Seveso III Directive: what's new?

Arthur van Rossem, a solicitor at Legaltree, looks at Seveso III and the changes that will come into force in 2015

In 1976, the small Italian town of Seveso was severely contaminated with dioxin as a result of a major accident at a chemical factory. This prompted the adoption of the first Seveso Directive in 1982 which was replaced in 1999 by the current Seveso II Directive (96/82/EC), amended in 2003 (2003/105/EC). In June 2012 the Seveso III Directive was adopted (2012/18/EU) which will replace the current Directive on 1 June 2015. The adoption of the Seveso III Directive is mainly driven by the need to align with the new system of classification of dangerous substances under the European Regulation on Classification, Labeling and Packaging (CLP). In addition it aims to improve on the current framework drawing on past experience. Some of the differences compared to Seveso II are highlighted below.

New classification system based on CLP regulation

The Seveso II Directive applies to establishments where ´dangerous substances´ are present in quantities equal to or in excess of the quantities listed in Annex I, parts 1 and 2, column 2 or column 3. The so-called 'qualifying quantities'. Part 1 listing named substances such as hydrogen, liquefied gas and petroleum products. Part 2 listing categories of substances and preparations not specifically named in part 1 such as toxic, explosive or flammable substances. Column 2 contains low threshold qualifying quantities which trigger an obligation to submit a notification to the competent authority and to draw up and implement a major-accident prevention policy (lower-tier establishments). Column 2 contains high threshold qualifying quantities which trigger an obligation to produce a safety report for the purpose of demonstrating that a major-accident prevention policy and a safety management system for implementing it have been put into effect (upper-tier establishments). For example, for petroleum products a low and high threshold applies amounting to 1,500 respectively 25,000 tonnes.

The substances and preparations not specifically mentioned in Annex I, part 1, are currently classified in accordance with the European Directives on classification, packaging and labelling of dangerous substances (67/548/EEC) and preparations (88/379/EEC). However these two Directives have been replaced by the European Regulation 1272/2008 on Classification, Labelling and Packaging of substances and mixtures, also known as the CLP Regulation. Directive 67/548/EEC and Directive 1999/45/EC shall be repealed with effect from 1 June 2015. Under the Seveso III Directive substances and mixtures are classified in accordance with the CLP Regulation.

The CLP Regulation aligns with the harmonised criteria of the United Nations `Globally Harmonised System of Classification and Labelling of Chemicals´ (GHS). This GHS differs from previous classification systems and may thus result in a shift in the danger class of substances. In other words: substances previously not classified as dangerous, may now be deemed dangerous and vice versa. Consequently some new companies may fall within the scope of the Seveso III Directive as per 1 June 2015, others may fall outside the scope and even others may be confronted with upper-tier requirements or downgrade to lower-tier. In a statement dated 16 August 2011, Cefic expressed its concern that the (proposed) new classification system would unnecessarily lead to more substances and, as a result, to more than 10% additional establishments falling under the scope of the new Seveso Directive.

In advance it is difficult, if not impossible, to say what changes the new classification system may bring to the scope. Although the competent authorities may be willing to show some enforcement leniency to unprepared ´newcomers´, it may be worth the effort to investigate whether the new classification system may bring your company within the scope of the Seveso III Directive. The new Directive provides for a correction mechanism to exclude substances which are classified as dangerous, but are not deemed to pose a danger of major-accidents. However this mechanism will probably not result in many exclusions.

Access to safety information

The new Seveso III Directive also aims to improve access to safety information. Basic information on all Seveso establishments must now be made permanently available to the public, amongst others electronically (online). This concerns information such as the name of the operator, the address of the establishment, basic information on compliance and an

explanation in simple terms of the activity undertaken. For upper-tier establishments additional information must now be provided, e.g. general information relating to the nature of the major-accident hazards, including their potential effects on human health and the environment and summary details of the main types of major-accident scenarios and the control measures to address them.

