

Training Outline



The first ten years of the EU Environmental Liability Directive: the critical issues Ljubljana, 11 December 2015

1. Trainer's professional experience in brief

	<p>Environmental attaché of Hungary to the EU between 1999 and 2003, Head of EU law department at the Hungarian Ministry of Environment and Water (2003-2008), Deputy state secretary at the Ministry of Foreign Affairs for EU sectoral policies (2010-2014). Main fields of expertise:</p> <ul style="list-style-type: none"> - EU environmental law - EU decision-making - EU infringement cases - international water law, international water conflict resolution
<p>Name: Gábor BARANYAI</p> <p>Current Position & Organization: Consultant, ELDH Consulting Ltd</p> <p>Contact: gabor.baranyai@eldh.hu, www.eldh.hu</p>	

2. Learning objectives

The training is aimed at providing a brief introduction to the implementation of the EU's Environmental Liability Directive (ELD, Directive 2004/35/EC). The ELD has taken several years to transpose for most EU member states and its implementation remains patchy over 10 years after its adoption. Following the training participants should have a clear understanding of the content of the ELD, the main challenges of implementation as well as the relevant practice of some member states, including Hungary. Based on that introduction, participants should be able to find further guidance to solve their own transposition/implementation difficulties.

3. Training session abstract

The first ten years of the EU Environmental Liability Directive: the critical issues

The EU's Environmental Liability Directive¹ (ELD) was adopted in 2004 after a decade of preparation and politically tense negotiations between the Council and the European Parliament. The ELD is generally regarded as one of the most complicated and potentially most burdensome legislation EU environmental law has ever produced. Member States were expected to start implementation in March 2007, a requirement that has not been met by most EU countries.

Today, over 10 years after its adoption and in its 8th year of implementation the ELD shows mixed results. In most countries very few cases have, thus far, been adjudicated under the ELD. This, on the one hand, may imply that the ELD has fulfilled one of its main objectives, i.e. the prevention of environmental damage. On the other hand, however, the empirics of the ELD also show that in many cases competent national authorities have a strong tendency to avoid the application of ELD altogether. This is largely due to the legal, technical complexity of the liability regime envisaged by the ELD as well as the complacency to go beyond the practice of pre-existing national liability schemes.

The actual implementation of the ELD is monitored closely by the European Commission as well as certain professional bodies. Such monitoring is however a particularly complex exercise compared to other, more traditional pieces of EU environmental legislation. First, the ELD contains a wide range of legislative options Member States may or may not choose to implement. Second, liability impinges on the core constructions of any national legal system that may trigger very divergent implementation responses.

Transposition was grossly delayed in most Member States despite the exceptional 3 year long transposition period. In view of the framework character of the ELD and the many options available to national legislators, the transposition of the Directive "has not resulted in a level playing field but a patchwork of liability schemes" across the EU. The variations among the national environmental liability regimes are of both procedural and substantive character. Thus, relevant first analyses of the implementation of the ELD reveal that:

- while environmental damage has occurred all over the EU, they have been mostly caused by activities falling outside the scope of the ELD (i.e. non Annex III activities),
- in many cases national authorities are more inclined to apply the provisions of the pre-existing legislation than the ELD. This is particularly acute where the ELD has been transposed through separate legislative acts, rather than through incorporation into the existing regime,
- many competent authorities fail to apply the ELD for sociological reasons (lack of expertise or technical capacity, lack of data, dominance of pre-existing legal culture, etc.).

Based on the first 10 years of experience of the ELD the following conclusions can be drawn:

- the ELD is one of the legally and technically most complex and potentially most expensive legislative act under EU environmental law,

¹ Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage

- given that its implementation is linked to a wide range of other EU environmental rules, meaningful transposition is only possible when the bulk of those other rules is already in place in the accession country concerned,
- some of the concepts and mechanisms of the ELD are too fluid for direct implementation. However, the relevant experience of the most advanced Member States may provide useful guidance,
- detailed guidance documents by competent authorities and frequent consultations by potentially liable parties help the smooth implementation of the Directive,
- financial security may come as an important aid to operators that will substantially reduce their exposure, even where no mandatory coverage is foreseen by the national legislation.

