



Efficiency and enforcement of legislation: the Environmental Liability Directive

**Training Workshop: Evaluation and Management of
Environmental and Social Risks in Lending and
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Efficiency and enforcement of the ELD

- **“Effectiveness”** of the Environmental Liability Directive (ELD) addressed in the Commission report 2010
 - **“Enforcement”** of the ELD at MS level and EU level
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Efficiency and enforcement of the ELD – a long story behind

- First considerations in the 1970s (waste sector)
 - European Commission Proposal of 1989 for a Directive on civil liability for damage caused by waste
 - Green Paper 1993
 - White Paper 2000
 - Working Document 2001
 - **Legislative Proposal 2002**
 - **Directive adopted by European Parliament and Council in April 2004**
 - **Deadline** for EU Member States to implement the directive in national law **expired on 30 April 2007**
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Enforcement at EU level – Transposition: Non-communication infringement case

- **Transposition deadline:** 30 April 2007
 - **Letter of formal notice** addressed to 23 MS on 1 June 2007
 - **Reasoned opinion** addressed to 16 MS on 1 February 2008
 - **Court application decision** concerning 9 MS on 26 June 2008
 - **Court judgements** received by 7 MS: Finland, France, Slovenia, Luxemburg, Greece, Austria, UK
 - As of **10 March 2010** the ELD has been **transposed completely by all 27 EU Member States** with one slight exception (Land of Salzburg in Austria)
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Enforcement at EU level – types of cases before the Commission/ECJ

- **Non-communication cases:** due to late transposition (ran down from 23 to 1)
 - **Non-conformity cases:** possible “horizontal case” in future in case of non-conformities detected in the assessment (1 Italian case pending)
 - **Bad application cases:** at present no infringement case pending
 - **Reference for preliminary ruling:** ECJ judgement of 9 March 2010 in Italian reference case for preliminary ruling C-378/08
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Judgement of 9.3.2010 in Italian case C-378/08 (1)

- ELD applies to damage caused by emission, event or incident taking place after 30 April 2007 where such damage derives from activities carried out after that date **or activities which were carried out but had not finished before that date.**
 - However, it is up to the national courts to ascertain on the basis of facts whether the damage falls within the above situation.
 - Where the conditions for the application of the ELD are not met *ratione temporis* and/or *ratione materiae*, **such a situation is governed by national law.**
 - **The polluter-pays principle** in Article 174 EC (now: 191 TFEU) is directed at action at Community level (now: EU level) **can therefore not directly be invoked** by individuals in order to exclude national legislation in an area of environmental policy for which **there is no Community legislation (EU legislation)**
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Judgement of 9.3.2010 in Italian case C-378/08 (2)

- Whilst Articles 4(5) and 11(2) ELD require establishment by the competent authority of a **causal link** between damage and the activity of the operator, the ELD does not specify how such causal link is to be established and **MS have a broad discretion** in laying down national rules giving concrete expression to the PPP.
 - Accordingly, a MS may provide that a CA has the power to impose remedial measures on the basis of the **presumption of a causal link**.
 - However, such a presumption must be based on **plausible evidence**, such as **near location** of the operator's operation to the pollution or **correlation between pollutants** identified and substances used by the operator.
 - Where the CA has such evidence, such a situation falls within the scope of the ELD, unless the operator is able to **rebut that presumption**.
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Judgement of 9.3.2010 in Italian case C-378/08 (3)

- According to Articles 3(1), (5) and 11(2) ELD **the CA is not required to establish fault, negligence or intent** on the part of the operators but it must first carry out a **prior investigation into the origin of the pollution** found (but has discretion as to the procedures, means and length of such investigation).
 - The CA has second to **establish a causal link** between the activities of the operator at whom the remedial measures are directed and the pollution.
 - MS may decide pursuant to Article 16(1) ELD to **identify additional activities (other than those listed in Annex III) and additional responsible parties to be held strictly liable** for environmental damage
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Key definitions - Operator

- Natural or legal, private or public person who operates or controls the damaging occupational activity (**absolute or "Community" scope**)
- OR**
- « where this is provided for in national legislation » (**optional or « national » scope**):
to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or the person registering or notifying such an activity
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Implementation – Key definitions: Operator