Where upper-tier establishments are concerned member states must now also ensure that all persons likely to be affected by a major accident receive regularly and in the most appropriate form, without having to request it, clear and intelligible information on safety measures and requisite behaviour in the event of a major accident. It remains to be seen how often those likely to be affected must be actively informed and what is the most appropriate form.

Under the Seveso II Directive member states were under an obligation to ensure that the safety report is made available to the public upon request, but the operator could ask to restrict publication for reasons of industrial, commercial or personal confidentiality. The same obligation is included in the new Directive, but refusal or restriction of publication must now comply with the European Directive on public access to environmental information (2003/4/EC). In practice this will probably result in less (lawful) possibilities to restrict publication and an increased risk that confidential information is made public. This also applies to other information the competent authority may hold pursuant to the Seveso Directive. It may therefore be prudent to carry out a confidentiality check on documents before they are sent to the competent authority. Where possible any confidential information should be left out. In this connection please note that the inventory of dangerous substances must also be made available to the public upon request albeit subject to restrictions under Directive 2003/4/EC.

More stringent inspection obligations

Under the Seveso II Directive member states are under an obligation to ensure that the competent authorities organise a system of inspections or other measures of control appropriate to the type of establishment concerned. These must be sufficient for a planned and systematic examination of the technical, organisational or managerial systems being employed to ensure compliance. The system of inspections must include a programme of inspections for all establishments. These obligations have also been included in the new Directive, but the possibility of ´other measures of control´ is no longer mentioned. This implies that Seveso establishments cannot be left uninspected.

In addition the member states are now under an obligation to ensure that all establishments are covered by an ´inspection plan´ at national, regional or local level. This plan must – amongst others – include a list of groups of establishments with possible domino effects, procedures for routine and non-routine inspections and provisions on the co-operation between different inspection authorities, and must be reviewed regularly and updated where appropriate. Based on the inspection plans the competent authorities must regularly draw up programmes for routine inspections for all establishments including the frequency of site visits. The period between two inspections may not exceed one year for upper-tier establishments and three years for lower-tier establishments (LTE), unless the inspection programme is based on a systematic appraisal of major-accident hazards of the establishments concerned. The three year period for LTE is new. Also new is the obligation to carry out non-routine inspections to investigate serious complaints, serious accidents and ´near misses´, incidents and occurences of non-compliance. Finally the competent authorities are now also under an obligation to ensure that the operator takes all necessary actions to correct violations found within a reasonable period after receipt of the inspection findings.

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All in all the Seveso III Directive lays down much more stringent provisions on inspections and enforcement of compliance. This will require more effort by competent authorities and will no doubt force some establishments to further improve their compliance programmes. That strengthening of inspection and enforcement obligations may not be an unnecessary luxury has become evident in the Netherlands in recent years. In 2011 a major-accident occurred at the Seveso company Chemie-Pack due to unsafe working methods and the resulting fire levelled the site and contaminated surroundings. In March 2012 a surprise inspection at Odfjell Terminals Rotterdam revealed many, often serious, violations such as overdue maintenance of storage tanks and untested fire fighting equipment. In all these cases government oversight and/or enforcement have been lacking. Inspections were often insufficient and violations found were often not enforced.

Conclusion

Since 1976 the EU has come a long way in preventing major-accidents involving hazardous substances and limiting the impact of such accidents. The new classification system of dangerous substances under the CLP Regulation may bring some existing companies within the scope of the Seveso III Directive where others may no longer fall under the scope. To improve access to safety information certain information on Seveso establishments must now be made available to the public online. Upon request publication of Seveso information held by government may only be restricted in compliance with the European Directive on public access to environmental information. To improve government oversight all Seveso establishments must be covered by a government inspection plan. These plans form the basis for programmes for routine inspections which must include the frequency of site visits. Non-routine inspections must also be carried out and violations found must be enforced. Both government and operators will have to step up their game in order to confront the challenges under the Seveso III Directive.