COMMISSION EUROPEENNE

DG Environnement
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Directrice Affaires juridiques et cohésion

Via EU Pilot

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N/Réf. : EU Pilot – 5647/13/ENVI
Concerne : Réponse de la Région de Bruxelles-Capitale à la demande EU Pilot de la Commission européenne (File ref n° : 5647/13/ENVI)

Madame,

Par un courrier communiqué le 25 septembre 2013, la Commission européenne a demandé à la Belgique la transmission du rapport requis en application de l'article 8 (1) de la directive 2004/35/CE sur la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages environnementaux.

Nous vous prions de trouver, en annexe, la réponse de la Région de Bruxelles-Capitale à cette demande.

Nous nous tenons à votre entière disposition pour toute question complémentaire relative à ce courrier et vous prions de croire, Madame, en l'expression de nos sentiments les meilleurs.

R. PEETERS
Directrice générale adjointe

F. FONTAINE
Directeur général
NON-BINDING GUIDANCE FOR MS REPORTS UNDER ARTICLE 18(1) IN CONJUNCTION WITH ANNEX VI ELD

The final objective of the reports by the Member States on the experience gained in the application of the Directive pursuant to Article 18(1) in conjunction with Annex VI of the ELD is to evaluate the effectiveness of this Directive (What works? What does not work? What can/should be improved?). Fragmentary and divergent information makes this task more difficult. The more meaningful and comparable the information and data provided, the more useful will be this exercise and the more reliable and better based will be the Commission report under Article 18(2) ELD.

This Guidance to the Member State reporting under Article 18(1) in conjunction with Annex VI of the ELD is therefore committed to the goal of ensuring meaningful, coherent and comparable information. It is meant to be a tool supporting Member States in the reporting of the experience gained in the application of the Directive.

Following the information exchange between the Commission and the ELD Government experts at the 11th ELD Government experts meeting of 30 May 2012 and the subsequent continuation by written exchange, the below annotations to the mandatory part of Annex VI (questions 1 – 5) and the comments to the voluntary part (indicative questions 1 - 3) serve the purpose of interpretation, ensuring common understanding and explaining the reasons why specific information is needed or useful. The last section in the voluntary part are expanding on Annex VI according to the identified most relevant information for a useful report.

Member States are therefore encouraged to make use of this Guidance when preparing their reports under Article 18(1) of the ELD.

MANDATORY PART

The reports referred to in Article 18(1) shall include a list of instances of environmental damage and instances of liability under this Directive, with the following information and data for each instance:

Q1. Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under this Directive.

No confirmed damage in Brussels Region but we have faced a "cross-Region" incident which took place at our North waste water treatment plant: this company, called Aquiris, completely stopped its water treatment from 8 December to 19 December 2009.

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No damage in the sense of the Directive (water quality, biodiversity) due to the short period of the incident and periodicity (Winter) + cf. common interpretation (e.g. the EU Commission and Danish guidelines)

The water quality immediately raised after the incident to normal standards

"Type of environmental damage" refers to the three categories of environmental damage in Article 2.1 ELD: damage to protected species and natural habitats; water damage; land damage. For the assessment of the effectiveness of the ELD it is necessary to obtain the number of environmental damage cases under each category per Member State. Under this heading, only "confirmed" damage is relevant information, i.e. where cases were treated as environmental damage cases by the liable operators and/or competent authorities according to the requirements of the ELD.

"Date of occurrence of the damage" refers to the date when the event, incident or emission occurred.

"Date of the discovery of the damage" refers to the date when the damage has been discovered by any person (private person, operator, authority etc.).

"Date on which proceedings were initiated under this Directive" refers to the date when remedial action was commenced, e.g. by containment or limitation of the damage (Article 6.1(a) ELD) or identification of remedial measures/launching the remedial action plan (Article 7.1 ELD). It is not related to preventive action as Q1 refers to "damage", its occurrence/discovery etc. and not to "imminent threat of damage".

Information about the length of remedial action is important. However, on a voluntary basis also information about the length of preventive action (which normally would be rather short) may be provided (see voluntary part, below).

In case, it is found difficult to determine the exact limit between preventive and remedial measures, either an estimated beginning of the remedial measure or an "integrative" initial date for both types of action can be provided, but this should in the latter case be clearly mentioned in order to avoid the mixing of incomparable information.

