



## THE FIRST TEN YEARS OF THE EU ENVIRONMENTAL LIABILITY DIRECTIVE: THE CRITICAL ISSUES



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### The rationale: why regulate environmental liability at EU level?

- EU environmental legislation since the 1970s
  - Product harmonisation
  - Level playing field in regulated economic activities
  - Nature conservation
- Result by 2000:
  - Over 300 legislative acts
  - High level of harmonisation
    - Permitting procedures
    - Product standards
    - Operational conditions
    - Silo-type regulation of relevant environmental media

### The rationale: why regulate environmental liability at EU level? (2)

- But: no EU rule to remedy the environmental consequences of acts or omissions of regulated activities
- Missing link: liability to restore damaged environmental media
- Poor implementation by operators and weak enforcement by authorities can be corrected by an EU-level liability scheme

## The political context

- The hard issues
  - ▣ Most Member States already had environmental liability regimes – what to do with them?
  - ▣ What type of environmental damage to be covered?
  - ▣ What level of remediation to be required?
  - ▣ What financial responsibility for the operator and the state?

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## The political context (2)

- The birth of Directive 2004/35/EC
  - ▣ Protracted process (10 years)
  - ▣ The most important political compromise adopted before EU10 enlargement (June 2003)
  - ▣ Full of optional clauses
  - ▣ Full of limitations on
    - Scope (damage, activities)
    - State liability
    - Financial coverage
  - ▣ Long transposition period (3 yrs)

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## The Environmental Liability Directive

- Objectives and principles:
  - ▣ Polluter pays principle (state not!)
  - ▣ Remediation, no compensation involved
- Scope: a complicated patchwork
  - ▣ Environmental Damage
    - Significant effects or risks
    - Land, water, biodiversity
  - ▣ The operator
    - Who effectively controls the activity (physically or economically)
    - Occupational (economic) activities (Annex III/unlimited)

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## The Environmental Liability Directive (2)

- Liability regimes: Two different liability regimes strict liability and fault-based liability.
  - Strict liability
    - general rule, operators of Annex III activities
    - operators held liable automatically if they cause environmental damage.
    - only a handful of defences can be invoked (armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character) (Art. 3.1, 4).
  - Fault-based liability
    - only by occupational activities not covered by Annex III
    - only in relation to damage to biodiversity
    - direct fault or negligence must be established

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## The Environmental Liability Directive (3)

- Obligations of the operator
  - Prevention of environmental damage
    - General duty of care
    - Concrete steps to control or contain imminent threat of environmental damage
    - Notification / intervention
  - Remediation of environmental damage
    - To inform the authorities immediately,
    - To control or contain the situation
    - To take the remedial measures prescribed by the competent authorities
      - the damaged environment is physically reinstated
      - replacement of the damaged natural resources by identical or, equivalent or similar natural components,
      - acquisition/creation of new natural components.

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## The Environmental Liability Directive (4)

- The level of remediation
  - water or biodiversity damage: baseline condition
    - If return to the baseline condition not possible, complementary measures may be taken elsewhere (for instance, an adjacent site).
  - land damage:
    - as a minimum, to ensure that the relevant contaminants are removed, controlled, contained or eliminated
    - the contaminated land no longer poses any significant risk of adversely affecting human health.
- Financial responsibility of the operator
  - The operator to bear the cost of the necessary preventive or remedial measures
  - The operator undertakes the measures itself or it commissions a specialist to do so or
  - The competent authority may carry out the preventive or remediation measures, either itself or through a specialised undertaking, at any time.
  - The authority has the right to recover the costs of its intervention within 5 years.
  - In case of multiple party causation Member States decide how the costs will be allocated - on a proportional basis or jointly and severally - among the various operators concerned.
  - The state holds no subsidiary financial liability

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## The Environmental Liability Directive (5)

- Financial security
  - ▣ No mandatory financial security.
  - ▣ However 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.
- Exceptions and defences
  - ▣ classic defences can be invoked by operators to exclude or limit their responsibility (third party causation, force majeure, etc.).
  - ▣ permit defence
  - ▣ state-of-the-art defence

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## The Environmental Liability Directive (6)

- Request for actions by interested third parties and judicial review
  - ▣ 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
  - ▣ Third parties to be provided with access to judicial review
- Time limits
  - ▣ no liability under the ELD for damage that was caused by emissions, events or incidents that took place before transposition deadline,
  - ▣ 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

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## The practice of the Environmental Liability Directive

- Transposition
  - ▣ transposition was grossly delayed in most Member States
  - ▣ transposition of the Directive "has not resulted in a level playing field but a patchwork of liability schemes" across the EU
  - ▣ Examples:
    - Defences
    - Definition of operator
    - Pre-existing regimes
    - basic notions of liability used differently: standard of liability, the level of causation of secondary liability.

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## The practice of the Environmental Liability Directive (2)

### □ Implementation

- In most Member States: no or very few ELD cases
- In some countries relatively high number of cases (Hungary, Poland, Germany, Greece, Italy and Spain)
- Reasons:
  - Many cases fall outside the scope of the ELD (i.e. non Annex III activities),
  - national authorities are more inclined to apply the provisions of the pre-existing legislation than the ELD,
  - competent authorities fail to apply the ELD for sociological reasons

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## The experience of Hungary

- Universal environmental liability scheme in place even before the ELD
- Scope broader than the ELD (any significant damage by any person)
- Relatively high number of cases
- Focus on land and groundwater damage
- Prevention ignored: No mandatory financial security, but growing insurance coverage

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## Conclusions

- The ELD is one of the legally and technically most complex and potentially most expensive legislative act under EU environmental law,
- Meaningful transposition is only possible when the bulk of other EU environmental rules already in place in the accession country,
- Some of the concepts and mechanisms of the ELD are too fluid for direct implementation. Seek guidance from Member States,
- Detailed guidance documents by competent authorities and frequent consultations help the smooth implementation of the Directive,
- Financial security may come as an important aid to operators.

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