JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Observations on the Implementation of the Environmental Liability Directive

Environmental Liability

Recommendations

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Introduction

The Environmental Liability Directive[1] (ELD) is one of the legal instruments which so far have not fully developed their intended effect. The major conclusions of the ELD evaluation (i.e. the EC Implementation Report including the REFIT evaluation) were the ELD improved environmental liability in the EU, but implementation varies significantly between Member States and even the data on implementation are not fully available. Therefore the Commission will propose a multi-annual rolling work programme to Member States' experts and stakeholders in order to improve the evidence base and to help align the national solutions. Moreover, the Commission will continue to provide administrative support measures.[2]

Since 2011 the environmental law network **Justice & Environment (J&E)** has been working on the improvement and better implementation of the ELD. Our network was deeply involved in the evaluation of the Directive and has been collecting and spreading national practice and suggestions. In 2016 J&E has performed two projects in the field of ELD: a comparative practical case analysis (in 4 countries) and a toolkit for raising the capacity of NGOs and local communities in ELD matters (6 countries participated)[3]. Although our resources are very limited, researchers in our network have long experience in public interest environmental law and enthusiastically follow the developments of international and national level research of environmental liability issues. We welcome the Commission's approach to develop and implement future work on the ELD together with Member States and stakeholders. Thus we want to seize the opportunity and share our opinion and ideas on a serial of key points of achieving Europe-wide effective and coherent ELD implementation. First, we would like to highlight some substantial (implementing laws, authorities, activities) and procedural (participants, timeliness, implementation of individual decisions) legal issues that seem to be relevant for further upgrading ELD implementation in the mirror of our experiences. Thereafter we shortly address some issues in connection with capacity building of all stakeholders with a special attention paid to the idea of an ELD database[4].

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[1] Directive 2004/35/CE

[2] Cp. Commission Staff Working Document, Regulatory Fitness and Performance Programme REFIT and the 10 Priorities of the Commission, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Commission Work Programme 2017: Delivering a Europe that protects, empowers and defends. Strasbourg, 25.10.2016. {COM(2016) 710 final}, p. 65: http://ec.europa.eu/atwork/pdf/201621025_refit_scoreboard_2016_en.pdf.

[3] See the national studies and their respective summaries on the homepage of J&E: www.justiceandenvironment.org

[4] In our paper prepared to the Stakeholders' meeting on 24th of 01May, 2016 we presented our observations in a different structure, more strictly following the basic logic of the 2016 REFIT Analysis: 1 The goals and leading principles of ELD, 2 material scope, 3 persons liable and the extent of liability, 4 Institutions and procedures, 5 Public participation, 6 financial security, 7 System approach.

I. Substantial legal issues

(*organic fitting of ELD into national laws*) As concerns transposition of the ELD, Member States follow different paths – none of them are good or bad in itself[5]. Some countries a) have a new, single ELD law with several levels of details and repelled the relevant old provisions in other laws; others b) amended their existing laws according to the requirements of ELD; yet another ones c) left the old laws almost totally untouched and inserted a new ELD law with the possibility to use them parallel. Actually, the (personal, territorial, topical) scope of the old laws might be broader, the responsibility of the operators might be better elaborated, while their public participation provisions might be weaker and they might focus less on the prevention and on certain important procedural issues. We see a great potential in solutions that ensure concerted efforts to prevent and remedy environmental emergency situations and are of the opinion that common *legal principles*[6] specific to ELD might help to raise the level of coherence in this field of law.

(*ELD authorities*) Similarly colourful picture we can see at the issue of selection of the competent authorities in ELD matters. In some countries there are single (environmental) authorities handling these cases, while in other countries other authorities, such as catastrophe prevention authorities, water management authorities, fire departments and municipal level authorities have important responsibilities[7], as well. Although more authorities might mean more resources, different professional contributions and a certain level of mutual control that might help to avoid fatal mistakes, full or at least satisfying level of harmonisation of their efforts are not always ensured[8] and this might lead to tremendous loss of the scarcely available resources.

