

THE INFORMATION GAP ABOUT THE ENVIRONMENTAL LIABILITY DIRECTIVE

In April, 2016 the report from the Commission on the evaluation of the implementation and effects of the Environmental Liability Directive has come out together with a so called REFIT evaluation¹. In May the Commission organised a stakeholder meeting for almost 100 experts from the administrative, business and NGO fields and issued a detailed report on this event in June.

The Commission evaluations resulted in an Action Plan, in order to address the uneven interpretation and application of ELD, and also in order to further raise awareness and administrative support for a more effective implementation. A central element of the Action Plan is to overcome the lack of data and information concerning the practical implementation and results thereof. Based on this Action Plan, this fall the Commission is starting to develop a multi annual rolling work programme for 2016-2020, involving all the stakeholder groups.

Justice & Environment, a European network of public interest environmental lawyers has put together an 8 country wide network (Austria, Croatia, Czech Republic, Estonia, Hungary, Romania, Slovakia and Spain) and prepares for following up and participating in this mapping and planning work. Our major focus is to help filling in the information gap here. We do understand that the very scattered issues, the large territories and time span concerned do not allow for an easy understanding what actually happens with the ELD in the practice of the Member States. However, we think that the present situation when a couple of countries report from unrealistic numbers (Hungary 563, Poland 506 serious incidents for 7 years), while 11 countries report from no ELD cases at all undermines the successful implementation of ELD and counteract with the will of the European legislator.

Lack of information is established by both the analyses of the Commission and the speakers and participants of the Stakeholders Meeting as the major, cross-cutting problem that prevents improving the effectiveness and efficiency of ELD, even if the Commission itself has initiated dozens of large comparative empirical studies in the last 7-9 years. Apart from the basic data of the number², type and cost of the ELD incidents in the Member States, the research materials and the Stakeholders Meeting have revealed a line of basic black holes in our map of knowledge concerning ELD implementation in the EU:

- use of optional defences (permit or state-of-the-art defences mostly)³
- interpretation of the key definitions of the ELD
- (uneven) level of application
- gaps in financial capacity of the operators⁴

¹ Regulatory Fitness and Performance Programme, based on the last Better Regulation Communication (COM(2015)215)

² In the Stakeholders Meeting one participants added (with a consenting area in the room): „According to our experience there are much more environmental damage incidents than reported. Some information must be missing somewhere. Maybe this is due to the transposition into various legislations. I know a number of biodiversity cases where prevention measures had been ordered by the authorities, but zero cases have been reported.”

³ At the Stakeholders Meeting a question was raised about the defences and the answer from the Commission was: „This is one of the gaps in information. Data about the use of optional defences would be very relevant, but the Commission had unfortunately only obtained rather haphazard and limited information in that respect, mainly due to the fact that Member States were not obliged to report on it.”

⁴ In all of these three indents the answer of the Commission was „The currently available information does not allow for more far reaching or robust conclusions in this respect.”

- right of NGOs and third parties to notify environmental damage instances⁵
- use of older national liability schemes instead of ELD⁶

Lack of high quality (reliable, coherent, comparable, timely etc.) data on the implementation of ELD makes premature to reach any conclusions about its effectiveness – it is said in many materials and presentations of all of the stakeholders and EU or national level authorities. There are very different solutions to address the information gap suggested by the Commission, the Stakeholders and NGO experts, including the environmental lawyers of J & E and we are convinced that only a good mix of them might result in better informed discussions and decisions on the harmonised and effective European environmental liability scheme⁷. Solutions might include:

- developing an ELD indicator system in order to enable evidence based environmental liability programs⁸
- developing an ELD clearinghouse in order to exchange the most important data about environmental liability, make available best practices for the authorities and other concerned parties and provide information for the insurance sector for better design of their products in this field
- introducing publicly available ELD registries in all the Member States in order to ensure transparency and better quality in reporting to the Commission and to the general public

We should add that without concerted European wide NGO efforts, similar to that of J&E has started this year⁹ there is no hope to gain a coherent picture of the level of implementation of ELD by the Member States.

⁵ The Commission's answer was: „It is difficult to judge overall on the basis of experience gained in the application of the Directive whether Article 12 works well.”

⁶ The Commission declared: „...we would need to broaden our evidence base also looking at national liability schemes and other mechanisms which are in place to safeguard the environment.”

⁷ Joachim D'Euigenio in his closing remarks at the Stakeholders Meeting noted: „At present it is premature to make a case for revision of the ELD. And if we were to consider other solutions, such as an amendment, we need better evidences.”

⁸ Several Stakeholders noted that the mere annual number of cases per country is a very poor indicator of the achievements in preventing and remedying environmental incidences.

⁹ 8 member organisations of Justice & Environment has started several projects (*inter alia* with the support of EU Life Project and the Visegrad Foundation) where it collects, analyses and compares case studies and also use the existing data in literature and at the Commissions web-page in order to evaluate their respective national situation in implementing ELD.