching frameworks for environmental liability more broadly. With a reassessment of the ELD on the immediate horizon—the Commission is obligated under Article 18(2) to review the success of the implementation of the ELD in early 2014—the book offers some fruitful areas for discussion and lays a broad and firm basis upon which yet more powerful features may be developed.

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9 At p. 340 [15.26].
11 At p. 124 [6.21].
12 At p. 334 [15.04].