Operator definition:

- Most Member States have transposed the **broad scope**, i.e. including the « national scope »: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Greece, Ireland, Italy, Malta, Netherlands, Portugal, Romania, Spain, Sweden, United Kingdom
 - Remained with the **limited scope** (the « Community scope »): France
 - Went even **beyond the Directive's scope** (« more stringent measure »): Estonia, Hungary, Lithuania, Poland
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Key definitions - Environmental damage

Definition of environmental damage

- **“Protected species and natural habitats”**: significantly affecting the reaching or maintaining of a favourable conservation status (with reference to Birds Directive 79/409 and Habitats Directive 92/43)
 - **“Water”**: significantly affecting ecological, chemical, quantitative status or ecological potential (with reference to the Water Framework Directive 2000/60)
 - **“Land”**: land contamination that creates significant risk to human health being adversely affected through introduction of substances, preparations, (micro-)organisms in, on or under land
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Implementation – Key definitions: Environmental damage

Definition of damage to “protected species and natural habitats” - **Extension to nationally protected species and habitats:**

- **Yes:** Austria (depending on the region), Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden, United Kingdom
 - **No:** Bulgaria, Denmark, France, Germany, Ireland, Italy, Malta, Netherlands, Romania, Slovak Republic
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Scope

- **Strict liability:** environmental damage and imminent threat when caused by specified occupations (“dangerous”) activities
 - **Fault based liability:** damage to protected species and natural habitats and imminent threat when caused by non-specified occupational activities
 - **Causal link** always required – see further interpretation by ECJ in case C-378/08
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Implementation – Scope (1)

- **Strict liability beyond Annex III-activities (enlarged scope):**
 - ◆ **Comprehensive:** Denmark, Hungary, Lithuania, Sweden
 - ◆ **Specific (by activities):** Belgium (different by region/federal state), Latvia
 - ◆ **Optional extension:** Greece, Netherlands
 - **Scope of strict liability identical with ELD:**
Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Ireland, Italy, Malta, Poland, Romania, Slovakia, Spain, United Kingdom
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Implementation – Scope (2)

Optional exemption of spreading of sewage sludge from Annex III

- **Exempt:** France, Latvia, Malta, Portugal, Romania, Slovakia, United Kingdom
 - **Covered:** Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Sweden
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Exceptions

- Act of armed conflict, hostilities, civil war, insurrection
 - Natural phenomenon of exceptional, inevitable and irresistible character
 - International Conventions (oil pollution, carriage of hazardous substances at sea and on land, nuclear risks/damage)
 - National defence, international security, civil protection
 - Diffuse pollution (i.e. no causal link)
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Implementation – Exceptions

- The **vast majority applies the exceptions to the same extent** as the ELD.
 - A **few Member States apply less exceptions**, such as Belgium (Walloon Region), Denmark: no national defence exemption, or Estonia: no exceptions
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Remediation

Remediation in case of damage occurred:

- Operator has to take containment/ mitigation measures
 - Operator has to develop and propose remediation plans to competent authority for approval
 - Operator has to take remediation measures
 - Powers of the CA: "getting the work done"
 - Discretionary subsidiary action by the CA
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Implementation – Remediation

- Most Member States just **rely on the remedial provisions** in Annex II of the ELD
 - Only a few Member States **maintained previously existing or developed additional or specified further (land) remediation standards:** Belgium (Flemish and Walloon Regions), Denmark, Greece (optional), Poland, United Kingdom
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Competent authority

- EU Member States have to designate the **competent authorities (CA)**
 - **Duties:**
 - ◆ To establish who caused damage
 - ◆ To assess the significance of the damage
 - ◆ To determine the remedial measures
 - **Powers:**
 - ◆ To require operator to carry out own assessment and to supply necessary information and data
 - ◆ To require operators and third parties to carry out the necessary preventive or remedial measures
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Implementation - Competent authorities (A)

Austria: District authority

Belgium: Federal level: several authorities according to sector (environment, civil protection departments etc.), Walloon region: *DG Ressources Naturelles Environnement*, Flemish region: *Dep. Leefmilieu, Natuur en Energie*, Brussels region: *Brussels Instituut voor Milieubeheer/Institut Bruxellois pour la Gestion de l'Environnement (BIM/IBGE)*