4. Suggested reading list, sources, useful links

- ELD website of the European Commission:
<http://ec.europa.eu/environment/legal/liability/>
- ELD website of the Ad-Hoc Industry Natural Resource Management Group:
<http://www.eueldpracticeexchange.com/index.htm>
- Bergkamp, L. & Goldsmith, B., J. (2013): The EU Environmental Liability Directive: A Commentary, Oxford University Press
- Other sources: see in attached background document

5. Glossary (List of key concepts)

See in attached background document

6. Any other information

The first ten years of the EU Environmental Liability Directive: the critical issues

I. The context of the Environmental Liability Directive

The EU's Environmental Liability Directive² (ELD) was adopted in 2004 after a decade of preparation and politically tense negotiations between the Council and the European Parliament. The ELD is generally regarded as one of the most complicated and potentially most burdensome legislation EU environmental law has ever produced. Member States were expected to start implementation in March 2007, a requirement that has not been met by most EU countries.

Today, over 10 years after its adoption and in its 8th year of implementation the ELD shows mixed results. In most countries very few cases have, thus far, been adjudicated under the ELD. This, on the one hand, may imply that the ELD has fulfilled one of its main objectives, i.e. the prevention of environmental damage. On the other hand, however, the empirics of the ELD also show that in many cases competent national authorities have a strong tendency to avoid the application of ELD altogether. This is largely due to the legal, technical complexity of the liability regime envisaged by the ELD as well as the complacency to go beyond the practice of pre-existing national liability schemes.

Consequently, while the ELD has undoubtedly contributed a great deal to the prevention and remediation of environmental damage in Europe, it can hardly be regarded a successful harmonisation project. Given the huge divergence in the transposition and implementation of the Directive in the Member States, the various environmental liability schemes resemble more a patchwork of national systems than a harmonised body of European law.

II. Introduction to the Environmental Liability Directive

II.1 Objective and Principles

The objective of the ELD is the prevention and remediation of environmental damage. It is not a liability scheme in the civil law sense of the word (i.e. it does not imply compensation). Rather, it focuses on the actual remediation of certain types of damage by way of compelling the economic operator who has caused the harm to effectively restore the environment or borne the costs of the restoration. I.e. the remit of the ELD does not extend to relations between private parties, but regulates the administrative and financial consequences of environmental damage vis-à-vis the competent authorities (the state). As such, the ELD aims to implement the polluter-pays principles, a cornerstone of EU environmental law.

² Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage

II.2 Scope

The ELD has not been conceived as a universal environmental liability scheme. It only applies to (i) particular types of environmental damage (ii) caused by the operator of (iii) certain regulated economic activities. The scope of the ELD is determined by the following definitions:

(i) *Damage* is a “measureable adverse change in a natural resource or a measureable impairment of a natural resource service” (Art. 2.2). *Environmental damage* however is not defined through a generic disposition, but with reference to specific environmental media as damage to biodiversity³, damage to water⁴ and damage to land⁵.

(ii) An *operator* is a natural or legal person who operates or controls the damaging occupational activity. This may include the economic decision-maker, the permit holder, the notifier, etc., as it may be defined by national law. Importantly, only economic (occupational) activities come under the scope of the ELD, even large scale and systematic damage to the environment that is caused by private persons escape the attention of the Directive (Art. 2.6).

(iii) The relevant *occupational activities* are defined in relation to the damaged environmental media. The priority rule is that only specific regulated activities are subject to the ELD (those listed in Annex III). Under a subsidiary rule however (Art. 3.1.b) operators of other occupational activities may be held liable if the damage relates to protected species and habitats, if the operator is at fault or negligent.

