National Experiences in Key Questions of Environmental Liability

Environmental Liability

Comparative Study

Justice and Environment 2017

a  Udolni 33, 602 00, Brno, CZ
t/f  36 1 3228462 /  36 1 7901381
tb  /justiceandenvironment
e  info@justiceandenvironment.org
w  www.justiceandenvironment.org
tw  JustEnviNet
National Experiences in Key Questions of Environmental Liability

Environmental Liability
Comparative Study

Introduction

Justice and Environment is a network of public interest environmental lawyers from 12 EU countries. Since its formation in 2003 it has contributed to many EU wide environmental discussions in the field of public participation, environmental impact assessment, nature protection and others. J&E has been active in ELD matters since 2012. This Position Paper is organised around the 3 major topics of the ELD Multiannual Working Program of the European Commission and tries to focus on questions where an additional value can be added to the process of stakeholders’ discussions and of rolling on revision of MAWP. First, we summarize here the experiences on the implementation of the ELD from 5 countries: Austria, Estonia, Hungary, Slovakia and Spain and thereafter we attach the whole text of the five country studies.

1. Data gaps in the national ELD systems

a. Sources of information (formal, informal) on ELD implementation

While we know that there are (should be, because of several reporting, planning etc. responsibilities) significant data on the implementation of the ELD in the Member States, usually these data are not processed systematically and are not made available to the general public, let alone using these data on awareness raising or capacity building purposes in connection with the most effective measures that can be taken in an environmental emergency situation. Even if where, like in the Slovak Republic an Information System on Prevention and Remediation of Environmental Damages was established in order to gather information on concrete cases concerning environmental emergencies or their imminent threats, in effect they hardly contain any meaningful information. Remaining at the Slovakian example, this database so far contains only two registered cases.

The most obvious sources of statistics, disaggregated data and analyses of ELD cases would be:

i) The home page of the ministry responsible for environmental protection or of a national environmental protection agency, an environmental board or any other similar national level body;

ii) The home page of the environmental authorities, especially second instance ones;

iii) A collection of old polluted sites (historical pollution); the reasons why such databases are developed and made widely available to the public could be multiple: for instance such a database can be the starting point of a State program to prioritize and clean up them when the resources are available or when there are mounting needs to do so; also we should take into consideration that such old sites usually mean less controversy, their restoration is clearly a State responsibility;
iv) NGO sources and sources of independent scientific research – these sources usually contain only sporadic data but frequently highlight outstanding cases and call the attention of the general public and the administrative decision-makers to certain outstanding features of such cases;

v) The home page of the European Commission where the national reports on ELD implementation are freely available. However, several tables and data sheets that would contain some disaggregated data are generally not attached to the body texts of these reports.

We can conclude that a lot of useful information can be found on ELD practice at certain organisations and on local level, and also on EU level, but usually not on national level. What could be the reasons behind this secrecy? In the majority of the cases, simply lack of awareness, of governmental resources spent on ELD related, follow up activities or lack of acknowledgement of the importance of ELD compared to other, older types of environmental legal responsibility. But we can put it quite simply: ELD is not yet a success story in the majority of the Member States, so it is quite understandable that they do not hurry to publish detailed data and analyses on that.

**J&E suggestions**

- NGOs should develop standing programs on collecting information on ELD implementation in their respective countries; while active information servicing on this issue is really sporadic, well organised national NGOs or coalitions of NGOs with proper resources could gain all the necessary information about the most important ELD cases and also about the most representative ones. Article 4 and 5 of the Aarhus Convention and the national level rules clearly ensure the legal path for acquiring such information; also the practice of the Aarhus Compliance Committee is very supportive in this respect.

- The European Commission could encourage the Member States to serve it with more detailed ELD reports and could support the general public when seeking such information. Detailed guidances on the basic information needs and methodologies could be developed in cooperation with the experts from the Member States and with other Stakeholders.

- In case the Directive underwent a modification, a Europe wide system of ELD data collection, processing, comparison and evaluation could be established. Uniformisation of the practice in that field would well serve the basic goals of the European legislator with the ELD, namely the effective prevention and remedy of environmental pollution and the polluter pays principle. Furthermore, it seems to be an unfair competition situation that some economic agents in certain Member States could hide behind the veil of silence by not revealing the most important facts of ELD implementation.

b. Data available on the number, locations, size of damage, procedural data, results of remedy operations, costs, and timing of ELD cases

While NGOs and researchers might be in possession only of “hearsay evidences” in connection with data collection activities of the Government, naturally, some of the numerous subjects from whose such data are collected leaks out some information. Sporadic information from conferences, the literature or NGO sources might be also helpful. For the 2014 EU national report about the practice between 2008 and 2013 most probably all the Members States have performed some more or less
systematic data collection. Such surveys could encompass the type and extent of the environmental damages, the time of onset of it, the date of revealing the facts, and the time of finishing and the result of the cleaning up operations. While the Governments might made efforts to collect information on the costs of the remedy operations, they could be successful in connection with the costs at the side of the environmental protection authorities, while we do think that the expenses at the operators are seldom known. A basic information which is seldom fully available is the on-site result of remedy operations and the extent remaining environmental damages. Also, there are some data on the procedures of legal enforcement the national environmental liability norms, especially the results of legal remedies, if any.