Bulgaria: Minister of environment and water; Directors of regional inspectorates of environment and water; Directors of river basin directorates; Directors of national parks

Cyprus: Ministry of Agriculture, Natural Resources and Environment or by delegation another authority according to the type of damage

Czech Republic: Ministry of Environment, CZ environmental inspection, National parks and protected landscape areas services, military authorities

Denmark: Supervisory authorities

Estonia: Environmental Board

France: *Préfet de département*

Germany: Technically competent authorities of the *Länder* in charge of nature conservation law, water law, soil protection law (as regards damage in the EEZ: federal Agency for Nature Conservation)

Hungary: Regional environment, nature conservation and water management inspectorates

Ireland: Environment Protection Agency



Implementation - Competent authorities (B)

Italy: Ministry for the Environment, Territory and the Sea

Latvia: State environmental authority

Lithuania: Regional environmental protection departments of the Ministry of Environment

Malta: Malta Environment and Planning Authority

Netherlands: Which authorities (State, province, community, waterboard) are competent depends on the specific case

Poland: *Voivodship* governors (regional authorities) except GMO damage (Minister of Environment)

Portugal: Portuguese Environment Agency

Romania: County Agency for Environmental Protection

Slovak Republic: Ministry of Environment or regional environmental offices or district environmental offices or Slovak Environmental Inspection (as regards IPPC activities)

Spain: Regional authority (as regards nature and land damage), Federal State (as regards water damage)

Sweden: Supervisory/inspection authority: normally the local municipality or the regional authority (country board), (environmental protection agency gives guidance)

United Kingdom: Natural England (biodiversity damage), Environment Agency (water damage), local authorities (land damage), Marine Fisheries Agency (marine biodiversity damage)



Optional defences - Permit defence

The EU Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation given under applicable national laws and regulations



Optional defences - State of the art defence

The EU Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place



Implementation – Optional defences

- **Both defences incorporated:** Belgium (regions), Cyprus, Czech Republic, Estonia, Greece, Italy, Latvia (except GMOs), Malta, Portugal, Slovakia, Spain, United Kingdom (except GMOs in Scotland, Wales)
 - **Both defences not applicable:** Austria, Belgium (federal level), Bulgaria, Germany, Hungary, Ireland (change planned), Netherlands (applicable only after check of reason), Poland, Romania
 - **State of the art defence applicable but permit defence not:** France
 - **Permit defence applicable but State of the art defence in general not:** Denmark, Lithuania
 - **Mitigation ground:** Sweden
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Cost allocation/ Multi-party causation

- Cost allocation in case of **multiple party** causation of damage: EU Member States decide whether every operator is responsible for the whole cost (**joint & several liability**) or only its own share of the cost (**proportional liability**)
 - « especially concerning the apportionment of liability between **the producer and the user** of a product »
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Implementation - Multi-party cost allocation

- **All parties have full responsibility (joint & several):** Austria, Belgium, Cyprus, Czech Republic, Denmark, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Portugal, Romania, Spain, Sweden, United Kingdom
 - **Each party obliged to pay only its share (proportional):** Bulgaria, Denmark, France, Lithuania, Slovakia
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Mandatory vs. voluntary financial security

Article 14(1) Financial security

Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.



Implementation - Mandatory vs. voluntary financial security

- **Mandatory financial security scheme:** Portugal (01/2010), Spain (04/2010), Greece (05/2010), Bulgaria (01/2011), Czech Republic (01/2013), Hungary, Slovakia, Romania
 - ◆ Schemes **differ significantly** in scope of covered operators, liabilities, recognised instruments, etc.
 - ◆ All above countries **facilitate the implementation** by the use of a gradual approach, financial guarantee ceilings and/or the exclusion of low-risk activities
 - **Most MS rely upon a voluntary financial security scheme**
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Implementation - where national transposition is more stringent

- **In several respects:** Hungary, Poland, Estonia
 - **As regards damage to land:** Belgium (Flemish and Brussels Regions), Denmark, Germany, Italy, Lithuania, Netherlands, Poland
 - **As regards damage to water:** Austria
 - **As regards time limits:** Sweden
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Overall conclusion from the comparison of implementation