Q1 is mirroring Q5 on "Date of closure of proceedings" and these two questions should therefore be best treated closely together in the report, or cross-referenced.

In case that a Member State experienced already a significantly high number of environmental damage cases under the ELD implementing legislation, summarised data for instance in the form of a table or a box describing the case would be sufficient if the overall information is clearly provided, with a level of detail that allows for meaningful understanding.

Q2. Activity classification code of the liable legal person(s) (1).

Waste water treatment plants are inserted in Brussels' Region annex III, as soil related risky activities: point 1.b (Ordinance of 13 November 2008), this "activity" is part of a de-pollution
scheme and their long-term inaction could lead to a pollution, this is untypical vis-à-vis the ELD approach and philosophy aimed at real "polluting" activities.

In our "case" the incident was too short to cause real damage.
Annex VI requires the indication of an "activity classification code of the liable legal person(s)" but does not require a specific code. It just includes a reference to the NACE code according to Council Regulation (EEC) No 3037/90, without however making the use of the NACE code mandatory.

It is therefore necessary that Member States clearly indicate the reference basis for the "activity classification code" used by each Member State in order to make this information complete.

For the purpose of evaluating the effectiveness of the ELD at EU level, classification of the activity pursuant to Annex III ELD would be most useful and would seem sufficient (see voluntary part).

Q3. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The type of claimants and the outcome of proceedings shall be specified.)

Some proceedings were started but the outcome is not yet known.

"Resort to judicial review proceedings by liable parties" refer to such proceedings instigated under Article 11.4 ELD.

"Resort to judicial review proceedings by qualified entities" refer to proceedings instigated under Article 12.4 ELD in conjunction with 13.1 ELD.

Indication of the number of proceedings is not required by the mandatory part, but may be useful additional information (see voluntary part: structure of cases, third category).

Under "type of claimants" should be understood the types indicated in 11.4 ELD ("liable parties") and in Article 12.1 ELD ("qualified entities"). As regards the latter (i.e. the "qualified entities") it would not seem indispensable to differentiate according to the three letters (a), (b) and (c), given that most Member States would not have all three categories. However, the differentiation between natural or legal person affected/having a sufficient interest/alleging the impairment of a right on the one hand and non-governmental organisations promoting environmental protection on the other hand would appear pertinent. If this is regarded uncovered by the mandatory part, the latter could go into the voluntary part.

In order to obtain comparable data the term "outcome of proceedings" should be further specified. It is suggested to use only three rough categories to this end: Claim (1) successful or (2) unsuccessful or (3) partly successful/unsuccessful. Any further differentiation or explanation of (i.e. "unsuccessful") may lead to complex difficulties due to the various reasons which may vary from one Member State to another Member State why a claim was not successful. However, Member States are of course free to provide the main reasons why a claim has not been successful or partly unsuccessful.

Q4. Outcome of the remediation process.

No need for remedial action.
The water quality immediately raised after the incident to normal standards.
A common understanding of the term "outcome of remediation process" needs to be found. It was suggested that it "refers to the state of the environment by the end of the remediation process and not to the types of remedial actions". It could however also be related to the type of remediation and/or the costs of remediation. In principle all these elements appear relevant and work together. It is therefore suggested to provide as far as possible information about the environmental outcome together with explanation of the remediation type(s) and the costs. If the latter parts (type, costs) are considered to fall under voluntary information, only information about the state of the environment is required. Because remediation may take long in bigger or more complex cases the final state of the environment (as well as remediation costs) will only be known in the future, one could in such cases only anticipate the expected or estimated outcome.

Q5. Date of closure of proceedings.

We still do not know.

Information as regards the "date of closure of proceedings" complements the information on the initiation of proceedings under Q1. It appears therefore reasonable to deal with both questions closely together in the report (or by way of cross-reference).

VOLUNTARY PART

Member States may include in their reports any other information and data they deem useful to allow a proper assessment of the functioning of this Directive, for example:

1. Costs incurred with remediation and prevention measures, as defined in this Directive:
   — paid for directly by liable parties, when this information is available;
   — recovered ex post facto from liable parties;
   — unrecovered from liable parties. (Reasons for non-recovery should be specified)

Structure into costs for preventive measures and costs for remedial measures would be useful. The latter category should be further structured into the three types of primary, complementary and compensatory remediation where possible. This could be aggregate data, but extreme ends should be indicated (i.e. the range or the costs for smallest and biggest remediation cases).

