

INTRODUCTION TO THE ENVIRONMENTAL LIABILITY DIRECTIVE

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TOPICS

- Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (ELD)
 - Aims
 - Key provisions
 - Transposition
 - Differences between Member States (MS)
 - Implementation
 - Reports and the Regulatory Fitness and Performance Programme (REFIT)
 - Multi-annual work programme and other actions by the Commission
 - Amendments to the ELD
 - European Parliament Resolution
 - CJEU cases
 - Conclusions
 - Way forward

PURPOSE AND AIMS

- ELD entered into force on 30 April 2004
 - First EU legislation that specifically states that it implements the polluter pays principle
- Aims
 - To 'induce operators to adopt measures and develop practices to minimise the risks of environmental damage'
 - To prevent and remediate environmental damage so as to lead to a reduction in the number of future contaminated sites in the EU
 - To assist in reducing the loss of biodiversity in the EU by establishing liability for damage to species and natural habitats protected under the Birds and Habitats Directives

Links to ELD, CJEU cases, reports, etc. available at <https://ec.europa.eu/environment/legal/liability/index.htm>

KEY PROVISIONS: LIABILITY

- Imposes liability on an operator for preventing and remediating an imminent threat of, or actual, environmental damage
 - Strict liability for activities under EU legislation listed in annex III
 - Applies to
 - Land damage
 - Water damage
 - Biodiversity damage (species and habitats protected under the Birds and Habitats Directives and equivalent national biodiversity at the option of an MS)
 - Fault-based liability for non-annex III activities
 - Applies only to biodiversity damage

KEY PROVISIONS: LIABILITY

- Annex III lists activities under 14 categories of EU legislation
 1. activities permitted under the Industrial Emissions Directive (2010/75/EU)
 2. waste management operations
 3. discharges of specified dangerous substances into inland surface water that require prior authorisation
 4. discharges of specified dangerous substances into groundwater that require prior authorisation
 5. discharges of pollutants into surface water and groundwater that require prior authorisation
 6. water abstraction and impoundment
 7. manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances, dangerous preparations, pesticides and other plant protection products and biocidal products
 8. transport of dangerous or polluting goods by road, rail, inland waterways, sea or air

What the Commission was trying to do was to look into the EU big legislation and apply the liability provisions to it.

KEY PROVISIONS: LIABILITY

- Annex III (continued)
 9. operation of installations authorised under air pollution legislation
 10. contained use, including transport, of genetically modified organisms (GMOs)
 11. deliberate release into the environment, marketing and placing on the market of GMOs
 12. transboundary shipments of waste
 13. extractive waste management
 14. operation of storage sites for carbon dioxide
- Items 12, 13 and 14 are amendments to the original version

And the ELD is amended to include legislation that came into force later on, as is the case with items 12-14.

KEY PROVISIONS: LIABILITY

- Enforcement
 - Imminent threat of environmental damage; operator must
 - carry out preventive measures 'without delay'
 - notify competent authority 'without delay' if measures fail to dispel threat of damage
 - Occurrence of environmental damage; operator must
 - notify competent authority 'without delay'
 - 'immediately' carry out emergency remedial actions
 - carry out remedial measures agreed by competent authority
 - If operator fails to carry out above actions, competent authority must require it to carry them out
- All the above measures are preventive or emergency measures except carrying out remedial measures agreed by a competent authority

KEY PROVISIONS: LAND DAMAGE THRESHOLD

- Land damage is not linked to EU legislation because there is no EU legislation on soil (proposed Soil Framework Directive was withdrawn in 2014)
 - Threshold is
 - ‘any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms’

KEY PROVISIONS: WATER DAMAGE THRESHOLD

- Water damage is linked to the WFD and, subsequently, the Marine Strategy Framework Directive (2008/56/EC; MSFD)
 - Threshold is
 - ‘any damage that significantly adversely affects:
 - (i) the ecological, chemical or quantitative status or the ecological potential, as defined in [the WFD], of the waters concerned ...; or
 - (ii) the environmental status of the marine waters concerned, as defined in [the MSFD] in so far as particular aspects of the environmental status of the marine environment are not already addressed through [the WFD]’
 - (ii) was added by the Offshore Safety Directive (2013/30/EU)

The addition by the Offshore Safety Directive happened because of the Deepwater Horizon disaster in the USA. It was then that the EU recognized that didn't have the instruments to require people that caused marine pollution to clean it.