- **Broad variety** of implementation across the EU with **significant differences** between Member States as regards
 - ◆ transposition and implementation of main elements of the ELD and
 - ◆ the level of ambition (more/less stringent measures)
 - Only a **few cases (around 50)** which are/were handled pursuant to the ELD transposing legislation in the EU
 - **Difficult to assess effectiveness** due to
 - ◆ lack of data and lack of experience
 - ◆ above mentioned broad variety, scattered picture
 - ◆ pre-existing legal national contexts
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Article 14 Report

- The Commission has to report before the **30 April 2010** on the
 - ◆ **effectiveness of the Directive** in terms of actual remediation of environmental damages
 - ◆ availability at reasonable costs and on conditions of insurance and other types of **financial security** for the activities covered by Annex III.
 - The report shall also consider in relation to financial security the following aspects:
 - ◆ a gradual approach,
 - ◆ a ceiling for the financial guarantee and
 - ◆ the exclusion of low-risk activities.
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Article 14 Study – Availability of financial security products

ELD coverage options are **widely available**, but:

- ◆ Product development still in process;
 - ◆ Varying levels of ELD progress in Member States;
 - ◆ Operators think their liabilities are covered by GTPL and EIL policies;
 - ◆ Operators reluctance to purchase additional insurance and preference to cover liabilities through captives etc;
 - ◆ Transposition and execution phases differ.
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Article 14 Study – MS approaches to financial security

The main financial security instruments in MS include:

- ◆ **Insurance** and re-insurance: all MS (within insurance most common: GTPL)
 - ◆ **Bank guarantees** (second most common): 8 MS
 - ◆ **Market Based Instruments** (MBIs): 6 MS
 - ◆ **Financial guarantees**: 4 MS
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Article 14 Study - Related insurance products

- Products **offering cover for the full scope** of liabilities under the ELD are not generally available and when available are more costly than other policies (GTPL or EIL)
 - While **sudden and accidental pollution** coverage is offered by most insurers, gradual pollution is only offered by a few
 - No insurance products for **risks where the economic consequences are hard to predict** such as damage by Genetically Modified Organisms
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Article 14 Study - Market developments

- Most insurers describe the market development as **positive**: A growing and competitive market providing good cover
 - Market development has been delayed due to the **Financial Crisis**, while it has been more profoundly hindered by **lack of information dissemination (f. e. through brokers) and lack of interest of operators**
 - Level of **premiums** is **not** considered a problem for further market development
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Article 14 Study - Barriers for product and market development

- **Lack of data** on loss frequency and loss severity
 - ◆ Especially regarding gradual pollution and compensatory remediation
 - ◆ Affects more GTPL than EIL market
 - **Lack of experience** in dealing with environmental liabilities
 - **Costs** of insurance policies
 - **Potential overlap** with other insurance products
 - **Variations in the transposition** across the EU
 - **Poor communication** about the ELD and related financial security products
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Article 14 Study - Effectiveness of ELD

- **Low number of ELD cases (now ~50)**
 - ◆ **Very little information** on these actual ELD cases available
 - ◆ **Discrepancy between information** provided by insurers and MS authorities
 - **Potential reasons for low number:**
 - ◆ **Complicated technical requirements** and challenges (economic valuation, remediation methods)
 - ◆ Difficulties due to **pre-existing legislation**
 - ◆ Potential for ELD not to apply cases when environmental **damage regarded not being significant**
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Article 14 Study – Some possible recommendations

- **Raising awareness** of stakeholders (operators – SMEs!)
 - **Improving communication and information exchange** between stakeholders at all levels (MS's authorities, operators, insurers, brokers, risk managers), f.i. on ELD cases and available financial security products
 - Developing **guidelines and models** regarding **legal interpretation, economic valuation, remediation types, significance of damage**: at MS level and possibly at European level
 - Facilitating **better risk assessment and risk management** in companies to increase the preventive effect of ELD
 - Stressing more the possibility to use **alternative financial security instruments (bank guarantees, captives, etc)**
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[http://ec.europa.eu/environment/liability/
index.htm](http://ec.europa.eu/environment/liability/index.htm)

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