The ELD excludes from its scope a wide range of specific types of environmental damage (art. 4), such as

- damage for which an international convention specifies a stand-alone liability scheme (nuclear, oil spills, inland navigation, etc.),
- damage caused by national defence or international security operations,
- damage of diffuse character, unless a clear causal link can be established.

II.3 Liability regimes

The ELD envisages two different liability regimes (i) strict liability and (ii) fault-based liability.

(i) *Strict liability* applies to be the operators of Annex III activities (i.e. those that are deemed by law to be of actual or potential concern). These include large industrial installations; waste management operations; certain installations releasing polluting substances into air; installations discharging polluting substances into water; manufacture, use, storage,

³ “Damage to protected species and natural habitats” is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43 (Art. 2.1.a)

⁴ “Water damage” is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60, of the waters concerned (Art. 2.1.b)

⁵ “Land damage” 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 (Art. 2.1.c).

processing, filling, release into the environment and onsite transport of dangerous substances and preparations; contained use of genetically modified micro-organisms and deliberate release into the environment, transport and placing on the market of genetically modified organisms. Operators of such activities are held liable automatically if they cause environmental damage. Only a handful of defences can be invoked by such operators to remain exempt from liability (armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character) (Art. 3.1, 4).

(ii) *Fault-based liability* is triggered only by occupational activities not covered by Annex III and only in relation to damage to biodiversity. Here, direct fault or negligence must be established for the biodiversity damage to be caught under the Directive.

II.4 Obligations of the operators: prevention and remediation

The first obligation of the operators of any occupational activities covered by the Directive is the *prevention* of environmental damage (Art. 5). This is not only a general duty of care, but implies concrete steps should an imminent threat of environmental damage emerge. If the operator cannot, by its own devices, dispel the threat, it has to notify the competent authorities who themselves can undertake the necessary measures to prevent the damage at any time.

If environmental damage has occurred, the operator concerned is required to inform the authorities, to control or contain the situation and, subsequently, take the *remedial measures* prescribed by the competent authorities (Art. 6). The ELD aims to ensure that the damaged environment is physically reinstated. This is achieved through the replacement of the damaged natural resources by identical or, equivalent or similar natural components, or by the acquisition/creation of new natural components.

In the case of *water or biodiversity damage* remediation must target the restoration of the environment to the baseline condition. If return to the baseline condition is not possible, complementary measures may be taken elsewhere (for instance, an adjacent site). As far *land damage* is concerned, the necessary measures must, as a minimum, ensure that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land no longer poses any significant risk of adversely affecting human health.

II.5 Financial responsibility of the operator

The operator liable under the ELD must bear the cost of the necessary preventive or remedial measures. As a general rule, it implies that the operator undertakes the measures itself or it commissions a specialist to do so. When, however, it is the competent authority that has carried out the preventive or remediation measures, either itself or through a specialised undertaking, the authority has the right to recover the costs of its intervention within 5 years. In case of multiple party causation the ELD allows Member States to decide how the costs will be allocated - on a proportional basis or jointly and severally - among the various operators concerned. Importantly, under the ELD the state does not hold subsidiary financial liability: competent authorities are not obliged to remediate environmental damage for which no accountable operator can be identified (Art. 8).

II.6 Financial security

The ELD does not provide for mandatory financial security. It however requires Member States to “take measures to encourage” the development of financial security instruments and markets with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive (Art. 14).

II.7 Exceptions and defences

The ELD has a complicated system of exceptions and defences that Member States are obliged or allowed to permit to operators. First, as mentioned above, the classic defences can be invoked by operators to exclude or limit their responsibility (third party causation, force majeure, etc.). Second, Member States may exempt operators from objective liability if the damage caused is a result of (i) its operation in compliance with a permit (“permit defence”) or (ii) novel products or technologies that was not expected to cause damage according to the scientific and technical knowledge at the time (“state-of-the-art defence”) (Art. 8).

