

The EU Environmental Liability System

ELD

Statement

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I. Executive Summary

Association Justice and Environment (J&E) is a European network of environmental law organizations 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.

With the Environmental Liability Directive¹ (ELD) the EU tried to establish a common liability framework for the prevention and remediation of damage to animals, plants, natural habitats water resources and soil damages to a reasonable cost for society. The liability scheme is narrowed to certain specified occupational activities. Public authorities are responsible implementing the necessary (financial, preventive, remedial) measures on responsible operators.

Ever since its adoption - the transposition and implementation of the ELD and the respective practice of the MSs has been on the agenda of J&E. Analytical work has been done and measures been taken to raise awareness on the existence and content of ELD among the public, stakeholders and decision-makers. J&E monitored the implementation of the ELD in its member countries and could thereby generate additional findings which have fed the here presented conclusions on the Environmental Liability Directive.

We are strongly convinced that the Environmental Liability Directive is a valuable instrument in order to stop environmental degradation and improve the protection of Europe's natural resources - this by creating clear responsibilities for polluters and establishing a very strict remediation system which aims at very comprehensive environmental restoration. **To maintain an EU wide environmental liability system is of particular importance due to the following reasons:**

- Environmental protection is a global task and environmental damages do not stop at national borders, thus a uniform system for the prevention and remediation of damages must be applied at least at European level.
- European Member States do not have comprehensive national environmental liability systems in place pursuing the polluter pays principle.
- One of the main aims of the EU Biodiversity Strategy to 2020 is to ensure no net loss of biodiversity and ecosystem services. The ELD is an essential instrument for the achievement of this goal, especially as biodiversity damages are not comprehensively sanctioned/treated in EU member state laws.

¹ DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

The ELD includes a review mechanism and in 2014 the European Commission was supposed to submit a report on the application of the ELD and make appropriate proposals for amendment to the European Parliament and to the Council. The report is expected to be adopted in 2015. We would like to use this occasion to outline our findings on – in our view – four important aspects of the ELD. We are of the opinion that these aspects are crucial for a well-functioning of the ELD in practice.

1. The environmental liability regime institutional setting

We consider that for an effective environmental liability regime it is paramount to count with a **powerful institutional setting** whose **key conditions** are:

- a) The **staff of the competent authorities (CA)**, no matter how many CA have been designated, **must be well trained** in the field of prevention and remediation of environmental damage. The staff must be comprised of experts with different profiles to provide a wide range of competence.
- b) The **CA must have available resources** including technology, funding and human resources.
- c) **Coordination and cooperation of CA with other relevant authorities** having competence in relation to the elements of the environment (like soil, water) is necessary for the proper functioning of the environmental liability regime. For example, the ELD authority should have an effective line of communication with the permitting authorities to determine whether a particular preventive measure is appropriate and whether an activity is covered by Annex III, to assess a permit compliance defense, etc. In respect of damage to protected habitats and species, the authority will want to contact the authorities responsible for nature protection to obtain information relevant to determining whether there is damage, and, if so, whether the damage is significant, determining baseline, etc². This coordination must work on a day-to-day basis and CA must have easy access to exchange and contact relevant authorities when necessary. It is not enough to establish coordination bodies as has happened in Spain that created the *Comisión Técnica de Prevención y Reparación de Daños Medioambientales* (Technical Committee on the Prevention and Remediation of Environmental Damages).
- d) **Cooperation with civil society** given that they can inform CA of cases of imminent threat or of environmental damage that the CA are not aware of.

Further a **clear framework on rights and obligations of the CA within the ELD and its transposing legislation** may lead to more effectiveness in the prevention and remediation of environmental damage. Thus we criticize the lack of CA obligation to take preventive or remediate action as a means of last resort in environmental damage cases in the legal text of the ELD.³ Integrating a subsidiary obligation of the CA into the ELD will guarantee the effectiveness of the ELD system. Further it might indirectly foster the implementation of the ‘polluter pays principle’ as CA have more reason to have the real polluters taking their obligations under the ELD system.

² Bergkamp, L and Van Wesembeeck, C, *Ibid.*

³ Art 5 (4) and Art 6 (3), ELD

We consider that these conditions are all necessary and the lack of one of them will endanger any environmental liability regime. Given the duties of CA, the **emphasis of CA must be on the prevention of environmental damage. Thus a close cooperation with permitting and monitoring (environmental inspections) authorities seems viable.**

2. Application of strict liability to Annex III operators

The *Coussouls de Crau incident*⁴ showed the **narrow scope of Annex III of the ELD**. There are many risky or potentially risky activities, which might pose threat to the environment, but fall outside the scope of the strict liability regime of the ELD because they are not listed in Annex III. In these cases administrative authorities are potentially facing difficulties to collect solid evidence to support a case of environmental pollution against an operator.

We are on the opinion that the personal scope of the current ELD regime is too narrow in order to deal with all environmental damages. In the light of the ‘precautionary principle’ even more activities might be integrated into the ELD – otherwise the Directive will continuously remain behind current developments. A good example on those activities which might be included into Annex III of the Directive is pipeline transport of dangerous substances, mining activities and invasive alien species because of its potential or factual dangers on the environment. In the practice of the Member States there are different alternatives introduced and applied regarding the strict liability regime,⁵ which result an uneven application of the ELD regime and uneven consequences of the activities causing harm to the environment.

