

ISSUES RELATED TO IMPLEMENTATION OF THE ELD

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TOPICS

- Environmental liability legislation in the EU before the ELD
- ELD and related legislation
- Key aims of the ELD
- Situation in 2016 (REFIT evaluation by the Commission)
- Subsequent actions by the Commission
- Current situation
- Key preliminary findings

ENVIRONMENTAL LIABILITY LEGISLATION IN THE EU BEFORE THE ELD

- Liability for remediating land/soil damage
 - Existed in most Member States (MS) including highly sophisticated systems in some MS
 - Mostly focused on remediating contamination caused by historic pollution events
- Liability for preventing and remediating water damage
 - Mostly imposed by national legislation implementing the Industrial Emissions Directive (IED) and national environmental permitting legislation
 - Focus on preventing and remediating water pollution, not other damage
 - Some MS had separate liability legislation for preventing and remediating waters
- Liability for remediating and restoring biodiversity damage
 - Very limited in vast majority of MS
 - Even when legislation existed, some MS required a conviction for causing damage

ENVIRONMENTAL LIABILITY LEGISLATION IN THE EU BEFORE THE ELD

- Enforcement of national environmental permitting and liability legislation
 - Competent authorities in virtually all MS had discretion whether to require prevention and remediation of pollution and, if imposed, other types of environmental damage

ELD AND RELATED LEGISLATION

- ELD incorporates and refers to other EU legislation
 - Water damage
 - Water Framework Directive
 - Marine Strategy Framework Directive
 - Biodiversity damage
 - Birds Directive
 - Habitats Directive
 - Annex III
 - Activities listed under EU legislation including the IED, Waste Framework Directive, etc.

KEY AIMS OF THE ELD

- Established a framework of environmental liability based on the polluter pays principle to prevent and remedy environmental damage
 - Key aims/benefits balanced with related costs
 - Internalise costs of preventing and remediating environmental damage to the polluter
 - To induce operators to adopt measures and to develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced
 - Strict liability limited to annex III operators (dangerous activities)
 - MS to take measures to encourage the development and availability of financial security instruments and the development of environmental insurance markets
 - Mandatory financial security proposed by the European Parliament considered too controversial
 - Exceptions / mandatory and optional defences

KEY AIMS OF THE ELD

- Key aims balanced with related costs (continued)
 - Assist in reducing the loss of biodiversity in the EU
 - Fault-based liability for non-annex III operators in addition to strict liability for annex III operators
 - Complementary and compensatory remediation
 - For water damage as well as biodiversity damage
 - Limited definition of biodiversity but ecological status of water damage includes remediation of further biodiversity damage
 - Prevent and remediate environmental damage above specified significance criteria
 - Duty to enforce instead of discretion
 - Prevent and remediate other types of environmental damage in addition to pollution
 - To allow participation of interested parties including access to justice
 - Reduce the number of future contaminated sites in the EU

SITUATION IN 2016

- REFIT report by the Commission (14 April 2016)
 - Overall conclusions
 - Transposition and implementation of the ELD did not result in a level playing field across the EU
 - Insufficient information adequately to carry out the evaluation
 - Available information indicated that some MS continued to implement national laws instead of legislation implementing the ELD

SITUATION IN 2016

- REFIT report by the Commission (continued)
 - Main challenges
 1. Low availability of data on ELD cases, especially application of complementary and compensatory remediation
 - 11 MS did not report any ELD cases
 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

ACTIONS BY THE COMMISSION

- Established the Multi-Annual Work Programme for 2017-2020 to improve the evidence base and help align national solutions
 - 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 (2020)
 2. Support more even implementation through tools and measures (common understanding of terms and concepts, capacity building and training)
 - Country fiches (2020)
 3. Ensure sufficient availability of financial security, in particular for large losses or in case of insolvency
 - Improving financial security study (2020)

