

The status of the Soil Framework Directive

Valerie Fogleman provides an overview of the ways that attempts to protect soil in European law have been stalled.

In September 2006, the European Commission submitted a proposal to the European Parliament and the Council for a Soil Framework Directive (Proposed Directive)¹. In November 2007, the proposal had its first reading in the European Parliament². The Proposed Directive has not, however, progressed since 2007 due to Austria, France, Germany, the Netherlands and the UK having formed and maintained a blocking minority in the Council. This article describes the origin and status of the Proposed Directive. It focuses on the controversial measures in the Directive to prepare national inventories of land that may be contaminated and to remediate land that poses a significant risk to both human health and the environment.

KEY THREATS TO SOIL

The Proposed Directive originated in 2002 in the Sixth Community Environment Action Programme, a key objective of which was the “promotion of a sustainable use of the soil, with particular attention to preventing erosion, deterioration, contamination and desertification”³. Also in 2002, the European Commission set out its approach to protecting soil in a Communication entitled ‘Towards a Thematic Strategy on Soil Protection’. The Communication identified the key threats to soil as erosion, decline of soil organic matter, compaction, salinisation, landslides, contamination, sealing (covering soil with impermeable material), and decline of soil biodiversity⁴.

The Commission’s approach was well received by the Council, the European Parliament and other EU institutions⁵. A public consultation was held, and

working groups were established to provide reports on the key threats to soil. The working groups subsequently published reports, including recommendations to the Commission. In 2005, an internet consultation resulted in 91 per cent of EU citizens who participated indicating that preventing or mitigating soil degradation in the EU was important or very important⁶. Consensus was unanimous that soil should have the same level of protection as air and water, due to the critical nature of its functions for human and ecosystem survival⁷.

In September 2006, the European Commission adopted the Thematic Strategy for Soil Protection. The strategy proposed, among other things, a framework Directive to protect soil⁸. At the same time, the Commission submitted the Proposed Directive to the European Parliament and the Council. The Proposed Directive stated that member states should identify “contaminated sites”, that is, sites “where there is a confirmed presence, caused by man, of dangerous substances of such a level that Member States consider they pose a significant risk to human health or the environment” taking account of their current and approved future use⁹. Each member state was to establish and publish a national inventory of contaminated sites, to be reviewed every five years¹⁰.

POTENTIALLY POLLUTED SITES

Five years after the deadline for transposition of the Directive, each member state was to identify sites at which potentially soil-polluting activities had taken, or were taking, place¹¹. The activities, listed in annex II to the Proposed Directive, were Seveso sites, integrated pollution prevention and control sites (now under the

Industrial Emissions Directive), airports, ports, former military sites, petrol stations, dry cleaners, certain mining installations, landfills, wastewater treatment installations and pipelines transporting dangerous substances¹². Competent authorities were then to measure concentration levels of dangerous substances at sites in the inventory. If the levels were such that the competent authority believed that they posed “a significant risk to human health or the environment”, the authority was to carry out an on-site risk assessment.

The Proposed Directive established the following timetable for carrying out the above tasks:

- at least 10 per cent of the sites within five years from the deadline for transposition;
- at least 60 per cent of the sites within 15 years; and
- the remainder within 25 years¹³.

In order to assist in the rapid identification of contaminated sites, soil status reports were to be submitted to the relevant competent authority for sites on which potentially polluting activities had taken, or were taking, place when such sites were sold. The reports were to be prepared by the owner or prospective purchaser of such a site and were to include the history of the site, a chemical analysis of the concentration levels of the dangerous substances in the soil that linked them to the potentially polluting activity, and the concentration levels giving rise to a determination that the dangerous substances posed a significant risk to human health or the environment¹⁴. Following submission of the reports to the competent authority, the authority would issue them and use the information in them to identify contaminated sites¹⁵.