[5] A corner stone study in this issue is of different opinion: „it is more likely that competent authorities will continue to apply pre-existing – and often less stringent – legislation when only stand-alone ELD legislation exists" (i.e. when the given Member State failed to perform the piecemeal work of incorporating ELD provisions into pre-existing legislation). Bio Intelligence Service (2013), „Implementation challenges and obstacles of the Environmental Liability Directive" Final report prepared for European Commission – DG Environment, in collaboration with Stevens and Bolton LLP, p. 4

[6] Spain and Slovenia goes even further: the duty of repairing serious environmental damages by the responsible operators rests on their respective constitutions („The Environmental Liability Directive: An effective tool for its purpose? – comparative study on existing environmental liability regimes and their practical implementation, Justice and Environment, Brno, 2012, p. 6)

[7] In our 2015 Statement we added a very important other group of authorities: authorities that are responsible for permitting and „peace time" monitoring of the relevant operations. With a closer inclusion of these authorities in the ELD cases more stress could be put on prevention and in broader sense to the system approach of controlling environmentally risky activities (p. 4)

[8] Based on a 16 country survey the 2013 Bio Intelligence Service establishes that „it is more likely that the designation of multiple authorities will result in less implementation and enforcement of the EKD, as it is more difficult for personnel in many authorities to become experienced in implementing the ELD regime, compared to personnel in a single authority or a limited number of authorities (p. 5)

(*the role of civil and criminal law*) Other branches of laws and types of authorities contribute to the effectivity of the implementation of ELD, such as civil law and criminal law. Corporate law and certain civil law provisions might play decisive role in catching those operators who try to escape environmental liability with the help of the corporate veil. In certain EU countries, especially in the new member states it can be frequently seen that companies responsible according to ELD simply disappear, leaving no financial resources after themselves. In such cases either the exceptional but well-known legal ways to remove the corporate veil[9] or criminal procedures should come to the forefront. According to J&E lawyers, criminal law should play a greater role in the enforcement of ELD decisions in other aspects, too.

(*basic legal institutions of ELD*) As concerns the key substantial legal questions of ELD, such as *calculation of the damage*[10] and the *cost of preventive and restoration measures*[11] or application of *joint and several liability*, they are not yet bolstered by solid and authoritative legal practice. Typically, also the concept of *strict liability* seem to be an alien body in administrative law, J&E lawyers have established that administrative authorities are rather inclined to undertake the burden of proof in all ELD cases almost totally in the examined countries. As concerns the key rules of determining the *responsible persons* we have experienced two approaches, sometimes used in a mixed way: economic and administrative logics. An operator will be responsible for the emerging environmental danger or harm either because of the strength of his economic control above the activity[12] or because of being the holder of certain administrative permits in connection with the operation.

[9] See a great comparative summary in: David S. Bakst: „Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive – Boston College International and Comparative aw Review, Volume 19, Issue 2, Article 4

[10] In our 2013 Statement („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" Brno, 2013) we pointed out that the definition of water damage cannot be identical between ELD and WFD and their national equivalents, because the purposes and available legal infrastructures are quite different in the two fields of environmental law. While water management and water protection laws seldom reach out to the smallest water flows, the environmental liability laws must encompass all the waters, for a serious pollution in even the smallest creek can cause irreversible damages on a large territory of a given watershed (p.5). Also we point out that definition of land is difficult because it multiple legal bases in environmental law, agricultural law (protection of soil) and land registers (p.7)

[11] Authors in the most frequently used literature acknowledge that administrative law should concentrate on physical restoration of the damages rather than financial compensation (for that is in civil law), yet resource equivalency methods and habitats banking bring this fiscal approaches into this field of environmental administrative law of ELD, too. See a summary in: Ece Ozdemiroglu et al. in REMEDE team, within the 6th Framework Program, 2006, and also in: Craig Bullock et al.: Environmental Liability, Resource Equivalency and the Valuation of Ecosystem Services, University College, Dublin, 2013

[12] The economic factors determining the person of liability can be further divided: those who are the closest ones in the causational chain or those who seem to be the best debtors (Justice and Environment Conference on Environmental Liability Directive, Budapest, 18th of October, 2016)

(*environmentally harmful environmental protection*) Finally, J&E lawyers have found an interesting legal-sociological feature in the ELD cases: responsible operators are quite frequently dealing with environmental protection activities, such as waste management or alternative energy production. Being "environmentally friendly" they might consider themselves as protected against the legal consequences of environmental harm they cause by their activities. Not seldom environmental authorities seem to share this view, too.