KEY PROVISIONS: BIODIVERSITY DAMAGE THRESHOLD

- Biodiversity damage is linked to the Birds and Habitats Directives
 - ‘any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of [protected] habitats or species’
 - Threshold is determined by reference to the conservation status of the habitat or species within ‘the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat [or species]’

KEY PROVISIONS: BIODIVERSITY DAMAGE THRESHOLD

- Note the 'significance' threshold for biodiversity, water and land damage
- Annex I specifically requires a risk assessment for biodiversity damage and sets out criteria to be considered in determining whether damage to protected species and natural habitats is significant

KEY PROVISIONS: REMEDIATION OF LAND DAMAGE

- Land damage
 - Remove, control, contain or diminish the significant risk that adversely affects human health taking into account the current or approved future use of the land at the time of the damage

KEY PROVISIONS: REMEDIATION OF WATER AND BIODIVERSITY DAMAGE

- Water and biodiversity damage
 - Primary remediation
 - Remediation and restoration to baseline condition (its condition if the damage had not occurred)
 - Complementary remediation
 - If a damaged site cannot be fully remediated and restored, restoration of an alternative site in addition to partial remediation and restoration of the damaged site
 - Compensatory remediation
 - Interim losses between the time of the occurrence of environmental damage and its full remediation
 - Providing, enhancing or improving the same or new natural resources at the damaged and/or alternative sites

KEY PROVISIONS: EXCLUSIONS

- Exclusions
 - Act of armed conflict, hostilities, civil war or insurrection (includes terrorism)
 - Natural phenomenon of exceptional, inevitable and irresistible character
 - Nuclear, marine oil and transportation of dangerous goods conventions
 - Diffuse pollution
 - Activities the main purpose of which is to serve national defence or international security
 - Activities the sole purpose of which is to protect from natural disasters

Under the IMO, marine conventions and nuclear conventions... If they apply, the ELD does not apply.

Diffuse pollution – if a lot of people pollute a water course and you cannot find a plausible link, then it is excluded.

KEY PROVISIONS: DEFENCES

- Defences
 - Mandatory 'defences'
 - Intentional act of a third party if safety measures are in place
 - Compliance with a compulsory order
 - Optional 'defences'
 - Compliance with a permit if the operator is not negligent
 - State-of-the-art if the operator is not negligent

KEY PROVISIONS: PUBLIC PARTICIPATION

- Public participation
 - Persons affected or likely to be affected by environmental damage, qualified environmental non-governmental organisations, and others may
 - Provide comments to relevant competent authority on environmental damage (and an imminent threat of environmental damage at the option of a MS)
 - Seek review of procedural and substantive legality of a competent authority's decisions, acts or failure to act

Public participation is somehow unusual for a liability regime.

TRANSPOSITION

- 30 April 2007: deadline for transposition into domestic law of MS
 - Transposition by Hungary, Italy, Latvia, Lithuania
 - European Commission commenced infraction proceedings against other MS
- 2008: Court of Justice of the European Union (CJEU) ruled against Austria, Finland, France, Greece, Luxembourg, Slovenia, and the UK for failure to transpose the ELD
- 30 June 2010: transposed by all MS
 - Many MS used the date of transposition as the effective date for implementation of the ELD
- August 2013: Italy amended its transposing legislation to comply fully

