



# **Complementary Study to J&E ELD Comparative study on existing environmental liability regimes and their practical application 2012**

Environmental Liability 2012

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## 1. Introduction

The current study means to complement what has been found within the **J&E ELD Comparative study on existing environmental liability regimes and their practical application (2012)**. The ELD Comparative study aimed to:

1. Highlight the differences of national liability systems and ELD
2. Focus on cross-cutting problems regarding national liability systems
3. Deduce valuable information from application in practice
4. Provide information of strength/weaknesses of national liability regimes compared with ELD

For the comparative study J&E members from the following countries have provided respective legal analysis and case studies: **Austria, Estonia, Czech Republic, Hungary, Slovenia and Spain.**

The main results elaborated from the national inputs from environmental organizations of the above mentioned countries can be summarized as follows:

- National administrative liability systems are **very fragmented**, regarding competent authorities and other aspects – every different environmental element has different rules. Some of those complex systems are even not used in practice.
- **Financial security systems are only partly** established, and if so, the most countries **lack detailed regulations** on financial guarantees.
- In a lot of cases **procedures tend to last very long.**
- Basically the majority of the assessed systems still **prioritise monetary compensation/financial penalties instead of natural restitution.** Mainly these systems also **lack of a preventive oriented mechanism** and a respective regulation. Due to the above mentioned fragmentation of the national systems no general strict liability regime for national administrative liability has been established so far.
- National liability systems do not provide for **systematic methods regarding cost and damage estimation.**
- **Public participation** is a rare exception within the analysed systems.
- It has been showed that **in some cases ELD application is hindered by practical reasons** – a better national administrative system established, vividly applied in practice, resources and competences already set and allocated.

According to the information gathered there is hardly any knowledge on ELD application in practice - this **lack of knowledge (or lack of practice)** impedes an adequate assessment of ELD application in practice. The study results suggested the assumption that **national liability regimes are functioning and used in practice undermining ELD application.**

It seems important to gather more information in order to be able to draw conclusions on the similarity of problems with the application of ELD in a large number of member states. So **J&E (in cooperation with EEB<sup>1</sup>) conducted a survey** addressing the basic problems we deduced from the comparative study (see the results above). The survey addressed the following areas:

- The existence of national liability systems (apart from ELD) and the environmental elements covered
- The technical transposition of ELD into the national legal systems
- Information and knowledge sharing on ELD cases within the respective countries
- The application of ELD and national liability regimes in practice
- Standards of damage prevention and remediation within different liability systems

The survey was structured as a two page questionnaire **requiring mainly YES/NO and multiple choice answers and figures. Additionally room for comments was left.**

Organizations from the following countries participated in the survey:

- **Ireland**
- **Finland**
- **Sweden**
- **Germany**
- **Greece**

The following Chapters will analyze the survey and relate these results with what has been found already in the ELD comparative study.

Furthermore the situation in the UK (with focus on legislation that affects England and Wales) and Cyprus will be shortly outlined to gather a more comprehensive view on European environmental liability systems.<sup>2</sup>

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<sup>1</sup> European Environmental Bureau

<sup>2</sup> Andreas Formosa, The Environmental Liability Directive: How have EU Member States responded through implementation of the Directive. 2011.

## 2. National Liability Regimes

In general there is no overarching environmental liability system covering all environmental elements within the examined legal frameworks – three types of liability regimes have been detected in the comparative study<sup>3</sup>:

- Public liability within sectoral environmental laws
- Civil liability
- Criminal liability

By assessing the different liability regimes a broad variety of sectoral liability provisions – still in force after national ELD transposition - have been discovered. These liability provisions were discovered in different legal acts - regulating different environmental elements or dangerous activities having potential impact on environmental elements – e.g. air, water, forest, protected areas and species, waste, GMO, nuclear facilities. A **significant characteristic** of the national regimes we discovered is their **fragmentation**.