Alternatively, we propose for the Commission to consider as an option for priority the extension of strict liability to non-Annex III activities, either only for biodiversity damage or for all environmental damage. Deletion of Annex III would simplify and streamline the Directive by removing the need to determine from case by case whether an activity is subject to the detailed legislation in Annex III or not.

⁴ In August 2009, over 4,000 cubic metres of crude oil spilled from an underground pipeline onto two hectares of the Coussouls de Crau nature reserve, which is adjacent to the Camargue national park in Southern France. Due to the operation of the pipeline not being an activity under Annex III of the ELD, however, the operator is liable under the ELD only if it was negligent.

⁵ Some Member States exercised their right under Article 193 of the TFEU and Article 16(1) of the ELD to transpose the ELD more stringently. These Member States did so in three ways; they included additional activities in Annex III, they imposed strict liability for biodiversity damage from non-Annex III activities, or they extended the definition of an operator to all (economic) operators in combination with non-transposition of Annex III. Source: BIO Intelligence Service (2014), ELD Effectiveness: Scope and Exceptions, Final Report prepared for European Commission – DG Environment, p 42.

3. Public databases of ELD cases

The public accessible databases have different kind of benefits to efficient implementation of ELD:

- 1) they create public awareness about the cases, thereby enhancing **awareness about possibilities to notify** competent authorities about the liability cases and provide input on the case;
- 2) they foster transparency of the liability regime, creating **trust in the system**. Without such trust, it is not likely that the system will be used actively by the public concerned (which is one of the purposes of ELD as stated in paragraph 25-26 of the preamble of the Directive);
- 3) they create **greater sense of responsibility of competent authorities** to deal with the cases in swift and effective manner;
- 4) such databases allow more easy **comparison of implementation of ELD in different Member States** and are therefore a useful tool for harmonizing practice in EU
- 5) insurers (and all practitioners) are getting a better database, which **make them able to learn and calculate better damage remediation costs**, premiums etc.

We therefore strongly support the recommendations from earlier analyses⁶ to create effective tools to notify and register environmental damage cases, through establishment of public accessible national registers of ELD incidents (e.g Poland).

From a technical perspective, in order to be effectively accessible, such public databases should be built according following principles:

- They should be available online. Furthermore information should be granted also upon request;
- The database should be central for every country, not separate register for every region;
- Notifications about new incidents should be immediately published online;
- The database should include information about the name of polluter⁷, nature and extent of the caused damage, prevention/remediation action measures taken, proceedings carried out by authorities (and which authorities).

⁶ Eg.: European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 18, 144.

⁷ Naming the polluter could be a kind of awareness raising tool; would inform members of the public on the polluters and by doing this would stimulate polluters towards a more environmentally conscious behavior.

4. Damage definitions and severity thresholds

ELD damage definitions and severity thresholds are partly unclear and partly inconsistent. Biodiversity and water damages are defined by reference to the Habitats Directive⁸ and Birds Directive⁹ and the Water Framework Directive¹⁰ (WFD). These concepts are not meant for damage assessments. Thus they are not adequate for measuring environmental damages (e.g. damages to waters/water bodies and the concept of water status according to the WFD). As regards land damages, the central element of land damages is not - as in the case of water damages - the deterioration of a natural resource but the health risk. These criteria do not comply with the environmental damage concept, as they foresee an additional element to be fulfilled, namely, the risk of human health being adversely affected. This is an element predominantly deriving from civil liability which should not be a criterion for environmental damage to be evaluated as such.

In order to establish an effective liability system we are on the opinion, that **it is very important to have a clear notion of damage in place** which does not prevent by its narrow scope any application of the ELD in practice, but foster the application of the ELD throughout the national practice (in all kind of damages to biodiversity, water or soil).¹¹

II. Detailed explanation of our arguments

A) The environmental liability regime institutional setting

One of the key objectives of the 7th Environment Action Program¹² (EAP) is to maximize the benefits of the Union environment legislation by improving its implementation¹³. To achieve those objectives the EAP put responsibility to take appropriate action not only on relevant Union institutions but also on Member States¹⁴. We can say that implementation of EU *acquis* is already a classic of EU EAPs¹⁵. However, there are still many difficulties arising when trying to achieve full and correct implementation of that *acquis*. One of the problems lies in the lack of attention to the institutional setting Member States provide or establish to comply with EU environmental Directives.

⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

¹⁰ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

¹¹ <http://www.justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>

¹² Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Program to 2020 'Living well, within the limits of our planet' (OJ L 354, 28.12.2013).

¹³ Art. 2.d), 7th EAP.

¹⁴ Art. 3, 7th EAP.

¹⁵ See 6th and 5th EAP.

The intention of this short analysis is to examine the institutional settings established to implement one of the EU environmental Directives which has been proved to be hardly implemented by Member States: the Environmental Liability Directive (ELD). According to the ELD *“it is necessary to ensure that effective means of implementation and enforcement are available”*¹⁶ and competent authorities (CA) are the pillar of those means. It is important to have in mind that under the EU environmental liability regime there is a shared responsibility between the polluter and CA which may take action and not third parties. Nevertheless CA may empower or require third parties to carry out the necessary preventive or remedial measures,¹⁷ but the main responsibility with ELD cases lies with the CA. The Directive requires Member States to designate competent authority(ies) responsible for fulfilling the duties provided in the Directive¹⁸.

