

ELD News Edition No. 1

Environmental Liability 2011

Update on Recent Developments

Justice and Environment 2011

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J&E ELD news

J&E establishes a news service on environmental liability. This is the first edition.

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Justice and Environment (J&E, www.justiceandenvironment.org) is a European NGO with member organizations in different European countries that focus on environmental law. J&E and its members use law to protect the environment, nature and people. Environmental liability is one of our focus areas.

ELD stakeholder workshop of the European Commission

In November 2011, the European Commission hosted a stakeholder workshop addressing the ELD implementation status. A major reason of concern is the low number of cases. The EC estimates there have been only 50 to 100 cases in the whole Union until now. However, Poland reported 400 cases. The approximately 200 participants of the workshop aimed to address problems as well as to find reasons and solutions for (a better) implementation of the Directive. We highlight the key issues:

- It is positive that the **insurance industry** was very active and developed various products.
- It is not clear how the **preventive effect** of the directive could be measured.
- It became apparent that there is still a **lack of awareness** on the Directive and its functioning in the Member States.
- In many Member States **existing liability systems** are triggered before/instead ELD.
- The **definition of damage** seems too narrow, and unclear (with special regard to the meaning of "significant").
- **Technical requirements** for economic evaluation, assessment of damage, baseline conditions and remediation methodologies are not clear, but complex.
- **Financial security** is crucial.
- The Directive has many **vague provisions** and gives much discretion to Member States.

The Commission aims to boost implementation by different measures. There will be a focus on information exchange, various guidelines will be published and other **awareness raising** are taken, such as the establishment of a transparent **case register**.

Research will be done as to **inter-linkages** between ELD and existing liability regimes, risk assessment and financial security.

Conference materials are available here:

<http://ec.europa.eu/environment/legal/liability/workshop081111.htm>

NGO discussion on ELD

An internal questionnaire and discussions show that most of the NGOs are not satisfied with the impact of the Directive.

Some NGOs considered calling upon the Commission to recall the proposal for the Directive before it was adopted in 2004 due to its weakness. **Crucial elements** and principles of effective environmental liability that were discussed before in the green and white papers or in the Lugano Convention are **missing** in the Directive. This starts at the very narrow **definition of damage** excluding damage from organisms or substances, oil spills or nuclear matters, damage to air, landscape or mankind. The Directive has too many vague terms, excludes civil liability, direct legal remedies against polluters and leaves too much discretion to Member States as to strict liability, burden of proof, financial security or joint and several liability. All these factors may be reasons for the weak performance of the Directive.

Our major aim is therefore to **revise the Directive** as soon as possible. Since the Directive is in force now as it is we aim to support its implementation and draw conclusions from its performance. The lessons learnt should then be used for the revision of the Directive in 2014. Most NGOs **welcome the existence** of the Directive among others since it is an EU matter now and gives access to information and justice rights to the public. We also see a need for further guidance and **information exchange** between Member States and authorities, but also within civil society. And finally it is crucial to gather as much information and **research** as possible on cases that fall under the Directive and others that are “slip through” or are treated under different national legislation.

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