All countries provide the possibility to apply civil liability regimes in case environmental damages happen. Prejudice of this system is that civil liability does not cover general environmental damages – damage is considered as such if certain legal goods or legal interests (e.g. property, fishing rights, human health, physical goods) are affected negatively.

The **Irish** legal framework has the common law of torts as the only liability regime apart from national ELD legislation. Under this just some aspects of environmental damage can be addressed. Likewise provides the **German** “*Umwelthaftungsgesetz*”<sup>4</sup> for a civil liability regime with respect to environmental damages covering only **bodily and health or property losses**. Apart from civil liability neither **Greece** has some kind of liability system which would be comparable to ELD. Regardless in the most of the analysed countries<sup>5</sup> (e.g. Austria, Czech Republic, Estonia, Finland, Spain, Sweden) **national administrative liability regimes – although fragmented – do exist**. Occasionally these systems cover a much broader range of environmental elements than ELD prescribes.

**Finland** had some 10 national laws or acts containing principles and elements to prevent, stop, compensate by money or even repair environmental damages. But ecological restoration or compensation (apart from e.g. new fish population releases) was not in the scope of these laws. ELD was more or less transposed by amendment of the existing national liability system (five laws had been adapted) – with the particularity that additionally a separate ELD Act was enacted.

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<sup>3</sup> Cp. J&E Comparative Study on existing environmental liability regimes and their practical application (2012): <http://www.justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>

<sup>4</sup> In contrast to the German “*Umweltschadensgesetz*” – that is the national transposition of the Environmental Liability Directive in Germany

<sup>5</sup> Cp. J&E Comparative Study on existing environmental liability regimes and their practical application (2012): <http://www.justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>

In principle the **Swedish** Environmental Code covers all environmental harm by applying the polluter pays principle and the precautionary principle. Sweden transposed ELD by amending the existing national liability system. Species and habitats came to be explicitly mentioned in the Environmental Code (Chapter 10) – before only soil and water damages were mentioned - pointing out in detail the obligations regarding prevention and remediation. Also the **United Kingdom (UK)** showed several pre-existing regimes regarding similar environmental liability and it was rather challenging to fit in the ELD into this system – as a result the Environmental Damage (Prevention and Remediation) Regulations<sup>6</sup> came into force in England and Wales to transpose the ELD. As **Cyprus** acceded to the European Union only in 2004 nearly all its environmental legislation derived from EU Directives and Regulations. It transposed the ELD with the statute for 'Environmental Liability for the Prevention and Restoration of Environmental Damage'<sup>7</sup>

ELD was **transposed by a separate piece of legislation** (Environmental Liability Act) in **Austria, Czech Republic, Estonia, Germany and Spain**. **Ireland** introduced separate ELD Regulations (Ministerial secondary legislation possible to implement EU Directives, with full legal effect). An ELD Act has been promised but the final Bill has not yet been published. Comparable to Sweden and Finland an **amendment of the exiting national liability system** was carried out in **Slovenia and Hungary**.

### **3. Access to Information on ELD Cases**

A rather important fact discovered within the comparative study was the lack of knowledge about the existence of ELD cases and their assessment by the respective authorities. The National Environmental Liability Reports handed in by the countries covered from the comparative analysis did include case studies. It is symptomatic that only one ELD Case (Estonia) was handed in – all the other cases were handled according to national (=non ELD) liability systems. So we questioned organizations from several countries on the existence of ELD cases (according to their knowledge) and on the existence of official and publicly accessible databases on Environmental Liability Cases.

In **Greece** the competent authority for the implementation of ELD is the Ministry of the Environment and specifically the Coordination Office for the Remediation of Environmental Damage under the Special Secretary of Environment and Energy Inspectorate which has been established by the Presidential Decree. Up to now this Office works with very limited staff. The Office should be supported by a National Advisory Committee on Environmental Damage. At a regional level, the Presidential Decree provides the establishment of Regional Advisory Committees on Environmental Damage. The members of this Committee are civil servants from Environment, Water, Public Works and other relevant units of the seven decentralized administrations.