The **duties of the CA** under the environmental liability regime are:

1. In cases of imminent threats the competent authority may¹⁹:

- require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such a threat;
- require the operator to take, and give the operator instructions on, the necessary preventive measures; and
- take the necessary measures itself. As a last resort the ELD only enables but does not oblige the CA to take action – *“may take these measures itself”*.²⁰

2. In case an environmental damage happened the competent authority²¹:

- may require the operator to provide supplementary information on any damage;
- must decide which remedial measures, from among the options presented by the operator, are to be taken;
- can decide the priority for remedial measures where several instances of environmental damage have occurred which cannot all be addressed simultaneously;
- may take, require the operator to take, or give instructions to the operator in regard to immediate control, containment, removal, or management of the relevant potential causes of damage;
- must require the operator to take the necessary remedial measures; and may take the remedial measures itself, as a means of last resort. In these cases the ELD only enables but does not oblige the CA to take action – *“may take these measures itself”*.²²

¹⁶ Recital 24, ELD.

¹⁷ See Art. 11 (3) of the ELD.

¹⁸ Art. 11 (1), ELD.

¹⁹ This is the “preventive action” provided by Art. 5 of the ELD.

²⁰ Art 5 (4), ELD.

²¹ This is the “remedial action” provided by Arts. 6 and 7 of the ELD.

²² Art 6 (3), ELD.

3. Both for imminent threats and for environmental damage, the CA must recover its costs from the operator, although it may decide not to do so if the costs of such action would exceed the amount to be recovered or the operator cannot be identified²³.

In addition, it is a duty of the CA to take a decision to accept or refuse the request for action submitted to them by natural or legal persons including NGOs²⁴.

As it has been already said, **CA plays a double supervisory role**²⁵:

1. First, in principle the ELD authorities, unlike the authorities under other environmental legislation, do not administer permitting, reporting, and other regulatory regimes affecting the day-to-day operation of industrial and other operations.²⁶ While other regulatory authorities deal with normal operations of regulated activities (and typically produce a regular stream of work for the authorities), the ELD authority is required to respond to imminent threats to environmental damage and instances of actual environmental damage, which are, by definition, exceptional situations.
2. Secondly, the ELD authorities do not have primary responsibility for the design and execution of preventive and restorative action. If operators fulfill their obligations under the ELD, the authority's role will be limited to review and supervision.

An additional problem arises if the CA enforcing the ELD at the same time is permitting authority for the respective industrial installations. A potential conflict of interest may arise, if the same authority does the permitting, the monitoring (environmental inspections²⁷) and the execution of environmental liability in case the installation causes damages to the environment by its operation.

Two studies commissioned by the European Commission have already examined how Member States have complied with their obligation to designate CA²⁸ and how they implement and enforce the ELD regime. Therefore, it is not our intention to re-examine the very same question but from the conclusions of those studies to provide recommendations on how to strengthen CA given its paramount role in the environmental liability regime.

²³ These are the duties on prevention and remediation costs provided by Art. 8 of the ELD.

²⁴ Art. 12, ELD.

²⁵ Bergkamp, L and Van Wesembeeck, C. *Procedures under Member States Law Implementing the ELD*, The EU Environmental Liability Directive: A Commentary, ed. Lucas Bergkamp, Barbara Goldsmith, Oxford University Press, 2013, ps. 160-180.

²⁶ In some Member States the CA enforcing the ELD is also the permitting authority (like in Great Britain, in Austria, in Estonia or in Hungary).

²⁷ In Austria the environmental inspections are carried out by the IPPC permitting authority (district authority). In Estonia inspections are carried out by the Environmental Inspectorate, whereas the Environmental Board issues permits and applies ELD. In Hungary the same authorities (departments of environmental protection and nature conservation of County Government Offices) are responsible for the authorization of activities falling under the EIA, IPPC legislation as well as for the control of these activities and to carry out environmental inspections.

²⁸ These are available at:

http://ec.europa.eu/environment/archives/liability/eld/eldimplement/pdf/ELD%20implementation_Final%20report.pdf <http://bookshop.europa.eu/en/study-on-analysis-of-integrating-the-eld-into-11-national-legal-frameworks-pbKH0114020/>

The ELD has been transposed **in Romania** by the Emergency Governmental Ordinance Number 68/2007.

The competent authorities for the ELD procedure are The National Environmental Guard and the Environmental Protection Agency (EPA). The first is responsible for noting the damage on the environment, as well as an imminent threat of such damage and to identify the operator responsible for the damage or imminent threat. The latter is responsible for establishing and taking preventive and remedial measures and also for assessing the significant nature of the environmental damage.

The ultimate decision on whether a case falls under ELD procedure belongs to the EPA.

The criteria on assessing the significant nature of the environmental damage is included in Annex 1 of the Emergency Governmental Ordinance Number 68/2007, which is identical to Annex I of the ELD. At the same time in the Romanian legislation there are no measures which would ensure the proper implementation of Annex I of the ELD. For example there is no regulation or guidelines to the respective authorities on the sphere and number of people who might be affected in the case a damage occurs, what the harm on the human health means and how damage should be quantified to trigger the ELD procedure etc.

