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Operator's new environmental liability

Law 2008-757 dated August 1, 2008 on environmental liability (the "Law") can primarily be viewed as the belated transposition of Directive 2004/35/EC of the European Parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

It goes beyond the European Directive's principles, however, adding a number of provisions giving priority to the protection of the environment over all other considerations - including, notably, economic ones - under circumstances that create new legal uncertainties for operators, who are already faced with increasing financial and criminal exposure.

In addition, the burden on operators should also be increased by the forthcoming adoption of various bills implementing the *Grenelle de l'environnement*^[1], the first of which known as "the Grenelle 1 framework Law" was adopted on October 21, 2008 (it merely sets forth broad environmental principles and does not provide for any detailed implementation measures).

Finally, further complications could arise from the terms of a report that was delivered in February 2008 to the Prime Minister by Mrs. Corinne Lepage, a former Environment Minister of France. This report calls for the creation of a High Authority for Health and Environmental Safety. One third of the members of such authority would be appointed from civil society and one of its missions would be to protect whistleblowers who are generally radical activists pretending to be scientists, as demonstrated in recent cases.

Pending the adoption of the above laws in connection with environmental protection, this article seeks to provide a synthetic overview of the most important provisions of the Law applicable to operators.

Preventing and remedying environmental damage

The Law sets forth the conditions according to which the prevention and remediation of environmental damage will be implemented pursuant to the "polluter pays" principle.

The Law broadly defines “operator” as “*any natural or legal, private or public person who operates or controls a profit or non-profit professional activity*”.

Any direct or indirect damage with an assessable impact on the environment shall be considered as environmental damage if it:

- Creates a significant risk to human health, notably as a result of land contamination;
- Significantly and adversely affects the ecological status of waters;
- Significantly and adversely affects the reaching or maintaining of the favorable conservation status of certain species, their habitats, breeding sites or resting places;
- Affects the “natural resources/services”, i.e., the functions performed by lands, waters, and certain species and their habitats to the benefit of other natural resources or the public.

The following types of damages must be prevented and remedied: (i) environmental damage caused by certain professional activities whether or not the operator is not negligent or at fault, the list of which will be set forth by Decree; and (ii) damages to species and habitats caused by any other professional activities and resulting from the operator’s fault or negligence.

The competent administrative authority to be designated by Decree (in practice the *préfet*, i.e., the local arm of the government) shall be responsible for establishing causality between environmental damages and the professional activity. Such authority shall be entitled to request any necessary assessment and information from polluting operators.

The Law, however, does not apply to development planning programs or activities that were duly authorized or approved pursuant to administrative requirements. Similarly, the Law does not apply to environmental damages caused by pollution of a diffuse character, unless it is possible to establish a causal link between the damage - or its imminent threat - and the activities of an individual operator.

Preventive and remedial measures

When there is an imminent threat of environmental damages, the operator must, without delay and at its own cost and expense, take the necessary measures to prevent the damage or limit its effects. When environmental damage has already occurred, the operator must, without delay, inform the competent authority and take, at its own cost and expense, the necessary measures to limit or prevent further environmental damage and remedy the situation.

The competent administrative authority must proceed with an assessment of the environmental damages and the operator must keep such authority informed of any contemplated remedial measures.

Such measures must aim at neutralizing the risk of serious adverse effects on human health while

taking into account the intended use of the site. Remedying environmental damage to waters, protected

species or natural habitats is achieved through the restoration of the natural resources and/or services to or towards their prior condition (i.e., how they were before the damage occurred).

If the operator fails to take the necessary measures, the competent administrative authority can require the operator to put in escrow enough money to cover the costs of the prescribed preventive or remedial measures and force such measures to be performed.

Costs of preventive and remedial measures

The operator required to prevent or remedy environmental damages bears all costs incurred in relation to the assessment of the damage, the implementation of the actions to be taken and, as the case may be, the consultation procedures and indemnifications provided for by law.

The competent administrative authority shall be entitled to sue an operator to recover the cost of preventive or remedial measures for up five years following the date those measures were completed or the liable operator identified, whichever is later.

Criminal sanctions

The Law stipulates that criminal sanctions can be imposed on an operator and its legal representatives if they obstruct the investigations by agents responsible for identifying and/or certifying violations of applicable law; or if they refuse to comply with the terms of a formal notice received from the competent administrative authority (in the latter case, the sanctions are 6 months' imprisonment and a EUR 75,000 fine).

Statute of limitations and application

The Law shall not apply when: (i) more than 30 years have elapsed since the occurrence of the event giving rise to the damage; (ii) the damage occurred before April 30, 2007; or (iii) the damage resulted from operations which definitively ceased before April 30, 2007. The objective here is to guarantee a certain level of legal certainty for operators.

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