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<sup>6</sup> No. 153 2009

<sup>7</sup> Andreas Formosa, The Environmental Liability Directive: How have EU Member States responded through implementation of the Directive. 2011, 10.

A number of about 15 cases were examined by the above mentioned services in order to be subject to the environmental liability regime. The damage mostly caused regards uncontrolled and illegal waste disposal. In many of these cases the operator is unknown and the state should provide for remediation. **The first Greek ELD case** concerned dangerous waste from an old asbestos factory. The Greek Ombudsman asked the competent Special Secretary of Environment and Energy Inspectorate for action in this case. In **Estonia**, according to the statistics of the Environmental Board, there were **two cases** till now where the environmental damage or threat of damage has been identified according to the national ELD regime. Altogether, **nine environmental liability cases have been reported and assessed** by the Estonian Environmental Board. In **Ireland** various cases (concerning peat extraction and contaminated land) have been reported. In **Finland** no official decisions on ELD cases have been taken so far, but the elaboration of statistics on possible and ongoing cases in Finland is in progress right now. – There **might be some recent cases, mainly dam accidents** in Finland which are to be classified as ELD cases (Kainuu – 2012, Talvivaara mine – 2012, Paimionjoki – 2012) and one logging of endangered species site (Vantaa – 2012), which are under investigation Till now **not a single ELD case** has been reported in **Austria, Czech Republic, Germany, Slovenia, Spain and Sweden**.

In comparison, these countries which dispose of a national environmental liability regime with similar components as ELD has – like e.g. Sweden, Czech Republic, Austria, Finland – do have cases handled according to the national regimes. In the **Czech Republic** about 500 cases/year are subject to different types of corrective measures (water, air, flora and fauna). It was reported that in about 2000 cases/year fines are imposed to the polluter. Also the **Austrian** and **Swedish** national liability systems are indeed applied in practice – although no exact figures could be provided for these countries. From **Finland** a general figure of about 450 cases (all environmental damages) between 2000 and 2005 has been reported, of which 48 were classified as serious ones.

Among the Czech Republic, Germany, Greece, Finland, Ireland and Sweden only the Czech Republic provides for an ELD database on the Czech Environmental Inspectorates' Homepage<sup>8</sup> **The lack of knowledge and officially accessible information impedes an adequate assessment of ELD application in national practice** – it should be one of the main goals **to make information accessible to guarantee adequate monitoring of ELD** – which is **essential to improve such an important tool as the Environmental Liability Directive could be for an effective environmental damage prevention and remediation in the future**.

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<sup>8</sup> <http://www.cizp.cz/Ekologicka-ujma/Evidence-pripadu-ekologicke-ujmy>

#### 4. Standard of Damage Prevention

The comparative study (which covered Austria, Czech Republic, Estonia, Hungary, Slovenia and Spain) evaluated that **financial security systems** are only partly established in national liability regimes, and if so, most of the countries lack detailed regulations on financial guarantees. With respect to financial security the case studies showed that lack of such systems leads to the situation that polluters hand over the responsibility to the state and thereby to society as such. The results of the survey have supported the assumptions on the existence of financial security systems none of the polled **national liability systems** provides for mandatory financial security. **So the mere “encouragement” ELD offers in the elaboration of financial security systems with respect to environmental damages (cp. Art 14 ELD) is an important although not sufficient step into the right direction.**