The EPA has a wide discretion in defining significant environmental damage, which result in the practice a non-transparent national ELD system with very few cases. This system also results, that some of the very damaging cases are not properly assessed from the point of view of the ELD procedure.

A good example of that is the accident that occurred in December 2013 at Turceni Coal Power Plant. A large quantity of slag and ash entered into the river (also Natura 2000 site), and on the people's yards and to the lands (about 15 ha). (According to the operator in March 2015 49 families received some financial compensation and 19 families were still negotiating) No remedial actions were taken in spite of the fact that the local EPA issued a decision in this regard. Until today few things were done for environmental restoration, no assessment of the damage caused in the Natura 2000 area was done.

The operator, a state owned company, SC CEO SA, applied in December 2014 for the environmental permit. Gorj EPAs conclusion was that there is no need for EIA nor adequate evaluation. The official statement of Gorj EPA was that the slag and ash is a natural fertilizer for peoples agricultural lands and yards and that they should rather be grateful.²⁹

²⁹ Here <https://www.youtube.com/watch?v=6fA8kf5roa8> is a short movie about the impact of the accident on local area and population, in English.

According to the above mentioned studies some Member States designated one competent authority to implement and enforce the ELD; other Member States designated several; some Member States designated several hundred. The number of authorities depend on various factors including whether a Member State has a federal system, the existence of authorities for different aspects of environmental and natural resources law, and the existence of regional, provincial and local authorities.

Although one of the studies shows that it is more difficult to implement the environmental liability regime when several or many CA have been designated, we consider this is not crucial for implementation and enforcement as we will explain below. Indeed we would like to raise the issue of conflicting competences as already mentioned above. This field has not been tackled in depth by the above mentioned ELD implementation studies nevertheless we consider it an important aspect for the successful implementation of the ELD by establishing a powerful institutional setting (see below) on MS level:

Problem of conflicting competences based on two Austrian environmental damage cases

In the case of groundwater pollution caused by the pesticide producer KWIZDA Agro the district authority was also competent for carrying out regular inspections on the operation of the producer's facilities. Due to the lack of safety regulations and controls by the district authority huge amounts of pesticides polluted the groundwater during years. The district authority is also competent for the application of the ELD (and for the application of the national water liability regime). As its omissions contributed to the great extent of the damage, the authority neglected the emissions and the pollution produced thereby for too long – currently the authorities' omissions in this case are reviewed in criminal investigative proceedings.

Also in the case of *Hexachlorobenzene* pollution of soil and foods by a Carinthian cement factory caused in 2014 the scandal was fostered by unclear competences for permitting and monitoring of industrial installations and the possible conflicts of interests of the competent ELD authority.³⁰ The district authority is both competent for the permission of industrial installations ("*Gewerbebehörde*": outside of the EIA regime), the control of these installations and the handling of environmental liability cases. The same authority (district authority) which – in this case even by violating its competences – authorized the capacity increase of the cement factory which was then followed by the mentioned soil pollution is competent to enforce the ELD.

In order to ensure the prevention and effective remediation of environmental damages it seems pressing to ensure that not the same authority is competent for both permitting, the monitoring and remediating the damages in order to ensure certain organizational and instructional independency.

³⁰ Official Report on the pollution case (Media Report), 18.05.2015: <http://kaernten.orf.at/news/stories/2711262/>

Taking into consideration the mentioned studies, we consider that for an effective environmental liability regime it is paramount to count with a **powerful institutional setting** whose **key conditions** are:

- a) The **staff of the CA**, no matter how many CA have been designated, **must be well trained** in the field of prevention and remediation of environmental damage. The staff must be comprised of different profiles to provide a wide range of competence.
- b) The **CA must have available resources** including technology, funding and human resources.
- c) **Coordination of CA responsible for environmental liability issues with relevant other authorities having also competence** is necessary for the proper functioning of the environmental liability regime. For example, the ELD authority should have an effective line of communication with the permitting authorities to determine whether a particular preventive measure is appropriate and whether an activity is covered by Annex III, to assess a permit compliance defense, etc. In respect of damage to protected habitats and species, the authority will want to contact the authorities responsible for nature protection to obtain information relevant to determining whether there is damage, and, if so, whether the damage is significant, determining baseline, etc³¹. This coordination must work on a day-to-day basis and CA must have easy access to exchange and contact relevant authorities when necessary. It is not enough to establish coordination bodies as has happened in Spain that created the *Comisión Técnica de Prevención y Reparación de Daños Medioambientales* (Technical Committee on the Prevention and Remediation of Environmental Damages).
- d) **Cooperation with civil society** given that they can inform CA of cases of imminent threat or of environmental damage that the CA are not aware of.

Further a **clear framework on rights and obligations of the CA within the ELD and its transposing legislation** may lead to more effectiveness in the prevention and remediation of environmental damage. Thus we criticize the lack of CA obligation to take preventive or remediate action as a means of last resort in environmental damage cases in the legal text of the ELD.³² To integrate a subsidiary obligation of the CA into the ELD would strengthen the effectiveness of the environmental liability system. Further it might indirectly foster the implementation of the 'polluter pays principle' as CA have more reason to have the real polluters taking their obligations under the environmental liability regime.