DIFFERENCES BETWEEN MEMBER STATES

- Mandatory and optional defences (permit and state-of-the-art defences)
 - Permit defence adopted (17 MS)
 - Belgium (regional level), Croatia, Cyprus, the Czech Republic, Denmark, Estonia (except GMOs), Finland (limited), Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Netherlands (limited), Portugal, Slovakia, Spain, the UK (except GMOs in Wales and Scotland)
 - State-of-the-art defence adopted (15 MS)
 - Belgium (regional level), Croatia, Cyprus, the Czech Republic, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Malta, Netherlands (limited), Portugal, Slovakia, Spain, the UK (except GMOs in Wales and Scotland)

DIFFERENCES BETWEEN MEMBER STATES

- Joint and several/proportional liability
 - Proportional liability adopted (modified liability in some MS)
 - Denmark, Finland, France, Italy, Slovakia
 - Joint and several liability adopted
 - All other MS

DIFFERENCES BETWEEN MEMBER STATES

- Extension of biodiversity damage to nationally and/or regionally protected sites
 - Adopted by 14 MS in part or all of their territory
 - Austria, Belgium, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden, the UK

DIFFERENCES BETWEEN MEMBER STATES

- Introduction of mandatory financial security for liabilities under the ELD
 - Czech Republic, Portugal, Slovakia, and Spain have adopted a mandatory financial security system
 - Ireland has introduced a hybrid mandatory financial security system
 - Italy and Poland have introduced provisions to require financial security for a limited number of activities

This was particularly controversial. First, what the Commission wanted was for all MS to adopt mandatory financial security. This means that the MS says all of the operators listed on Annex III have to have insurance, or a bank guarantee, or something else similar to a trust fund, so if you cause an environmental damage, you got the money to pay for it and cannot simply become insolvent and make the tax payer pay for it.

DIFFERENCES BETWEEN MEMBER STATES

- Exemption of spreading sewage sludge from waste management activities in annex III
 - Bulgaria, France, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia, the UK
- Addition of further activities to annex III
 - Belgium, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, Netherlands, Sweden

DIFFERENCES BETWEEN MEMBER STATES

- Examples of other differences between MS
 - Transposition of the ELD as stand-alone legislation or incorporation into pre-existing legislation
 - Designation of one or more competent authorities
 - Adoption of more stringent provisions

IMPLEMENTATION

- 30 April 2013: deadline for MS reports to European Commission on implementation
 - No ELD incidents
 - Austria, Cyprus, the Czech Republic, Denmark, France, Ireland, Luxembourg, Slovakia, Slovenia
 - Between 1 and 10 incidents
 - Belgium, Bulgaria, Estonia, Finland, Lithuania, Malta, Netherlands, Portugal, Romania, Sweden
 - Between 10 and 20 incidents
 - Italy, Latvia, Portugal, Spain, the UK
 - Between 50 and 60 incidents
 - Greece, Germany
 - Poland: 506 incidents
 - Hungary: 563 incidents

The lack of harmonization on those topics lead to some implementation hurdles.

One of the reasons why Poland and Hungary have so many incidents is that they adopted more stringent legislation.

RELATIONSHIP WITH MS LAW

- ELD is in addition to domestic law in individual MS; it does not replace it
 - Land damage
 - Nearly all MS already had legislation to remediate land contamination
 - Greece and Portugal were exceptions
 - Water damage
 - Most MS had legislation to remediate water pollution
 - Biodiversity damage
 - Some MS had legislation to restore biodiversity (limited to protected species and natural habitats in some MS)
 - Only Germany had complementary remediation

MS are required to adopt the ELD if it is more stringent than their domestic law, but may are not doing that.

REPORTS AND REFIT

- 30 April 2014: deadline for the European Commission to submit a report to European Parliament and Council, including appropriate proposals for amendment of the ELD
 - Postponed due to delays in MS reporting and evaluation and changes at EU political level
 - Review and report subsequently combined with review of the ELD under REFIT
 - Effectiveness; Have the objectives been met?
 - Efficiency: Were the costs involved reasonable?
 - Coherence: Does the policy complement other actions or are there contradictions?
 - Relevance: Is EU action still necessary?
 - EU added value: Can or could similar changes have been achieved at national/regional level, or did EU action provide clear added value?