II.8 The role of competent authorities

The ELD dedicates a central role to competent authorities of Member States (Art. 11). These competent authorities have to ensure the effective implementation and enforcement of the ELD; they will also safeguard the legitimate interests of the relevant operators and other interested parties. The core responsibility of competent authorities is to assess the gravity of the problem, to decide on the preventive or remedial and to compel the liable operators to actually carry out the prescribed actions. Competent authorities may themselves at any time intervene and take the necessary measures itself (Art. 5-6).

II.9 Request for actions by interested third parties and judicial review

Importantly, third parties, i.e. natural or legal persons affected or likely to be affected by environmental damage may request the competent authority to take action under the ELD. Also, those persons must be provided with access to a court or other independent public body to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authorities (Art. 12-13).

II.10 Time limits

Environmental liability automatically gives rise to a range of complicated time-related issues the ELD regulates as follows (Art. 17, 10):

- no liability under the ELD for damage that was caused by emissions, events or incidents that took place before transposition deadline (in terms of accession countries: the date of accession),
- no liability under the ELD for damage that was caused by emissions, events or incidents took place after the transposition deadline, if however the activity from which they derive finished before that date,
- no liability for damage if more than 30 years have passed since the emissions, events or incidents that have caused the damage,

II.11 Transboundary damage

Where environmental damage affects or is likely to affect several Member States, the Member States concerned must cooperate with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage (Art. 15).

III. The practice of the Environmental Liability Directive

III.1 Monitoring of implementation

The actual implementation of the ELD is monitored closely by the European Commission as well as certain professional bodies. Such monitoring is however a particularly complex exercise compared to other, more traditional pieces of EU environmental legislation. The ELD came into being as a result of hard-fought political compromises. Consequently, it contains a wide range of legislative options Member States may or may not choose to implement. Moreover, liability impinges on the core constructions of any national legal system that may trigger very divergent implementation responses.

As most EU countries already had some kind of environmental liability schemes in place when the ELD was adopted, the most complicated tasks of national legislators was the integration of the ELD into the fabric of existing law. Moreover, environmental liability is a potentially very costly legal tool. Countries that had experienced significant environmental catastrophes (Spain, Hungary) tended to transpose the Directive relatively quickly and comprehensively. Countries with strong industrial background and powerful business interests groups (Flanders, UK) implementation followed a minimalist approach. Significant delays were experienced in most Member States, seven of which were actually condemned by the European Court of Justice for the belated transposition.

The Commission published its first implementation report⁶ in 2010 by which time very little actual implementation has taken place. The Commission also funded a range studies on various aspects of the ELD, including a comprehensive study on implementation⁷. National reports had to be submitted to the Commission under Art. 18 of the ELD by end of April 2013. On that basis the Commission was required to present a summary report by end of April 2014. While the national reports have been duly submitted⁸, the Commission's own report and proposals for amendment are not yet available.

III.2 First results

Transposition

As mentioned earlier, transposition was grossly delayed in most Member States despite the exceptional 3 year long transposition period. In view of the framework character of the ELD and the many options available to national legislators, the transposition of the Directive “has

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0581>

⁷ <http://ec.europa.eu/environment/archives/liability/eld/eldimplement/documents.html>

⁸ <http://ec.europa.eu/environment/legal/liability/>

not resulted in a level playing field but a patchwork of liability schemes" across the EU. The variations among the national environmental liability regimes are of both procedural and substantive character. E.g. Member States differ in the number, degree and complexity of legislative acts, the number of competent authorities, etc. On the substantive side of the picture is even patchier. Some countries allow the use of defences by operators widely. Certain Member States define the operator or environmental damage more broadly than the ELD. Most EU members with pre-existing liability schemes tended to make only minor adjustments to their regimes. Naturally, most Member States apply the basic notions of any liability scheme differently, such as standard of liability, the level of causation of secondary liability.