We consider that these conditions are all necessary and the lack of one of them will endanger any environmental liability regime. Given the duties of CA, the **emphasis of CA must be on the prevention of environmental damage. Thus a close cooperation with permitting and monitoring (environmental inspections) authorities seems viable.**

³¹ Bergkamp, L and Van Wesembeeck, C, Ibid.

³² Art. 5 (4) and Art. 6 (3) of the ELD.

B) Application of strict liability to Annex III operators

The ELD aims to hold operators financially liable for environmental damage caused by their activities.

The ELD provides for two distinct, but complementary liability regimes. The first one applies to operators who professionally conduct risky or potentially risky activities. These activities include, among others, industrial and agricultural activities requiring permits under the EU Industrial Emissions Directive³³, waste management operations, the release of pollutants into water or into the air, the production, storage, use and release of dangerous chemicals and the transport, use and release of genetically modified organisms (GMOs).

These activities are listed in Annex III of the Directive. Under this regime, an operator can be held liable even if he has not committed any fault (strict liability), though there are a few cases in which he can be exempted from liability.³⁴

Strict liability means that it is sufficient that there is a causal link between the given occupational activity and the environmental damage, without the need to demonstrate that there has been fault or negligence attributable to the operator of the occupational activity. It applies to all forms of environmental damage, i.e. damage to water resources and land, as well as damage to protected species and natural habitats covered by the Birds and Habitats Directives.

The second, liability regime applies to all professional activities, including those outside Annex III. Under this regime the operator will only be held liable if it, through a deliberate action or omission, or negligence, has caused the environmental damage to species and natural habitats protected at EU level under the Habitats³⁵ and Birds Directives³⁶. It covers damage to protected species and natural habitats from all non-Annex III occupational activities but not to water and land damage.

³³ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

³⁴ For example environmental damage caused by force majeure will not give rise to liability. According to Article 8 (4) of the ELD Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place.

³⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

³⁶ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

Both of the liability regimes apply to damage³⁷ and also to the imminent threat of damage occurring by reason of the relevant activities. Imminent threat of damage means “*a sufficient likelihood that environmental damage will occur in the future*”³⁸.

Practical examples show, that provisions of the ELD are transposed into the national legislations in many different ways, mainly depending on the environmental liability regime and traditions of the individual countries. The ELD allows Member States to maintain their own systems if they meet the minimal requirements of the ELD. The already existing system of some Member States fulfilled most of the ELD’s requirements or even go beyond them even before the entry into force of the ELD. Others have had substantially to amend their legislation in order to bring it in line with the respective European provisions.

Analysis of environmental damage cases in the Member States³⁹ shows, that there are difficulties resulting from the scope of the ELD, in particular Annex III, which is considered too broad, too narrow, or inappropriate, depending on the given operator and activity. There is a potential for large polluting events to fall outside the ELD arises if, say, a non-Annex III operator whose activities caused the damage was not negligent or if it is not possible to establish a causal link between cumulative damage and specific operations.⁴⁰

Therefore, some Member States have chosen to extend the scope of Annex III in their national legislative framework. **Some Member States⁴¹ have extended strict liability beyond the activities specified in Annex III**, either by including additional activities to those listed in Annex III, or imposing strict liability for biodiversity damage on non-Annex III activities as well.

For example in **Hungary** the standard of liability for environmental damage caused by non-Annex III activities is the strict liability. Hungary did not transpose Annex III, as that would have limited the scope of the applicability of the liability system already existing in the country. In **Spain**, strict liability applies to preventive measures and emergency remedial actions for non-Annex III as well as Annex III activities; negligence-based liability applies to remedial measures for non-Annex III activities.⁴²

³⁷ Article 2 point 2.

³⁸ Article 2 point 9.

³⁹ European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 15, 46.

⁴⁰ European Commission (DG ENV): Study on the implementation effectiveness of the Environmental Liability Directive (ELD) and related financial security issues. Final Report, November 2009. Page 92.

⁴¹ Such as Belgium, Denmark, Finland, France, Greece, Hungary, Lithuania, Spain and Sweden.

⁴² European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013. Page 46-47.

However there are also Member States which have largely limited the transposing legislation to the confines of the ELD itself, because of the Government policy against ‘gold-plating’ Directives unless exceptional circumstances arise. Such restrictions exist for example in the **Netherlands**, in the **UK** or in **Estonia**.

The *Coussouls de Crau incident*⁴³ showed the **narrow scope of Annex III of the ELD**. There are many risky or potentially risky activities, which might pose threat to the environment, but fall outside the scope of the strict liability regime of the ELD because they are not listed in Annex III. **In these cases administrative authorities are potentially facing difficulties to collect solid evidence to support a case of environmental pollution against an operator.**

From the other point of view, the scope of Annex III can be also regarded as too broad, as the obligations arising from the ELD or from the transposing national legislation (like assessment of environmental risks of the activity, obligation to own financial insurance) apply to all companies whose activities are included in Annex III to the ELD, whereas the potential of causing environmental damage is not borne similarly between these companies (which could generate unnecessary costs for some operators).

According to our experiences, the scope of the current ELD regime is far too narrow to deal with all environmental damages. ELD needs to be formulated towards a more stringent system, which could be implemented and applied in a more consistent and uniform manner than the current legislation, which highly depends on the individual traditions and practice of the Member States.