So... What is the commission doing about all of this?

REPORTS AND REFIT

- 14 April 2016
 - Report from the Commission to the Council and the European Parliament under [then] Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (COM/2016/0204 final)
 - REFIT evaluation is annexed as
Commission Staff Working Document REFIT Evaluation of the Environmental Liability Directive
Accompanying the document Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (SWD(2016) 121 final)

REPORTS AND REFIT

- Report – overall conclusions
 - Transposition and implementation of the ELD have not resulted in a level playing field across the EU
 - There was insufficient information adequately to carry out the REFIT review
 - Available information indicated, among other things, that some MS have continued to implement national laws instead of the legislation implementing the ELD

What the Commission found out was that in a lot of the MS they simply continued to apply their own legislation. Would not be a big deal if they were stringent, but in most MS they were not.

So, what the Commission said was that it needed more data on the ELD cases, especially in those where complementary and compensatory remediation had been required.

REPORTS AND REFIT

- Report – main challenges
 1. Low availability of data on ELD cases, especially on the application of complementary and compensatory remediation
 - 11 MS did not notify any ELD cases
 - Some MS did not place any incidents under the ELD
 2. Low awareness of the ELD
 3. Ambiguities on key concepts and definitions such as ‘significance threshold’, ‘preventive action’, and ‘favourable conservation status’
 4. Exclusions and defences may reduce effectiveness and efficiency
 5. Insolvency of operators in cases of costly environmental remediation

REPORTS AND REFIT

- Report – proposals
 - Carry out a ‘multi-annual rolling work programme in order to improve the evidence base and help align national solutions’
 - Continue to provide administrative support measures, such as
 - Guidance or interpretative notices on key issues (e.g., ‘significance’)
 - Training programmes
 - Helpdesks for practitioners (covering competent authorities, operators, loss adjusters, financial security providers, affected individuals, NGOs, etc.) providing information, assistance and assessment support for risk and damage evaluations

MULTI-ANNUAL WORK PROGRAMME

- February 2017: European Commission finalised the Multi-Annual Work Programme (MAWP) 2017 – 2020
 - Three main pillars
 1. Improve the evidence base for evaluation and decision-making for the Commission, MS, stakeholders and practitioners (assessment framework and ELD registry)
 - Evaluation of different training formats
 2. Supporting the implementation through tools and measures for more even implementation (common understanding of terms and concepts, capacity building and training)
 - Country fiches

Clicking on the link make it possible to see the country fiches and look at the legislation of the MS. They tried to get as much information on the ELD incidents as possible.

MULTI-ANNUAL WORK PROGRAMME

- MAWP 2017 – 2020 (continued)
 3. Ensuring sufficient availability of financial security, in particular for large losses or in case of insolvency (secure, sufficient and available when required instruments to cover ELD liabilities)
 - Final report and three annexes including intensive research into the availability of, and demand for, insurance and other financial security instruments and mechanisms for environmental liabilities in all MS and at EU level

MULTI-ANNUAL WORK PROGRAMME

- Additional ongoing study
 - Environmental damage cases: A new perspective from the ground
- Additional ongoing follow-up study
 - Facilitating enforcement of the ELD by competent authorities
- New multi-annual work programme for 2021-2024 being developed by the Commission

The follow-up study focuses on understanding how the Directive fits the national legislations.

AMENDMENTS TO THE ELD

- 5 June 2019: Regulation (EU) 2019/1010 amended article 18 of the ELD
 1. Commission to collect information from MS that has been disseminated in accordance with Directive 2003/4/EC on public access to environmental information and, as far as available, on experience gained in application of the ELD
 - Information to cover cases of environmental damage under the ELD, with the following information and data for each instance
 - Type of environmental damage, date of occurrence and/or discovery of damage classified as biodiversity damage, water damage or land damage
 - Description of the activity in accordance with annex III
 - MS to include any other relevant information on experience gained from implementation of the ELD
 - Data to be collected by 30 April 2022 and every five years after that date

No terribly significant amendments to the ELD. Basically replacing the ones requiring reports from the MS with new ones going forward.