For national purposes, in order to raise awareness of the public or make the concerned communities best prepared to the protection of themselves, embarrass the polluters or make the other operators dealing with similar activities more alert etc. in some countries there are some data published about the operator who caused environmental damage or endangerment, specification of the location and the extent of the pollution, measures taken, impacts and recommendations for the population, constant update on the situation and the remediation actions and other relevant information.

**J&E suggestions**

The types of data that are collected systematically in the Member States should be harmonized on EU level, in order to enable the general public and the decision-makers to compare their results and find and amend the weakest spots in their respective national ELD systems. Also a European level clearinghouse of best practices would serve well the original goals of the ELD legislators, i.e. prevention and remedy of environmental damages in the quickest, cheapest and most effective way.

c. **Information available on specific key issues of implementation of the ELD**

Availability of data on one hand is an important factor of effective implementation of the ELD. However, processing the set of available data, analysing it and arriving at certain conclusions about the effective implementation of the Directive is a step further. Such basic issues are the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defences that save the operator from responsibility, public participation and the responsibility of the experts. If we said that access to *data* on ELD implementation is sporadic, access to *information* about such key issues is bordered to impossible. Primarily, because such a systematic analysis seldom takes place according to our knowledge. Again, however, when the official information is scarce and not standardized, the NGOs and certain scientific circles might offer their help. This way, even if not a full picture can be drawn in these key issues, at least we have some impressions that should lead to a more systematic further research.

In connection with *strict liability* we need to underline that our conviction is that numerous, high level professional and policy-making discussions are needed to gain a clear picture on the meaning and effects of this term. Clearly, it is a civil law concept that cannot be fit into the tissue of the administrative law automatically. In a civil law context the parties and their claims are unambiguous, while in an ELD administrative law case, the direct “victim” is the environment itself, therefore a lot of elements of the procedure of establishing and fulfilling responsibility are vague and needs further scrutiny. Furthermore, in the typical civil law cases of strict liability the causational chain is clearly
detectable, only the *culpa* element is questionable. Contrary to this, in the ELD cases quite frequently we are confronted with unclear causational relationship, the connection between the activity of the operator and the damage/endangerment is rather statistical (stochastic) and reaches a certain level of probability, but almost never a total certainty. Therefore, in several countries, in the ELD cases, in addition to the basic element of strict liability, a *presumption* is used, namely a presumption that the operator caused the environmental damage once the locations are close and the materials in question are the same in the possession of the operator and in the site of pollution. Naturally, this does not mean that the operator cannot avoid the responsibility, but the burden of proof is on her shoulder hitherto. Under such conservative and formalistic legal regimes where the authorities or the courts require a proof beyond doubt (like in criminal matters) for the establishment of a causal link between the hazardous activity and the environmental damage (the polluted groundwater etc.) which may be hard to deliver in any case where slow and gradual emissions from installations cause significant damage on water and/or groundwater sources, the application of the ELD is almost totally undermined. We have to note that in those countries which avoided using ELD and stayed at the old sectoral environmental responsibility legal regimes, strict liability is also used in very limited occasions.

Interestingly enough, our country surveys could not reveal major problems neither in connection with the key definitions of the ELD, nor in connection with special defences applied by the operators to get free from responsibility. Concerning the definition of environmental damage for instance and in close connection with them the methodology of the calculation of it has been a subject to intensive research from the side of the relevant natural sciences, as well as economics and statistical sciences. As concerns the *significance* of damage – the duration, intensity and extension shall be considered by experts (“prognosis decision”). We see here an example of using probability in environmental law that is quite natural for scientists, while lawyers might still have difficulties with it. We do think, however, that the close cooperation between lawyers and experts in the ELD matters, which is unavoidable, have resulted in a more or less clear picture in that field.

Also the definition of waters/water bodies seems to be less problematic, even if the ELD does not specify whether it applies to waters or a water body, this dilemma is easily solved with the help of the Water Framework Directive, since it unambiguously applies to waters, rather than only whole water bodies.

In respect to the latter case, we found some data that our authorities interpret the *permit defence* in a way that permits allow to exercise the environmentally dangerous activity under certain conditions, but they do not give a free card to cause environmentally damages/endangerment at any rate. Here the CJEU also ruled that national law which generally excludes significant water damage from the ELD regime due to mere fact that its covered by an authorization is infringing ELD (ECJ, 1.6.2017, C-529/15, *Gert Folk*).
J&E suggestions

We support the Commission in its continuous efforts to organise Europe-wide comparative researches on key issues of implementation of the ELD, we think this progressive trend should continue and the research efforts should be even more systematic and should lead to widespread discussions by the Stakeholders. Also these topics should be kept on the agenda for a while, in other words, we would like to see iterative procedures where the results of discussions of the research materials become the subject of further exchange between the Stakeholders. As concerns the individual topics, we would especially suggest to put more focus on a systematic analysis of the European ELD practice concerning strict liability and also run some multidisciplinary programs that target a better understanding of the most effective use in the administrative law of this originally civil law concept in order to best serve the goals of the ELD legislators, primarily the polluter pays principle.