The comparative study showed that in the most cases existent national administrative liability regimes – although fragmented – cover a much broader range of **environmental elements** than ELD prescribes. The **Czech Republic** even disposes of an overall legal notion of environmental damage as “**any loss or weakening of the natural functions of ecosystems, caused by damage to their constituents or disruption of internal links and processes that are results of human activity**”<sup>9</sup> Even the Hungarian system – although harmonized with ELD by its transposition – still disposes of a broader notion of environmental damage within its Environmental Protection Act than ELD does. Indeed quite high thresholds are applied on all kinds of damages within the Hungarian system (only measurable significant damages are covered by this regime). On the other hand the use of the term “*measurable*” does not cope with the term “*significant*” – lots of negative impacts on environmental elements can be measurable. And therefore a reference to measurable damages would basically broaden the scope in comparison with ELD. Furthermore the system focuses on measurable changes or impairments and not impacts – also measurable environmental harmful emissions without measurable impact could be covered under the Hungarian system. In this respect the Czech formula concentrating on “*loss and weakening*” might be even stricter.<sup>10</sup> In **Sweden**, the rules concerning environmental damage are wider than the ELD in that they cover all activities, not only those listed in Annex III of the directive. The Swedish rules do also include species and habitats protected under our national protection schemes. The level of contamination required for liability in Swedish law with respect to contaminated land is also lower than in the ELD. The obligation to take remedial measures begins already when it is necessary to prevent, hinder or combat damage or detriment to human health or the environment.

Nearly all of the national liability regimes covered by the comparative study and the present survey allow for **permit defences** – as ELD does. However, in Sweden the “*permit exemption*” in ELD has resulted in a weakening of the national liability system – which originally did not apply permit defences. On the other hand it was discovered that sectoral administrative liability provisions – if in place - have much **broader perceptions of the “polluter” as ELD has** – not only operators in their occupational activities can be held liable.

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<sup>9</sup>Czech Law on Environment

<sup>10</sup> Cp. J&E Comparative Study on existing environmental liability regimes and their practical application (2012): <http://www.justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>

## 5. Conclusion

Basically the countries without national administrative liability systems do consider ELD as the better system compared to the liability systems they already have (mostly civil liability systems). These countries which already had administrative liability systems in place seem to have mixed feelings with respect to the usefulness and effectiveness of ELD. The survey and study participants considered that ELD has brought added value but only in only in some aspects. This view is justified by the argument, that **the scope of ELD is so narrow an application in practice is hindered thereby**. As already mentioned above, most of the analysed countries did not report any ELD cases so far so the **innovative elements of this system did not come into effect**. National systems providing protection and remediation against environmental damages are applied in practice (see above) but the bigger part of these systems do not provide for an equal standard of damage prevention and remediation.

ELD is especially seen as an instrument providing **better standard for the prevention and remediation** of environmental damages – as this system provides for ecological restoration in contrary to most of the other systems. The systematic approach on damage prevention and remediation with a set of principles and measures to be taken is missing within national liability systems.

The mere **“encouragement” ELD offers in the elaboration of financial security systems** with respect to environmental damages (cp. Art 14 ELD) is an important although not sufficient step into the right direction. The Directive needs to advance from mere recommendations for the establishment of financial security instruments and markets to the regulation of a comprehensive financial security system.

Those countries with **two different environmental liability systems** (since ELD) in place have difficulties with assessing and applying one or the other system - ELD brought confusion with two systems overlapping each other. Mostly the traditional system continues to be applied and ELD solidifies as non-applied law.

So the results of the current survey draw a similar picture as our foregoing studies and the recommendations developed have to be again highlighted at this point:

There is a need for a **comprehensive European environmental liability regime** which is able to impede parallelisms and to integrate both the strengths of the existing national liability systems and the innovative elements the current ELD provides.

**This system should:**

- contain a broader range of environmental elements as ELD does at the moment
- have lower severity thresholds
- not be limited by using permit defences
- provide for mandatory financial security
- realize the “polluter pays principle” – strict liability system
- be integrated into the national administrative liability systems
- be equipped with the necessary financial and human resources to be put into practice

ELD needs to be revised towards a more stringent system including procedural and organizational specifications, providing more detailed guidelines for the member states. Therefore we highly recommend the corresponding revision of ELD towards the establishment of an effective and practiced system aiming at a sustainable protection of our environmental goods.

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