AMENDMENTS TO THE ELD

- Amendments to article 18 (continued)
 2. On the basis of the information in item 1. above, the Commission shall carry out an evaluation of the ELD and publish it before 30 April 2023 and every five years after that time
 3. By 31 December 2020, the Commission shall develop guidelines to provide a common understanding of the term 'environmental damage'

EUROPEAN PARLIAMENT RESOLUTION

- 26 October 2017: European Parliament Resolution
 - Suggestions 'to improve harmonisation of the ELD' include the following
 - Set out in detail the concept of the 'significance threshold'
 - Set out rules to distinguish between cases to which the ELD applies and cases to which more stringent domestic law applies
 - Introduce 'mandatory financial security, e.g. a mandatory environmental liability insurance for operators'

CJEU CASES

- *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Cases C-379/08 and C-380/08, 2010), and Companion Case (C-378/08, 2010)
 - Operation of many petrochemical companies in Priolo Gargallo Region of Sicily since 1960s
 - Remediation included removal of two metres of contaminated sediment from Augusta roadstead (sheltered anchorage), construction of a hydraulic dyke to contain groundwater, and construction of a physical barrier along the shoreline next to companies' facilities
 - ECJ concluded
 - MS may establish a rebuttable presumption of a causal link between contamination and the operator's activities if plausible evidence of a link exists
 - Evidence to establish the link may include location of the operator's facility near a contaminated site, and correlation between substances used by the operator and those identified at the contaminated site
 - Operator may rebut the presumption by showing that its activities did not cause the contamination

There are 6 six at the CJEU.

Those first two regard a petrochemical site in Italy that was considered the most contaminated site in Italy.

CJEU CASES

- *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* (Case C-534/13, 2015)
 - Case concerned requirements to remediate several severely contaminated sites in Massa Carrara, northern Italy
 - Contamination caused by Montedison Srl. (now Edison S.p.A.), which subsequently sold the sites to three companies
 - Sites were designated as 'sites of national interest' under Italian law
 - CJEU concluded that the ELD does not preclude Italian law that does not require landowners to remediate the contamination on their land unless they caused it
 - Italian law requires such landowners only to reimburse a competent authority for the costs incurred by them in remediating the land up to the market value of the remediated land

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In this case, the ones causing the contamination were not the owners of the site, and under the Italian law, the competent authorities can require a person who owns or occupies contaminated land to remediate it. But, if the competent authority remediate it, then it can seek reimbursement of the costs, up to the market value of the remediated land, from the owner or occupier.

CJEU CASES

- *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* (Case C-129/16, 2017)
 - Case concerned air pollution from the incineration of waste
 - Under Hungarian law, a landowner is liable for remediating its land unless the owner proves beyond a reasonable doubt that another person is liable
 - Operator/lessee had died
 - CJEU stated that ‘air pollution does not in itself constitute environmental damage covered by [the ELD but] environmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats’

CJEU CASES

- *Volk v Unabhängiger Verwaltungssenat für die Steiermark* (Case C-529/15, 2017)
 - Case concerned alleged water damage by a hydroelectric power plant that was authorised in 1998 and began operations in 2002
 - CJEU ruled that the ELD applies to any damage caused by the power plant after 30 April 2007
 - CJEU also ruled that the holder of fishing rights in the river downstream of the power plant is entitled to initiate review proceedings under the ELD
 - (Austria subsequently amended national law concerning access to justice)

When the power plant was turned on, there was still water going into the river, but not to the same extent it used to. The fish that were left outside of the main channel of the river died, especially the young fish.