2. The most pressing needs to enhance the effectiveness of the national ELD systems

a. Use of ELD in environmental liability cases: exclusively, together with other already existing legal tools or rather only these old tools are used

We have seen from the available information that there are serious effectiveness problems in insisting on the old system(s) of environmental liability (that is a compound of several liability rules in different branches of environmental law, such as liability according to the water law, liability under nature protection law etc. with different set of definitions, procedures and extent of liability). We also see from our country surveys that nothing prevents the Member State to fully harmonize their existing environmental liability norms with the new ELD requirements. This way they can achieve a coherent system of the environmental liability rules with no disturbing, counterproductive contradictions or competition between the two parallel set of liability rules. The opposite solutions, such as simply inserting a new ELD act into the national legal system, without performing the piecemeal work of harmonisation of the elements of the existing relevant laws (at least a half a dozen laws, usually), let alone a direct stipulation that makes the old laws prevail in any cases of collision, would not reach the goals of the ELD, especially in connection with public participation. The situation is even one grade more difficult when there are separate authorities responsible for implementing the ELD and for the old liability rules – in such case the institutional competition is almost unavoidable. In principle, according to the saying “more eyes see more” national States could harness the multiplicity in the institutional system but this would require further organisational measures and, naturally a high level administrative culture.

J&E suggestions

Advantages and disadvantages of the old and new environmental liability regimes should be systematically revealed and analysed and made a subject of widespread Stakeholders’ discussions. Ways and methods of harmonizing these two sets of legal norms should be worked out, using some of the best features of the already available examples.
b. The cost of the national ELD procedures

Based on our professional experiences we see there three main groups of cases according to the level and type of expenses:

i) the operator’s own expenses that were spent on preventing orremedying environmental damages. These costs remain most frequently unknown, but in the majority of the cases they do not exceed 5,000 Euro;

ii) in some of the exceptional major cases which represent less than 1% of the total, the expenses are one grades higher and can climb up to 100,000 Euro;

iii) in much less than 1% of the cases the expenses are one or even two grades higher, but these usually regional or national level catastrophes, we think, they fall beyond the scope of the ELD, for instance the polluter pays principle loses its meaning almost entirely;

iv) a totally different kind of expenses emerges at the operators because of the measures of authorities such as fees, fines and direct expenses (e.g. expert fees) of the authority and their amounts can be traced back easily and are duly paid by the operators almost without exemption - they are typically low below 1000 Euro)

v) finally, in some rare situations the authority has to spend from its own budget on cleaning up or securing the polluted sites; such expenses could be really high, such as several tens of thousands of Euro and they are seldom reimbursed to the authorities. We note that the authorities are not able to cover all, even a significant part of the abandoned sites of environmental pollution, because they lack the resources for it. We think that out of the five cost categories this very point is the central focus of the ELD.

J&E Suggestions

Justice and Environment lawyers would see some merits in separating these 5 groups of expense categories in the future ELD researches, because their social-economic background and as such legal evaluation differ significantly. In our opinion out of these cost categories the fifth group deserves the most attention, since it means a great problem of equity and social justice nature, as a typical “tragedy of the commons” situation. This is the case when the entrepreneurs, who consider their profit only as theirs, while they are eager to share their risks with the society, not seldom by illegal or even directly criminal schemes. We do think, therefore, that in such cases the administrative law provisions of the ELD shall be applied together with civil law, corporate law, petty offence and criminal law institutions.

c. Timeliness of the national ELD procedures

As concerns timing, our experience is that timeliness of the ELD cases primarily depends on the fact if the accident is revealed right after it happens or remains unknown for a longer period.

i) the majority of known cases are revealed right after the emergency happened, the cleaning up and further prevention works start immediately and they are finished within a couple of days, in a less
than one fifth of such early revealed cases the remedy might take a little longer, up to 6 months – we note that from costs viewpoints these cases mostly overlap with Point i) or in respect to the latter mentioned more lengthy case partly with Point ii) in Point 2a above;

ii) in a totally different group, that is estimated as one third of the total, the environmental pollution situation stands for several years, 2-3 or even much more. In such situations the authorities typically cannot clearly establish the starting date of the pollution, they are confronted with an escalated situation, for instance deeply and widely polluted underground water bodies. Either the remedy works or/and the legal administrative arrangement of such cases, for instance a legal dispute about the person and the extent of responsibility prolongs the end of the pending environmental pollution situation. Taking into consideration that the legal side of the ELD cases are overly complicated, where in the majority of the instances the contradicting opinions haven’t settled down yet, court procedures themselves usually take several years. We note here, that this timeliness category obviously closely related with the cost category v) in the previous point.