II. Procedural legal issues[13]

(*stakeholders*) Perhaps the most important procedural question in the ELD is the determination of the circle of persons and organisations that might participate in a given case and whose position entails with a certain procedural legal status with rights and responsibilities. Exact description of the role of the stakeholders is the precondition of their effective participation in the case. This is not always easy. Municipalities for instance have at least two hats on their heads in the ELD cases. Municipality authorities might play an important role in revealing and managing local level environmental emergency situations. In the same time, municipalities represent the interests of their constituency and also have key responsibilities in conveying messages about the environmental, public health, material security etc. consequences of the emergency and the proper behaviour that might result in the less damages for the dwellers. Other stakeholders, such as local businesses and insurance companies might flag their willingness and need to influence the course of the procedure, too.

(*public participation*) ELD lies on the crossroad of several technical, industrial rules and of the law of public participation as it is present in the Aarhus Convention, in the implementing regulations and directives on European level, including such important consequences of this wave of legislation such as the IPPC and the Water Framework Directives and many other sectoral environmental laws that apply public participation elements. ELD is one of the most important piece of law in this aspect, because *request for action* coming from the members and organisations of the public is a central element of the Directive. However, the national implementation of these public participation norms tend to be grades more conservative than the original ideas of the European legislators. Phrases such as "concerned", "interested" or "having rights" and the usually long list of conditions that allow an NGO to participate (time of operation, field of activity, territorial scope of activity etc.) cry for clarification in almost every cases. In addition to that, relevant laws and the authoritative legal practice in connection with public participation keeps changing in an amazingly frequent manner, according to the social, political, economic and administrative situation – not always for the better. No wonder that the position of local communities and NGOs in the ELD cases range from a mere notifier or observant through having certain participatory rights (mostly access to information) to full legal standing. J&E lawyers are of the opinion that public participation needs continuous interpretation work in order to keep the initiatives and feedbacks from the public in the centre of ELD procedures – otherwise these procedures might easily become uncontrolled, narrow minded technical exercises.

[13] We note here that many of the procedural issues of ELD are pretty much underrepresented in the literature, both in respect to the number of their mentioning and the depth of their analyses.

(*timeliness*) Time is naturally a basic factor of successful prevention and remediation of environmental harm. Our practical experiences (case studies, public interest environmental legal practice and other sources) show that timeliness is a two-folded issue in the ELD procedures. On one hand, the first measures after revealing the environmental emergency come usually quite quickly, but they are mostly exhausted in prohibiting further pollution or dangerous activity and starting some expert examinations. On the other hand, the whole ELD procedure that establish the legal responsibility with full legal force and implement the decision in all details and with satisfying results on the scene, usually takes years. In the J&E recent four case studies for instance 1-3-7 and even more years lasted until any meaningful results were achieved. The main reasons we found were: complicated technical issues, multi-authority and multi-stakeholder features of these cases and, above all, the endless line of legal remedies (annulation of the first instance decision, new decision, annulation again etc.). In many cases the procedural tricks of the operator that kill time almost endlessly are the major reasons of poor timeliness[14].

(*experts*) Apart from the quick and fully expeditious procedure, the quality and trustfulness of the expert examinations are the other key conditions of the successful prevention and remediation of the environmental harms in the ELD cases. In many EU countries, however, the procedure of experts in such cases is very slow, circumstantial, costly and the in top of all of these, not even trustworthy and unbiased. More resources allocated to this side of the ELD procedures, institutional and procedural solutions (such as ensuring bigger role for the chambers of experts or obliging the experts to give detailed reasoning to their opinions, amongst others, might allow a better position in the second instance procedure for those who wish to challenge the opinions) of controlling the experts seems to be indispensable. Another factor that could make significant increase in the quality of the expert opinions would be enhancing the possibility of NGOs, local communities and other stakeholders to apply their own *alternative experts* – with the help of independent funds, full time or part time, paid or voluntary public interest environmental experts etc..

[14] In the 2015 Statement of our network („The EU Environmental Liability System", Statement, Justice and Environment, Brno, 2015) we underline that the European wide ELD law and practice should be developed into a direction where there is an unambiguous responsibility of the competent authorities to make any necessary steps to prevent and remedy the environmental harm on the expense of the operators (p.3)

(*cost bearing*) No wonder that our ELD cases are seldom solved quickly and effectively: our authorities tend to consider all the costs of the procedures to be born by themselves. This is at loggerhead with the cornerstone principle of the ELD procedures, the polluter pays principle[15]. We do not see yet the clear procedural paths (most probably as an interplay of several concerned legal branches) along which the responsible operators are made fully responsible financially[16] [17]. This problem strongly interrelates with another deep procedural legal problem: our environmental administrative authorities are quite reluctant to apply *strict liability* in effect. As concludes, the burden of proof keeps resting on the shoulders of the authorities, instead of being shifted to the side of the responsible operators. Needless to say that once the environmental authorities consider themselves responsible for proving all the technical and procedural details, this entails with tremendous burden of financial and other resources. Handicapped with such false interpretations, our environmental authorities are simply not enough well off for the ELD cases at the time being.