REMEDIATION STRATEGY

Member states were directed to prepare a National Remediation Strategy including targets, a timetable for implementation of the above measures, and funding for them. Sites in the strategy were to be prioritised for remediation on the basis of the significance of the risk to human health¹⁶. The national strategies were to be prepared and published by no later than eight years after the deadline for transposition of the Soil Framework Directive¹⁷. Each member state was to ensure that contaminated sites in its national inventory were remediated by removing, controlling,

containing or reducing contaminants so that the sites no longer posed a significant risk to human health or the environment, taking account of their current use and approved future use¹⁸.

WHO PAYS?

The Proposed Directive did not identify the persons who would be responsible for paying for the remediation, stating that each member state should set up “appropriate mechanisms to fund the remediation of the contaminated sites for which, subject to the polluter pays principle, the person responsible for the pollution cannot be identified or cannot be held liable under [EU] or national legislation or may not be made to bear the costs of remediation”¹⁹. The Commission suggested that costs could be borne by land users, the polluter or the public purse, leaving the decision to each member state²⁰.

Further, the Proposed Directive would amend the Environmental Liability Directive (ELD) so that the discretion granted to a competent authority under the ELD to remediate orphan sites “as a means of last resort”²¹ was aligned with the Proposed Directive²². That is, whereas a competent authority is not obliged, under the ELD, to remediate environmental damage if the operator does not do so, the authority would be obliged to remediate it under the proposed amendment.

COMPROMISE AND BLOCKING

At the first reading of the Proposed Directive, the European Parliament made amendments to provide member states with more flexibility in carrying out the measures described above²³. Further progress of the Proposed Directive then met the blocking minority in the Council. Debates in the Council between 2007 and 2009 resulted in compromise texts of the Proposed Directive. Amendments included the streamlining of provisions and the incorporation of further flexibility for member states in their implementation of it; more specifically, the deletion of deadlines, a reduction in the list of soil-polluting activities for sites on the registers, and less information in soil status reports. The amendments failed to break the impasse because, although they met with approval from some member states, they also resulted in the Commission and other member states calling for “greater harmonisation in order to create a level playing field across the EU”²⁴.

The proposed Directive remains blocked by a minority of Member States on the grounds of subsidiarity, excessive cost and administrative burdens²⁵.

SOME SLOW PROGRESS

EU measures to protect soil and to assist in the remediation of contaminated land have, however, progressed in the absence of the Soil Framework Directive, albeit slowly. For example, in 2012, the Commission issued a report that overviewed the implementation of the soil thematic strategy. Whilst the report focused on measures to prevent soil degradation, it also mentioned the remediation of contaminated land, noting among other things that between 2007

and 2013 the EU had allocated approximately €3.1 billion to the rehabilitation of contaminated land and industrial sites as part of the Cohesion Policy, with the Czech Republic, Germany and Hungary having been allocated the most funding. The report also stated that the Commission had approved grants for remediating soil contamination by several member states (the Czech Republic, Estonia, Germany, the Netherlands, Slovakia and the UK) as being compatible with the polluter pays principle and the Treaty of the EU²⁶.

In addition, the Commission has included provisions to protect soil in proposed EU legislation. For example, the Industrial Emissions Directive imposes increased measures on operators to prevent soil and groundwater pollution²⁷. The proposed amendments to the Environmental Impact Assessment Directive require the consideration of the effect of proposed projects and plans on soil²⁸.

CONCLUSION

Measures in the Proposed Directive to protect soil degradation are progressing. Measures to prepare inventories of potentially contaminated land to remediate them are, however, halted at least for the near future. The UK will almost certainly continue to oppose provisions establishing national inventories of potentially polluted land. The so-called section 143 registers of land on which contaminative activities had been carried out²⁹, met strong opposition in the early 1990s, leading the UK government eventually to withdraw the proposal to establish them³⁰. Thus, whilst some member states have national inventories of potentially and actually contaminated land, together with national remediation programmes³¹, it will probably be some time before the UK establishes a national programme to remediate contaminated land³².

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◀ Biological soil treatment.