**J&E suggestions**

We have to underline that timeliness should be examined closely together with costs, especially because that usually the worst abandoned sites lay untreated for many years primarily because of the high amount of resources the public authorities should spend on them from the taxpayers money. Even if so, we are convinced that the solution of these very dangerous and unjust situations are not exclusively a matter of money available: first, social awareness and public participation can help in early warning and in exerting social-political pressure on the decision-makers and on the operators, and second, the strength of concerted legal actions that encircle the perpetrators and force their responsibility the fullest.

d. **Public participation (including request for action) and access to justice**

We consider public participation a key factor of the effectiveness of the ELD. Our estimation is, however, that in less then 5 % of the known number of the cases happens a certain level of participation either by NGOs or local communities (“grassroots“). Even if having succeeded in acquiring the necessary information about the environmental emergency situations, they are usually unable to take such cases to the courts, because of the high expenses and the time such procedure consumes in these urgent cases. Public participation in the ELD cases is made especially difficult because of the striking imbalance of the financial, professional and technical means between the members, groups and organisations of the public and the operators of the polluting facilities. Yet, exceptionally, some ELD cases with public participation can even reach the level of CJEU (C-529/15, *Gert Folk*).

Apart from not having systematic, satisfying information about the possible ELD cases, the major deterrent from public participation is the rigid application of the loser pays principle in such cases. In an Austrian case, for instance the participating NGO had to bear the costs (a few thousand euros) for the expert opinion assigned in an ELD case, which was only about a preliminary question on the admissibility of the case that was decided contrary to the legal standpoint of the participating NGO. This legal practice is dysfunctional from ELD viewpoints because discourages those who represent the community interests and might be a major independent contributor to the effective solution of
environmental liability cases. Furthermore, we doubt that this practice would be compliant with Article 9 para 4 and 5 of the Aarhus Convention, since, inter alia the Parties to the Convention have to ensure that claimants can challenge decisions affecting the environment in a way that is fair, equitable, timely and not prohibitively expensive.

**J&E suggestions**

While the ELD specific public participation rules are very well elaborated both in the EU and the national laws, the mere possibility of participation is worth not too much once there are not too many who could use these possibilities in an effective way. Therefore, we suggest systematic, institutionalized and normatively budgeted capacity building programs with the inclusion of the few specialized national or European environmental NGOs. Well-designed capacity building programs should encompass general information about the ELD cases, the ELD law, its substantive and procedural side, including legal remedies; special information concerning concrete ELD cases; expert and legal support in case there is a need for them from the side of the NGOs or local communities, institutional help; and most importantly the exclusion of any factors that hinder public participation especially unjust differentiation between participants or retaliation of participation. Legal and practical experiences in connection with the implementation of the Aarhus Convention might be of help.

e. **Use of the institutions of complementary and compensatory remediation of the ELD**

In four out of the five countries we have collected information for this paper, there is no mentioning about the legal institutions complementary and compensatory remediation. We consider this almost total neglecting of two important types of measures prescribed by the ELD as an indicator of low level of the willingness of the Member States to genuinely transpose and implement the goals, methodology and the spirit of the ELD.

**J&E suggestions**

We think that the strongest legal tools, including infringement procedures should be used in this case from the European Commission against the Member States which totally overlook these two important legal institutions of the ELD.

3. **Financial security measures to safeguard the covering for the most serious environmental damages**

a. **Evaluation of the effects of ELD on the market competitiveness of the concerned companies**

As we have seen from the distribution of costs in Point 2.b) only a smaller part of the cases entails with really considerable amount of expenses but these are the cases where the operators attempt to leave the expenses on the authorities or on the taxpayers generally, so other than economic tools appear to be more applicable. Therefore, in a situation where typically the expenses are not too burdensome for even the small and medium sized enterprises, the insurance costs should not be so
high (except probably in an initial period, when the market orientates its prices) so the ELD generally might have a neglectable effect on the market position of the companies.

No wonder that according to the J&E lawyers relevant industrial circles have really seldom complained publicly about the effects of ELD on their business. Even if so, they might complain about the prices offered by insurance companies. This might be only a transitional problem, where the new branch of services has higher prices because of the inherent uncertainty.

**J&E suggestions**

The issues described in this point leads us back to the mounting need of systematic collection, analysis and publication of environmental emergency and endangerment data and information as exhaustive as possible.

**b. Solutions to achieve financial security alternative to insurance**

In the mirror of the findings in the above Point 3 a) we might say that this question has minor practical relevance. Even if so, the market of financial security solutions is quite complex according to our findings and offer solutions such as:

- forming a *security fund* within the account of the companies dealing with environmentally dangerous activities; this solution has the advantage that the companies selecting this method might enjoy tax allowances or levies for the amount separated in the company security fund.
- depositing environmental *security bond* at a bank or on the account of the environmental authority; this is advantageous because enables the authority to take the quickest and most effective measures in a case of an environmental emergency;
- forming a *pool* of the companies that belong to the same ELD relevant category, running similar activities, using similar dangerous technology, etc.; either they form a joint fund or together conclude an insurance contract, most probably under more advantageous conditions than separately; an advantage could be that the financial safety construction is tailored exactly to the needs and specialities of the companies within the pool, also it can be cheaper than an offer from an outside insurance company or bank.