ELD practice

In the absence of the Commission's own comprehensive report on the subject, authoritative information on the actual practice of the ELD can be obtained from Member States' own reports and a 2013 study by Bio Intelligence Service on the subject, funded by the Commission⁹.

The two sets of information reveal that in many Member States no reported case of environmental damage has emerged during the first seven years of the implementation of the ELD (Austria, Bulgaria, Czech Republic, Ireland, Luxembourg, France, Slovakia, Slovenia). A number of countries reported only a handful of ELD-related cases (Belgium, Cyprus, Estonia, Latvia, Lithuania, Finland, Malta, Portugal, Romania, UK, Sweden). A smaller number of countries have however identified several instances (over 20) where the liability of operators has been enforced. This includes Hungary, Poland, Germany, Greece, Italy and Spain. Poland stands out even in the former group with over 700 reported cases.

The conclusions of the first analyses of the implementation of the ELD reveal that:

- while environmental damage has occurred all over the EU, they have been mostly caused by activities falling outside the scope of the ELD (i.e. non Annex III activities),
- in many cases national authorities are more inclined to apply the provisions of the pre-existing legislation than the ELD. This is particularly acute where the ELD has been transposed through separate legislative acts, rather than through incorporation into the existing regime,
- many competent authorities fail to apply the ELD for sociological reasons (lack of expertise or technical capacity, lack of data, dominance of pre-existing legal culture, etc.).

III.3 The experience of Hungary

Hungary featured among those four Member States that actually transposed the ELD on time. This was due to the fact that since 1995 Hungary already had a very broad, although not sufficiently precise environmental liability regime in place. Moreover, Hungary has been the subject of some major pollution incidents in the past decade, rendering environmental

⁹ BIO Intelligence Service (2013): Implementation challenges and obstacles of the Environmental Liability Directive, Final Report prepared for the European Commission – DG Environment
<http://ec.europa.eu/environment/archives/liability/eld/eldimplement/index.html>

liability an important public concern and a political priority. The main strength of the pre-existing regime was the groundwater and soil protection which was enforced robustly.

The main features of the implementation of the ELD in Hungary are as follows:

- *Scope broader than the ELD:* the Hungarian regime applies to any environmental damage caused by any person (i.e. not only operators of economic activities),
- *Relatively high number of cases:* given the broad scope of the Hungarian legislation and the pre-existing practice and expertise in implementation, the number of cases of environmental liability are relatively high,
- *Focus on land and groundwater damage:* most cases relate to groundwater and soil, as under the pre-existing regime. Biodiversity damage cases are growing in number, but remain rare. No surface water damage has yet been identified. The dominant view of the competent authorities is that surface waters (especially watercourses) change so dynamically that the likelihood of establishing real environmental damage is minimal,
- *Prevention ignored:* competent authorities focus exclusively on remediation cases and measures,
- *No mandatory financial security, but growing insurance coverage:* the original legislative package envisaged mandatory financial security coverage. The proposal was scrapped in the final phase due to industry pressure. Nevertheless, in the most exposed sectors a lively and flexible market of environmental liability insurance products has emerged.

IV. Conclusions

Based on the first 10 years of experience of the ELD the following conclusions can be drawn:

- the ELD is one of the legally and technically most complex and potentially most expensive legislative act under EU environmental law,
- given that its implementation is linked to a wide range of other EU environmental rules, meaningful transposition is only possible when the bulk of those other rules is already in place in the accession country,
- some of the concepts and mechanisms of the ELD are too fluid for direct implementation. However, the relevant experience of the most advanced Member States may provide useful guidance,
- detailed guidance documents by competent authorities and frequent consultations by potentially liable parties help the smooth implementation of the Directive,
- financial security may come as an important aid to operators that will substantially reduce their exposure, even where no mandatory coverage is foreseen by the national legislation.