ACTIONS BY THE COMMISSION

- Further actions
 - Guidelines to provide a common understanding of the term ‘environmental damage’ in article 2 of the ELD (2021)
 - Study to review implementation of, and the evidence base for, the ELD in all MS so as to broaden the evidence base and find key entry points where improving the effectiveness of the ELD might be possible (2021)
 - Study to examine and compare national ELD and non-ELD environmental legislation to facilitate implementation of the ELD by competent authorities (2022)
 - Ongoing development of new multi-annual rolling work programme for 2021-2024

CURRENT SITUATION

- Preliminary findings of study to assist the Commission in its 2023 evaluation of the ELD and its implementation
 - Two overall conclusions of the 2016 evaluation are still valid and heightened
 - No level playing field for implementation of the ELD across the EU
 - Many MS continue to implement national non-ELD legislation instead of national ELD legislation
 - Study is locating information to enable the Commission adequately to carry out the 2023 evaluation in the criteria of effectiveness, efficiency, relevance, coherence, added value
 - Case studies
 - Summaries of MS annex 18(1) reports
 - Analysis of rulings of the Court of Justice of the European Union (CJEU)
 - Analysis of comments in responses to the Call for Evidence, Open Public Consultation and Targeted Questionnaire

KEY PRELIMINARY FINDINGS

- No level playing field for implementation of the ELD across the EU
 - Has increased due, among other things, to differences between interpretations of the ELD
 - E.g., definition of biodiversity damage states that significance is determined by reference to ‘the European territory of the [MS] to which the Treaty applies or the territory of a [MS] or the natural range of that habitat [or species]’
 - Commission’s guidelines state ‘Assessment and determination of significance need to be meaningful at the local level. ... It does not mean that adverse effects have to be demonstrated at the national and European levels’
 - Poland requires biodiversity damage to be assessed by reference to the territory of Poland, the natural range of the species, or the territory of the entire EU
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Key difficulties in enforcing the ELD
 - Substantial differences between the ELD and national environmental permitting and liability legislation
 - No MS has dual liability systems for strict and fault-based liability except Denmark (only land damage)
 - No MS limits the imposition of liability for preventing or remediating environmental damage to operators; any person may be liable
 - Significance criteria to determine when duty to enforce the ELD is triggered
 - Easy to determine when an operator must remediate environmental damage under national legislation
 - Often numeric criteria
 - Difficult to determine when significance criteria in the ELD have been reached or exceeded
 - Also duplication of time and costs to enforce the ELD when non-ELD legislation is already being enforced
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Widespread misperception that significance criteria for environmental damage is high
 - CJEU discussed significance criteria in annex I of the ELD in a preliminary ruling in a case concerning damage to a population of black tern, listed in annex I of the Birds Directive (C-297/19), as follows

Annex I states: ‘The following does not have to be classified as significant damage:

 - negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,
 - 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,
 - damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition’

KEY PRELIMINARY FINDINGS

- CJEU concluded
 - Phrase 'does not have to' grants discretion to MS to regard damage from the above three indentations as significant or not significant
 - Damage from 'negative fluctuations that are smaller than natural fluctuations regarded as normal for the species or habitat in question' and damage from which species or habitats will quickly recover' may be 'minor with regard to the species or habitat concerned'
- CJEU referred to the precautionary principle in above case and four of the other six cases decided by it on the ELD
 - E.g., it is apparent 'that the liability mechanism established by [the ELD] is founded on the precautionary principle and on the polluter pays principle' (Case C-129/16)
- Significance criteria for biodiversity damage (and land and water damage) must therefore necessarily be very low
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Many (not some) MS continue to implement national non-ELD legislation instead of national ELD legislation (mainly concerns the IED and national permitting legislation)
 - Article 7 of the IED provides

‘Without prejudice to [the ELD], in the event of any incident or accident significantly affecting the environment, [MS] shall take the necessary measures to ensure that:

 - a. the operator informs the competent authority immediately;
 - b. the operator immediately takes the measures to limit the environmental consequences and to prevent further possible incidents or accidents;
 - c. the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to limit the environmental consequences and to prevent further possible incidents or accidents’
- Relevant criteria: Effectiveness, Efficiency, Coherence