In harmony with the analysis of timing and cost of the ELD procedures, the real danger to the polluter pays principle is that some enterprises aim to gain short term, illegal purposes, and by the time they would have to respond for the damages they had caused in the environment, they transform or bankrupt. The law on bankruptcy put the environmental costs on the top of the list of priority expenses in vain: in such cases there are no money or other resources left for such purposes. We underline again our opinion that the cases when the perpetrator has acted under such a scheme, with no financial guarantees left, the corporate veil could be removed, civil law actions, even criminal cases should be initiated.
**J&E suggestions**

Justice and Environment lawyers have arrived at the opinion that the obstacles in the field of effective use of the financial security tools in ELD matters is primarily due to the fact that we wish to address with this single tool a set of quite different phenomena: normal operation of honest enterprises and reckless economic manoeuvres of certain adventurer capitalists. In order to defend the interests of the society and honour the polluter pays principle we should develop differentiated legal tools that do not entail with significant financial burden on the bulk of companies relevant in ELD matters.

**Contact information:**

name: Sandor Fulop  
organization: J&E  
address: Garay u. 29-31., Budapest, Hungary, 1076  
tel/fax: +36 1 3228462, +36 1 7901381  
e-mail: info@justiceandenvironment.org  
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.
Austria

General remark:

Due to the division of competences within Austria’s federal system the Environmental Liability Directive (ELD)\(^1\) was transposed by one Federal Environmental Liability Act (Bundes-Umwelthaftungsgesetz – B-UHG\(^2\) - ELA) and several Environmental Liability Acts or provisions on Land level. The prevention and remediation of water damages lies with the competence of the Federal state, whereas the prevention and remediation of biodiversity damage lies in the competence of each Land (Bundesland). The competence for land damage is split between Federal state and the Laender. So always according to the type of occupational activity by which the imminent threat or the actual land damage is produced respectively the Federal state or the Laender are competent.

1. Data gaps in your national system

a. what kinds of sources of information (formal, informal) on ELD implementation exist in your country?

By 2013 there was no ELD case recorded in Austria (see Austrian Report on the implementation of the ELD to the European Commission). Till now we have not been noticed that there was any further case of ELD application in Austria.

In Austria the competent authority for environmental liability cases is the district authority (“Bezirksverwaltungsbehörde”) and there is about a 100 district authorities operating in our country.

In case environmental damage has been caused, the authority has to publish the essential content of the control and remediation measures which have been taken so far and the ones additionally ordered by the authority. It has to inform known stakeholders personally and consider opinions and comments from these stakeholders in the procedure (§7 para 3 Federal Environmental Liability Act - ELA). The information will then be published at least on the district authority’s website (so far we don’t have clarity on the type of publication which is required under this provision).\(^3\) There is no obligation to further process the relevant data, collect or keep it published as soon as the damages are remediated. note: aggregation and disaggregation might be needed as well

There is no database or registry to record environmental damage incidents in Austria.

---

\(^1\) Directive 2004/35/CE.

\(^2\) Federal Law Gazette I No.: 2009/55.

\(^3\) E.g. groundwater pollution in Korneuburg (Lower Austria) by the operation of a pharmaceutical company: [http://www.korneuburg.gv.at/Aussendung_der_BH_zum_Grundwasser](http://www.korneuburg.gv.at/Aussendung_der_BH_zum_Grundwasser)
**Excursus:** **Old contaminated sites** ("Altlasten") posing a risk to human health or the environment, are registered and recorded within a public registry. Legal basis for the management of the registry is the Contaminated Sites Act ("Altlastensanierungsgesetz"). The registry on contaminated sites is published as Ordinance in the Federal Law Gazette.

**b. what kind of data is available in general on the number, locations, size of damage, procedural data, results of remedy operations, costs, timing**

There is no systemized and complete capture of data on environmental damage cases (be it ELD or non-ELD cases) in Austria.

In selected cases we can report that the following information was collected and published by the authorities:

- the extent of the pollution
- measures taken
- impacts and recommendations for the population
- (constant update on the situation and the remediation actions)

Another assessment tool is the Environmental Control Report ("Umweltkontrollbericht") issued by the Austrian Federal Environmental Agency (an obligation arising from the Environmental Control Act). The report collects data and information on the state of the environment and environmental impacts and summarizes and evaluates them in order to deduce respective measures. The report does mention incidents of environmental damage only in some of its chapters (e.g. on industrial facilities or on water) without providing specific information on extent of damage, location procedural data, results of the operation, costs or timing.

**a) what do we know specifically on key issues, such as the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defences that save the operator from responsibility, public participation and the responsibility of the experts.**

There isn’t much knowledge on the interpretation of key concepts, as the system hasn’t been applied so far. There are selected judgments clarifying on some of the key issues mentioned above, and several opinions in legal literature which will be outlined below.

**Strict liability:** If the proof of causality cannot be provided, the applicability of the Federal Environmental Liability Act and the ELD is ruled out. Consequently the legal institute of the environmental complaint ("request for action") is also inadmissible (Lower Austrian Federal Administrative Court, 30.9.2015, Zl. LVwG-AV-31/001-2015).