2. Results of the actions to promote and the implementation of the financial security instruments used in accordance with the Directive.

3. An assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce this Directive.

In relation to the mandatory part above:

If not dealt already above within Q1 and Q5, it would be useful to provide the following supplementary information in the report on a voluntary basis:

As to Q1 of mandatory part above:
Member States should in their reports differentiate the environmental damage cases in closed (completed) cases and open (ongoing) cases in order to avoid misinterpretation and drawing of biased conclusions.

Member States may furthermore structure the cases into (a) cases dealt by competent authorities following a request for action (Article 12 ELD), (b) cases dealt by competent authorities following an imminent threat of damage, and (c) cases dealt by courts or other independent and impartial public bodies (Article 13.1 ELD).

If information as to Q1 refers only to remedial proceedings, Member States should also provide similar information as under Q1 for preventive action.

If not already covered or resulting from the context of the information provided under Q1, Member States may also in addition indicate the number of potential cases assessed under the ELD since the transposition into national legislation.

As to Q2 of mandatory part above:

If information as to Q2 does not relate to the activity categories in Annex III, Member States are encouraged to provide such information in the voluntary part of their report. Information about the number of cases, the respective damage categories and the respective length of proceedings as well as costs incurred with remediation and preventive measures per dangerous activity pursuant the numbers in Annex III would be extremely useful information for the evaluation of the Directive.

As to Q3 of mandatory part above:

The overall number of requests for action under Article 12 of the Directive received in a Member State would provide useful information.

If the differentiation between (1) natural or legal person affected/having a sufficient interest/alleging the impairment of a right on the one hand and (2) non-governmental organisations promoting environmental protection on the other hand is not dealt in the mandatory part above, such information may provide useful insights and should hence be provided on a voluntary basis if feasible.

As to Q4 of mandatory part above:

If not dealt already under the mandatory part, information about the number of remediation cases per type (primary, complementary, compensatory remediation or a combination thereof).

In addition:

Article 18(1) ELD provides that member States shall report to the Commission on the experience gained in the application of the ELD. Therefore, any further information gained in the application of the Directive deemed useful by the respective Member State for the assessment of the functioning of the Directive may be submitted.
This applies in the first place to the review points listed in Article 18.3 of the ELD where Member States are encouraged to send their relevant experience on:

- Application of the exceptions in Article 4.2, 3 and 4 in conjunction with Annexes IV and V
- Application of the Directive to environmental damage caused by genetically modified organisms (Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress)
- Application of the Directive in relation to protected species and natural habitats
- Instruments that may be eligible for incorporation into Annexes III, IV and V

This applies in the second place to the points listed under the conclusions in the final part of the ELD Report of 12 October 2010, in particular the issues regarding:

- Mandatory financial security v. voluntary financial security
- Application of the optional defences (permit defence, state of the art defence)
- Extension of the scope of biodiversity damage

Moreover, the following points could be considered:

- Experience gathered regarding the implementation of financial security instruments in accordance with the Directive for Annex III operators (extent, sufficiency)

- Information on actions to promote the application of the Directive, as for example stakeholder workshops, information meetings, brochures/leaflets and on the tangible results, if any

- Application of a "severity threshold" in the respective Member State in determining the significant biodiversity/water/land damage

- Relationship between the ELD-transposing legislation and previously existing legislation in this or neighbouring fields (e.g. civil liability for environmental damage, permitting regimes for the relevant activities)

- Other information regarding the perceived strengths and weaknesses of the ELD (general or specific), for example also including an indication as to what has been perceived as the largest beneficial change brought by the Directive what as the most significant problem.

- Not least, it would be extremely useful for the assessment of the functionality and effectiveness of the ELD to obtain explanations on the reasons for problems and difficulties in the application of the Directive, while it will be very useful to receive your input on the challenges that still authorities (either at central level or at local level) are facing with the implementation of the ELD, including the solutions found to such problems as the case might be.