The authorization for that plant was given way before the ELD was adopted.

CJEU CASES

- *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V.* (Case C-683/16, 2018)
 - Request by a nature conservation NGO to the relevant competent authority to prohibit, under national law, fishing methods which touch the seabed, and the use of gillnets, in several Natura 2000 sites located in the German exclusive economic zone in the North and Baltic Seas
 - Included request to require operators to ‘take necessary preventive measures’ under the ELD
 - EU has exclusive competency in the field of conservation of marine biological resources under the Common Fisheries Policy
 - Precludes the adoption of necessary measures concerning waters of the MS to meet obligations under the ELD

An NGO was trying to apply the ELD to stop various fishing methods, but the Court said the ELD would not apply.

CJEU CASES

- *Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV v Kreis Nordfriesland* (Case C-297/19, 2020)
 - Concerned damage caused to the black tern (*Chlidonias niger*), listed in annex I of the Birds Directive at a bird sanctuary at a peninsula in Schleswig-Holstein
 - Naturschutzbund Deutschland, and environmental NGO, requested the relevant competent authority to issue an order to limit and remedy environmental damage caused by the drainage system to the black tern
 - When water levels reached a specified level, a pump automatically drained water out of channels to reduce the water level

CJEU CASES

- *Naturschutzbund Deutschland (continued)*
 - Case concerned annex I of the ELD
 - Includes three situations in which damage to protected species and natural habitats may – or may not – be classified as significant
 - Second situation: ‘negative variations due to natural causes or resulting from intervention relating to the *normal management of sites*, as defined in habitat records or target documents or as carried on previously by owners or operators’ (emphasis added)
 - CJEU ruled that if a site hosts a species or natural habitat protected by the Birds or Habitats Directives, its management can only be regarded as normal if it complies with the objectives and obligations set out in those Directives, taking into account human and other activities at the site
 - Court concluded that the normal management of the site included irrigation and drainage, including operation of the pump

In this case, the Court looked at what is a normal management of sites, and it ruled that if the site holds a species or a nature habitat protected by the nature directives, its management can only be normal if it complies with the objectives and obligations set up in the directives. So, it pushed the ELD beyond what people would assume its scope would go, because it was not being applied to an accident, but to the intentional act, in this case by a public authority, statutory authority, that was providing these pumps.

CJEU CASES

- Key points
 - CJEU has applied the polluter pays principle and the precautionary principle
 - Includes reversal of the burden of proof in *Raffinerie Mediterranee*
 - Two cases, *Volk* and *Naturschutzbund Deutschland*, did not involve accidental pollution
 - Both involved long-standing measures (shutting down turbines at a hydroelectric power plant and operation of a drainage system, respectively) that must be changed so they do not cause environmental damage
 - Close link between the ELD and the Birds and Habitats Directive in *Naturschutzbund Deutschland*

CONCLUSIONS

- Final version of the ELD could not have been adopted
 - In a more robust form due to strong opposition from industry and insurers
 - Without options due to differences between MS as well as strong opposition
- Introduced concepts that benefit the environment and natural resources
 - Environmental damage not confined to pollution
 - Restoration of water and biodiversity
 - Public participation
- BUT severe limitations in application to accidental damage especially due to ELD being enforced together with domestic environmental liability law

In conclusion, it is not going so well, but the Commission is working on that.

WAY FORWARD

- Degree to which implementation of the Multi-Action Work Programme and other studies for the Commission will result in better implementation of the ELD?
- Likelihood of revisions to the ELD indicated by the European Parliament?
- Potential for more actions by environmental NGOs?
- Implications of CJEU current and future judgments?

- Degree: it depends on how good the Commission's multi-action Work Program is going to be. Because they have come up with very big revisions to the ELD, but were stopped by the Commission.
- Likelihood: it does not look likely right now, but it depends on what the parliament does.
- And a lot also depends on what the ENGOs will do and what judgments there will be at the CJEU.