Valerie Fogleman is a Consultant at Stevens & Bolton LLP and Professor at Cardiff University School of Law. She has practiced environmental law for over 25 years and is an Honorary Member of the RICS and Vice Chair of the Planning and Environment Committee of the City of London Law Society.

SOURCES

1. Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC (COM(2006) 232 final, 22 September 2006).
2. European Parliament legislative resolution of 14 November 2007 on the proposal for a directive of the European Parliament and of the Council establishing a framework for the protection of soil (14979/07).
3. Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme. OJ L242/1 (10 September 2002).
4. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Towards a Thematic Strategy for Soil Protection (COM(2002) 179 final, 16 April 2002).
5. See Commission Staff Working Document, Document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Thematic Strategy for Soil Protection, Impact Assessment of the Thematic Strategy on Soil Protection (SEC(2006) 620, 22 September 2006), 5-7.
6. See *ibid* 7.
7. See Proposed Directive, 4.
8. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Thematic Strategy for Soil Protection (COM(2006) 231 final, 22 September 2006).
9. Proposed Directive, art. 10.
10. *Ibid* art. 10(3).
11. *Ibid* art 11(2).
12. *Ibid*, annex II.
13. *Ibid* art 11(3).
14. *Ibid* art 12; see *ibid* recital 25.
15. *Ibid* art 12(4).
16. *Ibid* art 14(1).
17. *Ibid* art 14(2).
18. *Ibid* arts 13(1)-(2).
19. *Ibid* art 13(3).
20. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Thematic Strategy for Soil Protection (COM(2006) 231 final, 22 September 2006, 10-11).
21. Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, as amended. OJ L 143/56 (30 April 2004), art 6(3).
22. Proposed Directive art 23; see recital 29. Another controversial proposal in the Proposed Directive is the identification by each member state of areas in its national territory at which "there is decisive evidence, or legitimate grounds for suspicion, that one or more [soil degradation processes] has occurred or is likely to occur in the near future". The so-called "risk areas" or "priority areas" were to be made public and reviewed at least every 10 years. *Ibid* art 6.
23. European Parliament legislative resolution of 14 November 2007 on the proposal for a directive of the European Parliament and of the Council establishing a framework for the protection of soil (14979/07).
24. Council of the European Union, Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil – progress report (2006/0086 (COD), 10919/09, 16 June 2009), 5.
25. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The implementation of the Soil Thematic Strategy and ongoing activities. (COM(2012) 46 final, 13 February 2012), 6 (2012 Report).
26. *Ibid* 4.
27. Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control). OJ L 334/17, 17 December 2010), arts 14(1)(b), (e), 16, 22(1); see 2012 Report, 4 (describing provisions as setting "a sort of 'zero tolerance' policy for new pollution").
28. Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (COM(2012) 628 final, 26 October 2010), Annex (proposing new Annex II.A and amendments to Annex III and IV).
29. EPA 1990, s 143 (repealed).
30. The purpose of the registers was to alert local authorities and persons interested in such sites, including landowners, potential purchasers and developers of the 'possibility of contamination' at the listed sites and the type of contamination to be expected. Department of the Environment and the Welsh Office, 'Public Registers of Land which May be Contaminated: A Consultation Paper' (May 1991) para 6.1.
31. See, for example, France: Base de données des sites et sols pollués (inventory of potentially and actually contaminated land); <<http://basol.environnement.gouv.fr/tableaux/home.htm>> accessed 15 June 2013 and Banque de données des anciens sites industriels et activités de service (BASIAS) (inventory of details of specified sites at which contaminative activities were carried out); <<http://basias.brgm.fr/donnees.asp>> accessed 15 June 2013; Denmark: Order No 1519 on the definition of lightly contaminated soil (14 December 2006) (establishing inventory of potentially and actually contaminated sites).
32. Part 2A of the Environmental Protection Act 1990 does not establish a national programme to remediate contaminated land. See Defra, 'Assessing Risks from Land Contamination – A Proportionate Approach, Soil Guideline Values: The Way Forward' (CLAN 6/06, November 2006) 6, para 2.6 ('Part 2A was never intended to establish a national remediation programme').