



OECD capacity-building event on Liability for environmental damage: From policy design to application - 14 September 2022

The main features of the Environmental Liability Directive and insights from the ongoing evaluation of its application

**Olga Kurpisz - Policy Officer in charge of the ELD
European Commission, DG ENV.E.4.**

Environmental Liability Directive

Directive 2004/35/EC of 21 April 2004

- establishes a framework to prevent and remedy environmental damage, in accordance with the polluter pays principle
- deals with damage to protected species and natural habitats, damage to water and damage to soil (and immediate threat of such damage)
- supports other EU environmental laws that are designed to protect the environment
- supplements Member State environmental liability legislation
- Applicable from 30 April 2007

ELD main features - liability

➤ Type of liability:

- the ELD deals with 'pure ecological damage',
- it is based on the powers and duties of public authorities.

The authorities determine and assess the extent of environmental damage and agree with those responsible for the damage (or threat thereof) the preventive or remediation measures to be taken.

➤ Without prejudice to:

- **Criminal liability**

Environmental Crime Directive and criminal law of Member States **OR**

- **Civil liability**

Civil liability for traditional civil damage (property damage or personal injury) falls under national law

ELD main features – scope of the damage covered (1)

- ELD addresses damage to the following natural resources:
 - **Protected species and natural habitats (biodiversity)**, defined by reference to the relevant parts of the [Wild Birds Directive](#) and [Habitats Directive](#)
 - **Water** – damage is defined with regard to waters concerned in the [Water Framework Directive](#) and [Marine Strategy Framework](#)
 - **Land** – no specific EU legislation is referred to

ELD main features – Damage (2)

- Immediate threat of the damage to the three resources
- The list of resources doesn't cover Air
- In March 2021, the Commission adopted [guidelines](#) that clarify the scope of the term 'environmental damage' in the ELD. The guidelines are based on the established caselaw.

ELD main features scope of required response

The key added value of the ELD lays in the scope of obligations on operators responsible for the damage (or immediate threat thereof)

- prevention in case of an imminent threat of damage
- immediate limitation measures
- remediation measures, including primary, complementary and compensatory remediation
 - **Primary remediation** - any remedial measure that takes place at the affected site and returns the damaged natural resources and/or impaired services to the original condition.
 - If primary remediation does not fully return the damaged site to its original condition, **complementary remediation measures** should be taken at another site possibly geographically linked to the damaged one.
 - If full remediation is delayed, **compensatory remediation measures** should be taken for the interim loss of natural resources and services.

ELD main features – stakeholder participation

➤ *ELD stakeholders may:*

- Provide comments to relevant competent authority on environmental damage (and imminent threat of environmental damage at the option of a Member State) public participation in decision-making
- Seek review of procedural and substantive legality of a competent authority's decisions, acts or failure to act (access to justice)

In case C-529/15 the CJEU has ruled that “Article 12(1) of Directive 2004/35 enumerates three categories of natural or legal persons which, alternatively and independently considered, have standing” - those:

- (a) affected or likely to be affected by environmental damage;
- (b) having a sufficient interest in environmental decision making relating to the damage;
- (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition public participation in decisions

ELD patchwork formula – 2 levels of liability

- Strict liability for operators carrying out dangerous activities (Annex III):
 - Annex III activities include activities under the Industrial Emissions Directive, waste management, transport of dangerous substances, water abstraction and impoundment, etc.
 - Species and natural habitats protected by the Birds and Habitats Directives; plus nationally protected biodiversity at the option of a Member State (biodiversity damage)
 - Water under the WFD and MSFD
 - Land/soil

- Other (non-Annex III) Operators : fault-based liability for biodiversity damage only

ELD patchwork formula –limitations regarding the damage covered (1)

- Significance criterion
- The list of resources doesn't cover Air
- In March 2021, the Commission adopted guidelines that clarify the scope of the term 'environmental damage' in the ELD. The guidelines are based on the established caselaw.
- Immediate threat of the damage to the three resources, but other prevention measures not explicitly

ELD patchwork formula – scope of the damage covered (1)

- ELD addresses damage to the following natural resources:
 - **Protected species and natural habitats (biodiversity)**, defined by reference to the relevant parts of the [Wild Birds Directive](#) and [Habitats Directive](#) - any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species;
 - **Water** - any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, of the waters concerned in the [Water Framework Directive](#), or the marine waters concerned, as defined [Marine Strategy Framework](#)
 - **Land** - 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.