In the light of the ‘precautionary principle’ even more activities might be integrated into the ELD – otherwise the Directive will continuously be behind current developments. A good example on those activities which might be included into Annex III of the Directive is pipeline transport of dangerous substances, mining activities and invasive alien species because of its potential or factual dangers on the environment. In the practice of the Member States there are different alternatives introduced and applied regarding the strict liability regime,⁴⁴ which result in an uneven application of the ELD regime and uneven consequences of the activities causing harm to the environment.

⁴³ In August 2009, over 4,000 cubic metres of crude oil spilled from an underground pipeline onto two hectares of the Coussouls de Crau nature reserve, which is adjacent to the Camargue national park in Southern France. Due to the operation of the pipeline not being an activity under Annex III of the ELD, however, the operator is liable under the ELD only if it was negligent.

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Alternatively, we propose for the Commission to consider as an option for priority the extension of strict liability to non-Annex III activities, either only for biodiversity damage or for all environmental damage.⁴⁵ Deletion of Annex III would simplify and streamline the Directive by removing the need to determine from case by case whether an activity is subject to the detailed legislation in Annex III or not.⁴⁶

C) Public databases of ELD cases

Currently, the ELD provides an obligation for notifying the competent authority of imminent threat of, or actual environmental damage. **There is no obligation to publish such notifications or information about how the cases were proceeded with.**

Some Member States have seen this as a gap in the legislation, and have filled the gap themselves by **setting up registers or databases** about the notifications/incidents/cases. However, as shown in previous studies about ELD implementation, the practice varies broadly from Member State to Member State, and is rather limited.

For example, in **Ireland** the national legislation provides for establishment of register of ELD incidents, though the register is not published and the information is available on request only.⁴⁷ In **Estonia**, the list of ELD incidents is published on the website of environmental authority, thus fulfilling the requirement of the law to publish “*information about environmental damage and threat*” on the websites of relevant environmental authorities.⁴⁸ The authority dealing with environmental liability cases is the Environmental Board and the register is kept as a simple Excel file on the Board’s website, so anyone has access to it.⁴⁹

⁴⁵ <http://documents.clientearth.org/wp-content/uploads/library/2015-06-22-en-ce-sluk-reviewing-the-environmental-liability-directive-clientearth-recommendations.pdf>

⁴⁶ Sources of information:

Justice and Environment: The environmental liability Directive - An effective tool for its purpose?, Environmental Liability 2012. Comparative study on existing environmental liability regimes and their practical application. (Comparative study of J&E)

CEA Insurers of Europe: Navigating the Environmental Liability Directive - A practical guide for insurance underwriters and claims handlers, April 2009.

European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013.

European Commission (DG ENV): Study on the implementation effectiveness of the Environmental Liability Directive (ELD) and related financial security issues. Final Report, November 2009.

BIO Intelligence Service (2014), ELD Effectiveness: Scope and Exceptions, Final Report prepared for European Commission - DG Environment. <http://ec.europa.eu/environment/legal/liability/>

⁴⁷ European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 71

⁴⁸ Estonian Environmental Liability Act, Art 32(1)

⁴⁹ http://www.keskkonnaamet.ee/public/Juhtumid_seisuga_10.12.2013.xls

The most comprehensive database has been created in **Poland**, consisting of data about incidents – including notification ID, date of entry and notifications, description of the preventive and remedial action taken up, date of initiating the proceedings by the environmental protection authority, copies of decisions issued in the case, information about appeals against these decisions, and also the description of the ecological effect that was achieved.⁵⁰ The detailed regulation about the register has been established in national legislation. However, the Polish register is not available on the Internet and the members of the public must know about the existence of the register in order to request details of it.⁵¹

In the **United Kingdom** there is a dedicated website⁵² where spreadsheets are available on a yearly basis on environmental liability incidents recorded by UK regulators.

Other Member States such as **Cyprus, the Czech Republic, Germany, Malta, Lithuania, and Luxembourg** do not mention registers or databases.⁵³

In **Croatia** there is no national database of the ELD cases, and the data available on the website of the Ministry of Environmental and Nature Protection is limited. For the approved cases, only the fact of the approval is visible but for the ones waiting approval, the remedial measures are also indicated.

In Hungary, individual decisions of the environmental authorities are published on their website. At the same time the information is spread all over on the websites of the competent environmental authorities across the country and can be found in a bulk form: not only decisions related to the environmental liability are uploaded here, but also all kind of permitting decisions (like EIA or IPPC), decisions related to the management of waste, protection of the air, soil etc. Additionally, it does not turn out from the individual, liability-related decisions, if these are related to the ELD or not.

⁵⁰ European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 74-75,139

⁵¹ European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 89

⁵² <http://data.gov.uk/dataset/environmental-liability-incidents-recorded-by-uk-regulators>

⁵³ Study on Analysis of integrating the ELD into 11 national legal frameworks,16 December 2013, page 94

It is deduced in the DG Environment recent analyses that the **extensive publication of information about ELD regime implementation in Poland may well be a factor for better ELD enforcement** in this Member State (this conclusion has also been drawn to other MS-s that have a higher number of reported ELD cases).⁵⁴ However, there might be other reasons for that in Poland, as also shown in the study – the transposition of ELD filled a gap in Polish legal framework in the issue of environmental liability (which was not the case in countries where ELD regime was added to national environmental liability provisions and not implemented as useful tool), the definition of land damage is broader than in ELD, etc.⁵⁵ Nevertheless, it is correct to conclude that **publication of such data can enable stakeholders and the public to become much more aware of the existence of the ELD regime and its implementation and enforcement.**⁵⁶ Further stakeholders and the public might provide valuable inputs to the damage assessment and remediation procedure of each and every environmental incident. This reduces administrative burden and contributes to the quality of the prevention and remediation of environmental damages.

