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THE POLLUTER PAYS PRINCIPLE, PREVENTION, AND THE ELD

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THE POLLUTER PAYS PRINCIPLE, PREVENTION, AND THE ELD

- ❖ The ELD is aimed at two inter-related objectives:
 - Prevention
 - Remediation
- ❖ Remediation serves two purposes:
 - Prevention
 - Restoration

THE PREVENTION OBJECTIVE

- ❖ Prevention is pursued through several mechanisms, both ELD and non-ELD:
 - Extensive regulation of hazardous activities
 - Civil liability under national law
 - Incentives arising from stakeholder expectations; sustainable finance, sustainability report, sustainability due diligence, etc.
 - ELD art 5 preventive action (imminent threat)
 - ELD art 6 remedial action (environmental damage)
 - ELD art 14 financial security instruments

THE REMEDIATION OBJECTIVE

- ❖ Remediation pursuant to the ELD may involve up to four components:
 - Containment and immediate removal (art 6.1(a) ELD)
 - Primary remediation towards base-line condition (art 7/Annex II ELD)
 - Complementary remediation to compensate for incomplete primary remediation (art 7/Annex II ELD)
 - Compensatory remediation to compensate for interim losses (art 7/Annex II ELD)

THE POLLUTER PAYS PRINCIPLE

- ❖ The polluter pays principle is aimed at prevention by both imposing and not imposing remediation obligations
 - Disincentives for harm-causing: obligations are imposed on polluters, i.e. those who cause environmental damage
 - Incentives for prevention: no obligations are imposed on non-polluters

THE POLLUTER PAYS PRINCIPLE

- ❖ ELD is aimed at creating balance between incentives and disincentives to ensure both optimal prevention and justice
 - ELD is not about finding 'deep pockets'
 - Art 8(3) ELD exceptions for third party actions and compliance with orders
 - Art 8(4) ELD optional defenses for non-negligent authorized emissions/events and state-of-the-art
 - Art 9 ELD multi-party causation

THE POLLUTER PAYS PRINCIPLE, PREVENTION, AND THE ELD

- ❖ Like any law or indeed any human activity, the ELD is not perfect
 - There will be some cases in which prevention is not achieved
 - There will be some cases in which remediation is not complete
 - The key is understanding those cases and the underlying causes, and identifying needs

THE POLLUTER PAYS PRINCIPLE, PREVENTION, AND THE ELD

- ❖ Proposals to amend the ELD are aimed at fixing an actual or perceived deficiency in terms of prevention or remediation
 - Proposals range from mandatory financial security to an additional civil liability regime
- ❖ However, not enough attention is paid to:
 - Other laws and instruments addressing the same issue
 - The disadvantages of the solutions -- relative costs and benefits count

Ronald Coase, The Problem of Social Cost

“Policy-makers have tended to overestimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This has to come from a detailed investigation of the actual results of handling a problem in different ways.”

AVAILABLE RESOURCES

- ❖ Commission Guidelines on Environmental Damage; Training Materials
- ❖ Member State Guidance Documents
- ❖ Ad-Hoc Industry Natural Resource Management Group Materials
 - Implementation of the EU Environmental Liability Directive: Summary of Guiding Principles and Recommended Best Practices
 - Industry Case Studies: An Examination of Potential Effects of the EU Environmental Liability Directive (ELD) in Practice and Options Available to Member States
- ❖ “The EU Environmental Liability Directive: A Commentary”, Lucas Bergkamp and Barbara J. Goldsmith eds.
- ❖ Actual Case/Site Experience; Literature

CONCLUSIONS

- ❖ ELD implements polluter pays principle in a considered, balanced manner
- ❖ Proposals for amendments should be assessed in terms of (i) actual needs and (ii) ability to maintain reasonable, balanced and predictable regime
 - The cure may be worse than the disease; and the perfect is the enemy of the good



THANK YOU

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Questions?

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