ELD patchwork formula – exceptions and defences

➤ Exceptions

- 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

➤ Mandatory 'defences'

- Intentional act of a third party if safety measures are in place
- Compliance with a compulsory order

ELD patchwork formula – Member States (1)

➤ **Optional ‘defences’**

Permit defence

- Belgium (regional level), Croatia, Cyprus, Czechia, Denmark, Estonia (except GMOs), Finland (limited), Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Netherlands (limited), Portugal, Slovakia, Spain

State-of-the-art defence

- Belgium (regional level), Croatia, Cyprus, Czechia, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Malta, Netherlands (limited), Portugal, Slovakia, Spain

➤ **Financial Security instruments**

Introduction of mandatory financial security for ELD liabilities

- Czechia, 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

ELD patchwork formula – Member States (2)

➤ **Joint and several/proportional liability**

Proportional liability adopted (modified liability in some Member States)

- Denmark, Finland, France, Italy, Slovakia

Joint and several liability adopted

- All other Member States

➤ **Other differences between Member States**

- Adoption of more stringent provisions Article 3(2)
- Damage to biodiversity can be extended to cover nationally protected habitats or species, designated by a Member State for equivalent purposes as those laid down in Birds and Habitat Directives; Art 2(3)(c)
- Diverging scope of the reporting exercise: in addition to core info on the number and type of cases, any other information and data deemed useful to allow a proper assessment of the functioning of the ELD, with various examples Art (18), Annex VI
- Transposition of the ELD as stand-alone legislation or incorporation into pre-existing legislation
- Designation of one or more competent authorities

ELD 2nd evaluation 2023 – Context



- Evaluation as part of the EU policy cycle and the Better Regulation agenda
- European Parliament [Resolution](#) of 20 May 2021 on the liability of companies for environmental damage
- Court of Auditors' [special report](#) of 5 July 2021 on the polluter pays principle
- EU Action Plan: [‘Towards a Zero Pollution for Air, Water and Soil’](#)
- Polluter Pays Principle – [fitness check of its application to the environment](#) (2024)

ELD 2nd evaluation 2023 – Scope

- Specific legal obligation set out in Article 18 of the ELD
- Evaluation focus:
 - ELD overall functioning
 - Whether the Commission’s and Member States’ actions have improved the implementation and enforcement of the ELD, since the Commission’s first [evaluation](#) of 2016
- Supported by external experts through a study contract
- 5 Evaluation criteria: **effectiveness, efficiency, relevance, coherence, EU added-value**
- 14 questions defined in the Call for evidence

Environmental Liability Directive

Specific objectives of the ELD

(as defined in the context of the ongoing evaluation)

1. To establish the common framework for preventing and remedying environmental damage
2. To ensure that the polluter carries out preventive measures, remedial actions and remedial measures (including primary, complementary and compensation remediation) as applicable
3. To ensure that the costs are borne by the polluter
4. To encourage the availability of financial security at an affordable cost
5. To allow participation of interested parties

ELD 2nd evaluation 2023 - Questions

Effectiveness

1. To what extent have the objectives of the ELD have been achieved since 2016?
2. Are there any factors that have limited the effectiveness of the ELD?

Example sub-questions:

- **2.5** What national legislation has been used to handle ELD occurrences instead of national ELD legislation (IED legislation, national liability legislation, etc.)?
 - **2.7** Have the preventive/remedial measures under national non-ELD legislation ensured the same minimum standard of environmental protection as the ELD?
 - **2.8** Can national non-ELD legislation be applied jointly with national ELD legislation instead of being applied instead of national ELD legislation?
3. What is the extent to which stakeholders have been engaged in the process of improving the implementation of the ELD at national level?