The public accessible databases have different kind of benefits to efficient implementation of ELD:

- 1) They create public awareness about the cases, thereby enhancing **awareness about possibilities to notify** competent authorities about the liability cases and provide input on the case;
- 2) They foster transparency of the liability regime, creating **trust in the system**. Without such trust, it is not likely that the system will be used actively by the public concerned (which is one of the purposes of ELD as stated in paragraph 25-26 of the preamble of the Directive);
- 3) they create **greater sense of responsibility of competent authorities** to deal with the cases in swift and effective manner;
- 4) such databases allow more easy **comparison of implementation of ELD in different Member States** and are therefore a useful tool for harmonizing practice in EU;
- 5) insurers (and all practitioners) are getting a better database, which **make them able to learn and calculate better damage remediation costs**, premiums etc.

J&E therefore strongly supports the recommendations from earlier analyses⁵⁷ to create effective tools to notify and register environmental damage cases, through establishment of public accessible national registers of ELD incidents (e.g Poland).⁵⁸

⁵⁴ European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 87; Study on Analysis of integrating the ELD into 11 national legal frameworks, 16 December 2013, page 6

⁵⁵ The reasons of large number of ELD cases in Poland is listed in the analysis European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 88-89

⁵⁶ Study on Analysis of integrating the ELD into 11 national legal frameworks, 16 December 2013, page 48

⁵⁷ eg European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013, page 18, 144

⁵⁸ Sources of information:

European Commission, DG Environment: Implementation challenges and obstacles of the Environmental Liability Directive, 16 May 2013.

From a technical perspective, in order to be effectively accessible, such public databases should be built according following principles:

- they should be available online. Furthermore information should be granted also upon request;
- the database should be central for every country, not separate register for every region;
- notifications about new incidents should be immediately published online;
- the database should include information about the name of polluter, nature and extent of the caused damage, prevention/remediation action measures taken, proceedings carried out by authorities (and which authorities).

D) Damage definitions and severity thresholds

The notion of damage (the damage concept according to the ELD and its severity thresholds) **is one of the key aspects for an effective environmental liability system across Europe.**

The ELD applies three different types of damage definitions. '*Environmental damage*'⁵⁹ means any damage to protected species and natural habitats that significantly affects the reaching or maintaining of a favorable conservation status (with reference to the Birds Directive and to the Habitats Directive). '*Water damage*' means any damage that significantly affects the ecological, chemical, quantitative status or ecological potential (with reference to the Water Framework Directive) of the waters concerned or the environmental status of the marine waters concerned (with reference to the Marine Strategy Framework Directive⁶⁰). Finally '*land damage*' means any contamination that creates significant risk to human health being adversely affected through introduction of substances, preparations, (micro-) organisms in, on or under land. According to Article 2 (2) of the ELD, '*damage*' means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

As regards for example '**land damage**', the legislation in Hungary is broader than the ELD as it applies also to land on which there is no risk to human health. The Hungarian legislation applies the term '*damage in geological media*', which covers any contamination, that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, or under land of substances, preparations, organisms or micro-organisms, *or exceeds the pollution limit values defined by the national legislation or an individual decision of the environmental authority.*⁶¹

Study on analysis of integrating the ELD into 11 national legal frameworks, 16 December 2013

<http://ec.europa.eu/environment/legal/liability/pdf/Final%20report%20-%20ELD.pdf>

Study on ELD Effectiveness: Scope and Exceptions, 19 February 2014

http://ec.europa.eu/environment/legal/liability/pdf/BIO%20ELD%20Effectiveness_report.pdf

Estonian Environmental Liability Act: <https://www.riigiteataja.ee/akt/108072014019> (in Estonian)

⁵⁹ Article 2 (1) of the ELD.

⁶⁰ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

⁶¹ Government Decree 219 of 2004 (VII. 21.) on the protection of groundwater, Article 3, Point 46.

Consequently the threshold for land damage is not limited to a significant risk of an adverse effect on human health; when the thresholds for contamination to geological media are exceeded, land damage under the national legislation has occurred even if the human health is not affected at all. At the same time in **Estonia, Romania, Spain and main parts of Austria the land damage** needs to have a “*significant risk of human health being adversely affected*” to be evaluated as such under the national ELD regime.

Similar to the question of definitions, the **thresholds set by the ELD is also seen as an obstacle to its application to environmental damage**. Especially the thresholds regarding land and water damage are considered too high.⁶² For example the **Croatian** thresholds are lower than ELD because they do not require ‘a significant risk’ to human health, only a general risk to human health is sufficient.⁶³ Even lower thresholds are created in **Hungary** and in the **Austrian region Carinthia** with respect to land damages.⁶⁴

⁶² BIO Intelligence Service (2014), ELD Effectiveness: Scope and Exceptions, Final Report prepared for European Commission – DG Environment. p 121.