The requirements applied on evidential standards are hard to fulfil and if continued to be applied in the future they will considerably diminish – if not to say, undermine - the application of the ELD in Austria. We are facing the situation, that the court requires a proof beyond doubt (like in criminal

---


5 E.g. groundwater pollution in Korneuburg (Lower Austria) by the operation of a pharmaceutical company: [http://www.korneuburg.gv.at/Aussendung_der_BH_zum_Grundwasser](http://www.korneuburg.gv.at/Aussendung_der_BH_zum_Grundwasser); and environmental hazards due to hexachlorobenzene (HCB) in Görschitztal (Carinthia): [http://www.ktn.gv.at/302398_DE%2dHCB](http://www.ktn.gv.at/302398_DE%2dHCB)
matters) for the establishment of a causal link between the hazardous activity and the environmental damage (the polluted groundwater etc.), which may be hard to deliver in any case where slow and gradual emissions from installations cause significant damage on water and/or groundwater sources or even protected fauna and flora. note: in our time the relationship between the environment and industrial activities is described by a complex system of determinants (“risk society”), therefore the environmental legal responses should take it into consideration and apply probability models that ensure a higher level of environmental security, in the spirit of the precautionary principle

Notion of damage: The ELA does not specify whether it applies to waters or a water body under the Water Framework Directive although it appears to apply to waters, rather than water bodies. As the damage definition refers to the Austrian Water Management Act and the latter refers to “waters” and not “water bodies”.

The Austrian legal definition of water damage excludes damages which are covered by an authorisation granted pursuant to the Water Management Act. Here the CJEU ruled that national law which generally excludes significant water damage from the ELD regime due to mere fact that its covered by an authorization is infringeing ELD (ECJ, 1.6.2017, C-529/15, Gert Folk).

Thresholds: Generally the parliamentary materials indicate that a case by case decision has to be taken in order to assess the significance of damage – the duration, intensity and extension shall be considered by experts (“prognosis decision”). note: an other example of using probability in environmental law

According to the parliamentary materials the ELD shall only cover imminent threats and sudden damages – slow and gradual deterioration does not fulfill the criteria for environmental damage. From a scientific perspective this is assessed differently by academia – By the parable “the jug goes to the well until it breaks” assesses Wagner the characteristic of a gradual deterioration. Such situations might well produce an imminent danger of environmental damage. An exception for not permitted gradual deteriorations is not in conformity with the ELD, if at some point the threshold is reached or even exceeded. Imminent threat of an environmental damage is often produced by an excessive use of certain substances (fertilizers, plant protection products etc.) which are constantly used and over time leading to an imminent threat of environmental damage.

Defences: The transposing legislation does not include the permit defence or the state-of-the-art defence.

Public participation: See 2. b)

---

6 IA 464/A BlgNR 24. GP.
2. The most pressing needs to enhance the effectiveness of your national ELD system

a. for preventing and remedying environmental damage is ELD used exclusively or together with other already existing legal tools or rather only these old tools are used?

The Federal Environmental Liability Act (ELA) does not state how its provisions interrelate with other sectorial laws. Sec. 2/3 states that further obligations due to directly applicable Union legislation and on the basis of laws and regulations enacted governing the prevention or remediation of environmental damages remain unaffected. This merely means that the ELA shall not derogate further liability provisions. As “further obligations” is meant everything that exceeds the subject matter of the ELA: be it sectorial administrative orders (“verwaltungspolizeiliche Aufträge”), due diligence obligations, permit conditions, other administrative orders (“Auflagen”). “Further obligations” might be equally evaluated not by the order or obligation itself but also by the legal consequences and effects (e.g. Sec 101a Gene Technology Act - GTG). Basically the legal foundation of the taken measures can be unsecure till the end of an ELA-procedure. Sec. 5/6 and Sec 7/6 ELA stipulate that if measures according to other environmental regulations have been taken before these measures shall be considered in the sense of this provision – meaning as ELA measures.8 The parliamentary materials evaluate the ELD system as complementary and strengthening element to the already existing national liability systems. It should not be applied in an isolated way.9 Existing terminology should be used also in the future – so that common criteria are set and uniform application is secured.

Nevertheless in Austria the old sectorial liability legislation is used exclusively, instead of the ELD implementing legislation.

b. how are the cost and timeliness of your ELD procedures?

No data available.

c. is public participation (including request for action according to the ELD) and related access to justice working well?

So far all requests for action by the public or affected persons have been dismissed by the competent authorities and in the appeal procedures.

In a preliminary ruling concerning Austria the CJEU ruled (ECJ, 1.6.2017, C-529/15, Gert Folk) that persons holding fishing rights must not be excluded from access to justice in case the damage results in an increase of fish mortality (=affects the fishing rights). In this respect the Austrian Federal Environmental Liability Act is in non-compliance with the ELD and the legislator will have to respectively adapt the law.

The Lower Austrian Administrative Court issued a quite momentous decision on costs for the requester for action in environmental liability proceedings (NÖ LVwG, 12.5.2016, LVwG-AV-31/006-

8 Köhler in: Raschauer/Wessely Handbuch Umweltrecht 20112, 204.
9 IA 464/A BlgNR 24. GP.
The NGO, who filed a “request for action” (Art 12 ELD) because a company caused environmental damages, was ordered to pay the costs for the expert who was assigned to assess the severity of the damage (so actually to solve the question: whether the Austrian Environmental Liability Act is applicable to the case or not). The court concluded that the Environmental Liability Law was not applicable in that case and thus the “applicant” = the NGO had to bear the costs (a few thousand euros) for the expert opinion.

