



## ELD News Edition No. 3

Environmental Liability 2011

ELD/Lugano Convention/UNEP guidelines

*Justice and Environment 2011*

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### Environmental Liability 2011

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##### J&E ELD news

This is the third edition of the J&E newsletter on ELD.

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The association Justice and Environment (J&E, [www.justiceandenvironment.org](http://www.justiceandenvironment.org)) is a European network of environmental law organisations which was created in 2003 and was founded as non-profit association in 2004. J&E is striving to protect the environment, human health and nature by improving environmental legislation and enhancing the enforcement thereof.

#### **What are the key differences between the EU Environmental Liability Directive, the 1993 Lugano Convention on liability and draft UNEP Guidelines on the same matter?**

Justice and Environment compared **three legal regimes** that aim to regulate environmental liability. Only one of them is of legal value. Whereas the **Environmental Liability Directive** (ELD, 2004/35/EC) is in force since 2007, the 1993 **Lugano Convention** never entered into force due to the lack of signatories. The draft 2009 **UNEP Guidelines** on environmental liability propose legal paragraphs but would be of non binding nature even if they would be adopted.

The idea for this comparison grew from the fact that the ELD seems not very effective until now. One of the reasons could be that it lacks clear and/or crucial provisions. This small research should aims to **identify major differences** between the ELD and the other two regimes. Based on this conclusions could be drawn for improvements of the ELD.

The comparative analysis and a comprehensive table with the full text of all three legal orders can be found under: <http://www.justiceandenvironment.org/publications/eld>

#### **Narrow scope**

The ELD has a rather narrow scope compared to the Lugano Convention and the draft UNEP guidelines. This starts with the limiting number of **dangerous activities** in the Annex of the ELD – Lugano is far more open here. In addition the ELD **excludes** damages from oil pollution, hazardous substances or nuclear matters, whereas Lugano explicitly includes - among others - **GMO** damages.

### **Narrow damage definition**

The next limitation in the ELD follows in the damage definition. Whereas Lugano and UNEP have a wide damage definition covering biotic and abiotic natural resources, **air**, soil, flora, fauna, **cultural heritage, landscape**, loss of **life and property**, preventive measures or pure **economic loss**. ELD only refers to water, soil and nature, with relatively **high thresholds**. Again Lugano has far lower thresholds and sees for example **certain substances** to possess a significant risk for people, the environment and property by definition. The damage definition seems to be more concise both in the Lugano Convention and the UNEP guidelines.

### **Request for action, access to justice and information**

Whereas both Lugano and UNEP enable any person to take **preventive measures** the ELD does not provide for this. The same counts for **compensation claims**. Access to justice provisions in ELD are far **weaker** compared to the other regimes. The same counts for access to information.

### **Fault based versus strict liability, criteria for liability and financial security**

One of the worst shortcomings of ELD is for sure the **fault based liability** approach. Even though the ELD currently faces other problems such as a low number of cases, when it comes to cases liability could be easily turned down by using the defenses that are a **systemic breach** of a liability system for dangerous activities such environmental or product liability. Only a strict liability regime is expected to have effective preventive effect. It goes without saying the Lugano Convention follows a **pure strict liability** approach. The Lugano Convention and UNEP guidelines are also stricter regarding compulsory **financial security**, prove of evidence and joint and several liability.

### **Scope of ELD should be extended**

To conclude, the ELD is subject to **major shortcomings** compared to the other (proposed) liability regimes. It can be argued that many aspects of the Lugano Convention might exist in most national European legal systems. However, Justice and Environment is convinced that there should be a **comprehensive European approach for environmental damages** that is far closer to the Lugano Convention than to the current ELD. This would raise the level of environmental protection in the EU and would avoid a “race to the bottom” regarding environmental legislation. Investors should not be able to choose locations in the EU with the low liability standards.

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