ELD 2nd evaluation 2023 - Questions

Efficiency

4. To what extent have costs of the ELD been justified, overall and for different stakeholder groups, given any benefits that the ELD has delivered?
5. Are there significant differences between Member States in implementation and efficiency, and if so, what is causing them?
6. To what extent have actions undertaken by the Commission and Member States since 2016 (particularly in response to the REFIT Evaluation) made the
7. Is the current approach, where financial security for ELD liabilities is not mandatory, appropriate?
8. Can the efficiency of the ELD be further improved?

ELD 2nd evaluation 2023 - Questions

Relevance

9. Does the ELD still correspond to the current needs of the EU?
10. Is the scope of the ELD still appropriate?
11. Has the ELD been flexible enough to respond to new and/or emerging issues?

Coherence

12. To what extent is the ELD internally consistent and coherent?
13. To what extent is the ELD coherent with other EU environmental policies and wider EU policies?

EU added value

14. What is the EU added value of the ELD compared to what is likely to have been achieved by Member States in its absence?

ELD 2nd evaluation 2023 - data sources:

- Previous studies, notably recent studies on [Facilitating enforcement of the ELD by MS](#) and [Financial Security for ELD Liabilities](#)
- Feedback received for the [Call for evidence](#)
- Member States Reporting: Article 18 ELD + Annex VI
- Literature review - desk research
- Open public consultation
- Targeted consultations and Interviews
- Case studies: covering both ELD and non ELD cases
- Stakeholder Workshop

ELD 2nd evaluation 2023 - Timeline:

- **November 2021** – Call for evidence published
 - November – December 2021 – feedback collection (4 weeks)
- **January - April 2022** – Study inception phase
- **March - January 2023** – Study execution
 - March–November 2022: evidence gathering & analysis, stakeholder consultations
 - 30 April 2022 – Member States Reporting time limit
 - May - July 2022 - online public consultation (12 weeks)
 - 7 June 2022 - ELD expert group consultation
 - November 2022 - Workshop with stakeholders and the ELD expert group consultation
 - October 2022 – January 2023: Study conclusions and final report
 - November 2022 – 1st draft of the Study final report
 - November – January – revisions of the study final report
- **October 2022 - April 2023** – **Commission Staff Working Document**
 - October 2022 - February 2023 – drafting
 - February – April 2023 – internal consultations and approval
 - 30 April 2023 – legal deadline to publish the evaluation

Court of Auditors' special report on the polluter pays principle

Adopted on 5 July 2021

Recommendations:

- Insufficient criteria used in definition of environmental damage (water and land damage)
- Insufficient take-up of financial security

Commission response:

- The Commission agreed with the concerns raised by ECA
- The Commission agreed to further consider both issues in the context of the evaluation

European Parliament Resolution on the liability of companies for environmental damage

Adopted on 20 May 2021(2020/2027(INI))

Places ELD in much broader context that includes civil liability, rights of victims, environmental crime, detection and enforcement, corporate due diligence and reporting, voluntary approaches, public procurement and trade

European Parliament Resolution on the liability of companies for environmental damage

Points relevant to ELD which go in the direction of new legislation:

10 from directive to regulation;

24 scope of environmental damage and operator;

25 alignment with the Paris Agreement;

28 scope of Annex III;

38 secondary and chain liability;

40 limit defences;

41 possible alignment with civil liability regimes;

43 mandatory financial security;

44 fall-back funds – either national or EU.

European Parliament Resolution on the liability of companies for environmental damage

Points relevant to ELD which go in the direction of non-legislative measures:

15 create EU task-force of ELD experts;

16 improve data collection;

18 and 19 support for victims of environmental damage;

26 study on diffuse pollution;

27 guidance on environmental damage.



European
Commission

THANK YOU!