The current decisions and opinion on the taxation of costs in environmental liability matters indicate that the Austrian courts see the public as some kind of private party trying to evoke its personal rights via the submission of a request for action instead of seeing the request for action (and the requester) as a supporter to the public hand providing it with hints and evidence to potential environmental damage cases (= acting in public interest).

It is to be feared that the request for action under the Austrian environmental liability legislation is dead due to the fact that NGOs and individuals cannot be sure anymore whether they will be obliged to bear cash expenses (including the costs of external expert opinions – which can be several thousand Euros) in case the authority rejects the request for action. It has to be assessed whether this practice would be compliant with Article 9 para 4 and 5 of the Aarhus Convention. Parties to the Convention have to ensure that claimants can challenge decisions affecting the environment in a way that is fair, equitable, timely and not prohibitively expensive.

d. are the institutions of complementary and compensatory remediation of ELD used?

No data available.

3. Financial security in your country for the most serious environmental damages

a. how do you (and the relevant industrial circles of your country) evaluate the effects of ELD on the market competitiveness of the concerned companies?

Austrian ELD implementation does not provide for a mandatory financial security system.

Within the general civil liability regime no mandatory financial security systems regarding environmental damages have been established. Some civil liability acts do provide for mandatory financial security.

ELD is not applied in Austrian practice, thus there might be no effects on the market competitiveness of the concerned companies.

b. are there alternative solutions to insurance available to achieve financial security and honour the polluter pays principle that do not entail with significant financial burden on your companies (e.g. financial incentives rather than liability regimes, national ELD fund with redress claim, targeting the responsible persons rather than the companies).
Estonia

1. Data gaps in your national system

a. what kinds of sources of information (formal, informal) on ELD implementation exist in your country?

Websites

- Sub-page on ELD on the [website of the Ministry of the Environment](#)
- Sub-page on ELD on the [website of the Environmental Board](#) (competent authority)
- Sub-page on ELD on the [website of the Estonian Environmental Law Centre](#)

Guidance/Info material

- Environmental Liability Directive fact sheet
- Environmental Liability Directive European natural resources protection brochure;
- Environmental liability in Estonia (fact sheet)
- Overview of the implementation of the Environmental Liability Directive 2004/35/EC in the member states of the European Union
- Excel file on environmental liability cases

Articles


b. what kind of data is available in general on the number, locations, size of damage, procedural data, results of remedy operations, costs, timing

There is a simple data base (Excel-file worksheet) of environmental liability cases available on the homepage of the Environmental Board. In the data base, there is information about environmental liability cases that have been processed by the Environmental Board.

The table contains the following information:

- Number of cases – the table shows that since 2013 there has been altogether 12 cases processed;
- Location – it is brought out exactly where the event took place. For example, in 2013 there was an incident that took place in Ida-Virumaa county, Alajõe parish, Karjamaa village, Karjamaa stream;
- The extent of damage – description of the case contains the extent of the damage. For example, there was a case in 2017 where 52 tons of chemicals spilled on the ground around the area around Sonda railway station and Tapa railway station;
- Procedural data – the procedural data includes information about the beginning of the proceedings, the object of the environmental damage or threat of environmental damage, date and identification number of the decision and the person who caused the damage. For example, on 26.04.2016 Environmental Board started a procedure concerning Väinamere limited-conservation area and habitats therein. Environmental Inspectorate identified environmental damage to Väinamere limited-conservation area and to habitats (sandy and muddy shores and wide low bays). Precept was made by the Environmental Board No 1-3/16/2266, on 6.09.2016. The person causing the environmental damage was OÜ HansaAssets.

- Measures taken and results – type and content of measures are described under applied avoidance and/or remedial measures (incl. results of remedy operations). For example, in order to remedy environmental damage to Väinamere limited-conservation area and habitats, the areas had to be restored. For restoration, they had to liquidate the filled area (foreland) of Paslepa port’s southern part boat channel and pond at the Paslepa Presidential summer residence.

- Costs – costs of prevention/remedy measures are reflected with VAT. For example, the cost for prevention and remedying of damage caused to the environment (damage to lake’s natural state and building of monolithic concrete stairs and a platform) in Porkuni landscape protection area and to different species and their habitats was 3174 euros.

- Timing – timeline for the cases is described at least with the beginning date of the proceedings (under information about environmental liability procedure) and the deadline for applying the measures and follow up control date (under information about applied avoidance and/or remedial measures). For example, Väinamere limited-conservation area and habitats environmental damage were identified on 26.04.2016, the prescription was issued on 6.09.2016, the deadline for the applying the measures was on 31.10.2016 and the follow-up control date was on 16.12.2016 (environmental damage was by then remedied).

Specific information about the cases can be found here (in Estonian).

c. what do we know specifically on key issues, such as the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defenses that save the operator from responsibility, public participation and the responsibility of the experts.