⁶³ Land damage is determined by the EPA Article 4 paragraph 1 subparagraph 67: “*Environmental damage is any damage to:*

- *soil, whose contamination or damage results in a risk to its ecological functions and to human health, in accordance with special regulations. (point 4) - Earth's rocky crust whose contamination or damage resulted with risk to their ecological functions and to human health, in accordance with special regulations (point 5).”*

⁶⁴ Please see also: BETWEEN THE LIMITS OF ENVIRONMENTAL DAMAGE. Comparative study on national damage definitions and severity thresholds for biodiversity, water and land damages in selected EU Member States. Association Justice and Environment, 2013.

<http://www.justiceandenvironment.org/files/file/2013/ELD%20study%20on%20damage%202013.pdf>

The Austrian Nature Protection legislation provides for so called “obligations to restoration” (*“Wiederherstellungsverpflichtungen”*). In the case of illegal activities (= beyond permission or not allowed), the authority is competent to require natural restitution (according to ELD – primary remediation) and the Nature Protection Act provides for administrative penalties. The procedural rules are different in each Land.⁶⁵ These provisions do not require an environmental damage to occur but tie in with an illegal activity. Due to various components missing, the restitution system established by the Austrian Nature Protection legislation cannot be defined as a national liability regime on biodiversity damages⁶⁶:

- ➔ National provisions are triggered only by illegal activities and not by damages: e.g. AC/DC Concert at “Welser Haide” in 2010: *“Birds had fled in panic and would have to leave their children in the lurch, the habitat of rare plants and animals had been trampled and transformed into a sea of mud”*. Permission for the rock concert was granted – no illegal activity had taken place back then. Nevertheless the “Welser Haide” (the concert venue) is breeding and living space for the protected birds under the Birds Directive.⁶⁷
- ➔ The Nature Protection Act does not provide for complementary and compensatory remediation. E.g. in case of an illegal act the Upper Austrian Nature Protection Act pursues the following system:
 1. The trespasser must subsequently apply for authorization, or
 2. Has to carry out in rem restitution, or
 3. if “restitutio in rem” is indeed not possible ***“to modify the state created in a way that nature and landscape are affected as little as possible”*** (cp. Section 58 Upper Austrian Nature Protection Act⁶⁸)

Similarly the Salzburg Nature Protection Act provides for “restitutio in rem” and if this is not possible to ***“modify the created state in such a way that the interests of nature conservation are taken into account to the greatest possible extent”*** (cp. Section 46 Salzburg Nature Protection Act).⁶⁹

Additionally, the respective case law on these provisions confers only to the removal of buildings, fences, pavements and other installations lacking adequate permission.⁷⁰ Whereas the environmental liability system is primarily meant to prevent and remediate damages to protected species and habitats – the Austrian “obligation to restore” under the Nature Protection Act does not take account of threats of damages or actual damages and is therefore of no use for the achievement of the ELDs proper goals.

⁶⁵ Bußjäger, Österr. Naturschutzrecht (2001), 203.

⁶⁶ J&E Study on the Notion of Damage. 2013:

http://www.justiceandenvironment.org/files/file/2013/ELD%20study%20on%20damage%202013_1.pdf

⁶⁷ <http://www.umweltdachverband.at/presse/presse-detail/article/umweltdachverband-zum-acdc-konzert-auf-welser-heide-affront-am-internationalen-tag-der-artenvielfa/>

⁶⁸ OÖ LGBl. No.129/2001 last amendment by LGBl. No. 92/2014.

⁶⁹ Sbg. LGBl. No.73/1999 last amendment by LGBl. No.100/2007.

⁷⁰ cp. Highest Administrative Court – Sentences No. 97/10/0150, 93/10/0239, 95/10/0067, 94/10/0144 et al.

The above mentioned conditions and thresholds determine if a specific case falls under the ELD regime or not. **In the practice it is however difficult to demonstrate, that the ELD thresholds are met**, mainly with regards to the three types of damage definitions mentioned above. In the case of **water damage** for example the threshold may be applied to all waters or only to an entire water body, depending on the practice of MS. The determination of the significance threshold may also **depend on the availability of data** (for example on the favorable conservation status of protected species). The poor or even excellent status of the affected waters, soil etc. may also influence the legal evaluation of the damage case and the relevant consequences.

In the case of an incident, which causes negative impacts on the natural habitats for example, CA shall decide if there is a damage and environmental damage as defined by the ELD, if this damage is significant or not, if the damage is the result of an activity covered by Annex III of the ELD (or an occupational activity and there is a fault on the part of the operator), if the causal link between the activity and the environmental damage exists etc. Consequently the situation needs first of all investigation of the given circumstances and then the evaluation of these, which takes time and consumes (human and financial) resources even without knowing which liability system (national or ELD or both) is to be applied. **Therefore the ELD is considered difficult to apply and full of challenges and uncertainties.**

In order to establish an effective liability system we are on the opinion, that it is very important to have a clear notion of damage in place which does not prevent by its narrow scope any application of the ELD in practice, but foster the application of the ELD throughout the national practice (in all kind of damages to biodiversity, water or soil).⁷¹

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⁷¹ <http://www.justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>