III. Capacity building

(*importance of capacity building*) Even the most effective substantial and procedural laws (including detailed and timely notification of the concerned communities and organizations), and the most developed (also budgeted and institutionalized) ELD systems will not produce the expected good results unless there are authorities, stakeholders, members and organisations of the public who are able and willing to use them. All the role players should understand the goals of the national ELD laws and the ways to reach them, also they should be able to afford all the costs entailing with these procedures[18] [19].

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[15] After having failed to receive support from the EU Solidarity Fund for the remedy costs of the Kolontár red sludge disaster, in 2011 Hungary suggested the introduction of a European Industrial Disaster Risk Sharing Facility. The proposal was seriously considered by the Commission but it was finally rejected, first of all because of the fierce objection from the side of relevant industrial and insurance lobbies (Bio Intelligence Service et al. (2012): „Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents" Final report prepared for European Commission, DG ENV p. 5-6)

[16] An additional problem Europe wide is that the language of ELD is imprecise in connection with the term „defences": in certain countries it is understood as „defences to liability", while in others as „defences to costs" (Bio Intelligence Service, 2013, p. 6). In our opinion the second interpretation might be more progressive and allow the polluter pay principle better prevail on longer run: once the issue is only a defence to costs, the operators will have to cover the expenses immediately and have the right to seek reimbursement from other Stakeholders. This way the possible insecurity in financial responsibility is shifted to the field of a civil law discussion between third parties and the prevention or remedy of the environmental damage will not suffer delay.

[17] A further important observation concerning the defences is that this issue should not always be black and white, defences could be used in certain cases as mitigating factors, too (Bio Intelligence Service 2014, „ELD Effectiveness: Scope and Exceptions", Final Report prepared for European Commission – DG Environment, p. 15)

[18] One of the basic reasons of wide variations of ELD cases in the Member States from zero in a number of countries to 400 in Poland is „the lack of knowledge of the ELD among many operators (particularly small- and medium-sized enterprises), the public and even competent authorities" (Bio Intelligence Service, 2013, p. 8)

[19] According to another study, five out of seven main effectiveness factors of ELD are closely related to capacity building: 1 a developed register of ELD), 2 publication of data on ELD incidents by authorities, 3 broad access for interested parties, including environmental NGOs to submit comments / observation on potential ELD incidents to competent authorities, 4 Interested parties reacting to the broad access by submitting comments (…), 7 a greater knowledge of the ELD by operators (Stevens & Bolton LLP (2013) „The Study on Analysis of integrating the ELD into 11 national legal frameworks" Final Report prepared for the European Commission – DG Environment, p. 6)

(*databases*) Publicly available databases could be the main tools of informing the general public and the concerned communities about an environmental emergency case falling under an ELD category. Such databases might serve quite well also as a channel to forward information in the other way around, from the public to the authorities. Above all, however, ELD public databases are one of the best tools of capacity building. The members of the public and not only they, can learn from the older cases and might be able to avoid the old pitfalls in the new cases. Needless to say that authorities, even more the legislator handle the existing (e.g. in Poland) databases as a major source of new legislative and implementation programs[20]. Taking all of these issues together, one might have difficulties in understanding why publicly available ELD registers spread out so slowly. Lack of proper expertise and resources might be only one of the reasons. Actually, ELD cases most frequently are quite controversial ones, operators and other interested parties usually havbe a vested interest in keeping them secret, for getting public that their behaviour led to an environmental emergency situation might cause serious harm in their good-will and also make much more difficult to escape the responsibility once the members of the public and the media keeps a close scrutiny of the case.

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[20] In the 2015 Statement J&E brings further arguments for establishing ELD databases on several levels: better trust in the ELD system from the general public, enhanced feeling of responsibility from the side of the authorities, comparison of the achievements of several Member States and such technical ones as the insurance sector could better overview and estimate the remediation costs (Statement, p. 17)