KEY PRELIMINARY FINDINGS

- Implementation of the IED and other national permitting legislation
 - Issue is better framed as follows
 - Competent authorities in many MS do not enforce the ELD in addition to the IED and/or environmental permitting legislation because
 - Operators subject to environmental permitting legislation must comply with conditions in their permits including conditions to carry out measures to remediate and prevent further pollution
 - Consequences for not complying with conditions include
 - Suspension or prohibition on carrying out operations at a permitted facility
 - Increase in likelihood of prosecution for caused pollution and/or having breached the condition(s)

KEY PRELIMINARY FINDINGS

- Implementation of the IED and national permitting legislation (continued)
 - Is an 'incident or accident' different from an 'emission [defined], event or incident' under the ELD?
 - Operator obliged to notify the competent authority pursuant to the IED and the ELD
 - Same competent authority for national ELD legislation?
 - Operator obliged to take short-term measures in the IED and the ELD
 - Are 'all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants' under the ELD different from 'measures to limit environmental consequences and to prevent further possible discharges' in the IED?
 - What is the difference between 'appropriate complementary measures' in the IED and primary, complementary and compensation remediation under the ELD?
 - If different, competent authority should assess whether environmental damage meets significance criteria under the ELD and, if so, apply the ELD

KEY PRELIMINARY FINDINGS

- Consequences of not implementing the ELD in addition to national environmental permitting and national liability legislation
 - Complementary and compensatory remediation is not carried out
 - Even when national ELD legislation is enforced, vast majority of cases do not include complementary or compensatory remediation
 - Implementation of the ELD does not, therefore, go beyond implementation of other legislation in most cases with possible exception of liability for remediating biodiversity damage

KEY PRELIMINARY FINDINGS

- Architectural issues
 - If a non-annex III environmental damage occurrence causes land or water damage as well as biodiversity damage that reach or exceed significance criteria under the ELD, must the operator remediate land or water damage under the ELD when the ELD does not require non-annex III operators to remediate such damage?
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Architectural issues (continued)
 - Article 2(13) of the ELD defines ‘services’ and ‘natural resources services’ as
‘functions performed by a natural resource for the benefit of another natural resource or the public’
 - Annex II describes ‘compensatory remediation’ and ‘interim losses’, respectively, as
‘any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect’
‘losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources *or to the public* until the primary or complementary measures have taken effect’ (emphasis added)
 - Should compensatory measures for water damage be carried out to provide better facilities for angling clubs affected by the damage? Or is this interpretation of ‘the public’ too narrow?
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Other issues (optional defences; permit defence)
 - Information located on the use of the permit defence in only one case
 - Competent authority for England discovered an imminent threat of, and actual, damage to freshwater pearl mussels (*Margaritifera margaritifera*), listed in annexes II and V of the Habitats Directive in a river
 - Damage was caused by the abstraction of water from the river for public supply pursuant to an abstraction licence and an impoundment licence
 - Authority issued prevention notices under national ELD legislation to order a large water company, the holder of the licences, to reduce the amount of abstracted water
 - Authority did not issue a remediation notice because the operator was in compliance with its licences and could thus invoke the permit defence under the ELD
 - Note: optional defences do not apply to preventive measures
 - Operator carried out compensatory measures to restore the damage pursuant to the Habitats Directive

KEY PRELIMINARY FINDINGS

- Other issues (optional defences; state-of-the-art defence)
 - No information located on a single use of the state-of-the art defence
- Relevant criteria: Effectiveness

KEY PRELIMINARY FINDINGS

- Other issues (effective date)
 - Article 17 of the ELD states that the ELD ‘shall not apply to:
 - damage caused by an emission, event or incident that took place before the date referred to in Article 19(1),
 - damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date’
 - Despite the CJEU stating in several ELD cases that the applicable date for the ELD to be effective is 30 April 2007, the following MS include a later date in their national ELD legislation
 - Austria, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Finland, France, Ireland, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, Sweden
- Relevant criteria: Effectiveness