As referred to above, there are quite a lot of materials available on the “theory” of environmental liability regime and some information on the cases. However, there is no specific guidance/information publicly available on the key definitions that would go further than the text of the law itself (which is pretty much based on the ELD, therefore quite abstract). No information, other than that in the Excel table referred to under point “b” of this question, is available on the defences that save operators, public participation and responsibility of experts (last two issues are totally missing from the table).
2. The most pressing needs to enhance the effectiveness of your national ELD system

a. for preventing and remedying environmental damage is ELD used exclusively or together with other already existing legal tools or rather only these old tools are used?

Statistics show that for most of the cases that deal with preventing and remedying environmental damage, use legal tools that existed before the ELD was transposed. For example, in 2016 there were:

- 3 cases where ELD was used exclusively by Environmental Board;
- 119 cases (26 hunting act, 58 fishing act, 8 radiation act and 27 forest act cases) where already existing legal tools where used by Environmental Inspectorate.

It should be noted here that one of the reasons might actually be that the day-to-day surveillance and supervision “on the field” is carried out by the Environmental Inspectorate, therefore they are usually the first to detect and react to environmental damage and deal with it within their powers (rather than forwarding the case to the Environmental Board in charge of ELD application). However, this theory would need to be tested by in-depth interviews and surveys with the environmental authorities.

b. how are the cost and timeliness of your ELD procedures?

Since 2013 there have been two cases where cost of measures is reflected on the previously mentioned database/table. For the first one it was altogether 28 726,32 euros (maintenance of protected trees and access road slope coating) and on the second one, it was 3174 euros (mowing, cleaning and monitoring actions).

There is no information available on the costs related to the proceedings for persons causing damage/threat of damage, the competent authorities, NGOs, individuals or any other party. Therefore we cannot assess this.

Information from the previously mentioned table shows that all the follow-up controls have identified that the environmental damage and damage hazards have been removed (except still ongoing proceedings). In general, it’s not said in the table if damages/damage hazards were removed on time (except one case where it has been clearly marked that all the damage was removed on time). The time period between the detection (first control/complaint letter) of environmental damage or damage hazard and its removal is different from case to case. The shortest period since 2013 is six months (from 9th of June 2015 to 21st of December 2015) and the longest period is over 9 years (an ongoing proceeding from 19th of June 2013 where the date for implementation of measures is 31st of December 2022).
c. is public participation (including request for action according to the ELD) and related access to justice working well?

There have been 3 cases since 2013 where public has made a referral to request action according to the ELD. All of them were processed and can be found in the previously mentioned table. We have no information about the quality of public participation nor access to justice practice related to the ELD.

d. are the institutions of complementary and compensatory remediation of ELD used?

Yes, there are. For example, there was a request to establish a border fence around protected Kelchi linden tree. It is a remedial measure that was implemented in order to reduce and prevent the future significant risk resulting to the linden tree from an access road to a waste management centre (which was constructed through a protection zone).

3. Financial security in your country for the most serious environmental damages

a) how do you (and the relevant industrial circles of your country) evaluate the effects of ELD on the market competitiveness of the concerned companies?

We cannot give such an evaluation as lawyers. The relevant industrial circles have also not publicly complained about the effects of ELD on their business as far as we know (and based on how few cases there have been, are unlikely to do so).

b) are there alternative solutions to insurance available to achieve financial security and honour the polluter pays principle that do not entail with significant financial burden on your companies (e.g. financial incentives rather than liability regimes, national ELD fund with redress claim, targeting the responsible persons rather than the companies).

Not according to the Environmental Liability Act.
Hungary

1. Data gaps in your national system

a. what kinds of sources of information (formal, informal) on ELD implementation exist in your country?

There is no official source of information on the legal practice of the implementation of the ELD in Hungary. We note, that this is not reflecting a generally poor environmental data system or lack of access for the general public. For instance, from the homepage of the ministry responsible for environmental protection (Ministry of Agriculture) one can easily find the 100 major waste emitters and more than 20 groups of relevant information about waste management, but no information on emergency situations in connection with waste. The only place where the Hungarian national environmental data collections refer to environmental liability occurrences is the underground water section, but the boxes of this title are empty. Nevertheless, as a rebound effect, several organisations are very active in revealing at least sporadic data. Just to mention the two most outstanding examples from 2017:

- in April the 24th in Budapest, the Association of the Judges of Hungary and the Deputy Parliamentary Ombudsman responsible for Future Generations jointly organised a conference on the implementation of the ELD in Hungary
- in May the 24th, also in Budapest in the Europe House, Benedek Jávor, MP of the European Parliament organised a similar conference

Scientific interest and NGO research is also intensive in this field, for example:

- dr. Orsolya Csapó wrote her doctorship dissertation on “The limits of environmental responsibility – the effect of community law on the Hungarian legislation” (2015, lead of the topic was Prof. Gyula Bándi)
- EMLA published several case studies, including a case study of a major soil pollution by a pharmaceutical company, in 2012
  [http://www.emla.hu/sites/default/files/Kornyezeti_felelosseg_esettanulmany_1.pdf](http://www.emla.hu/sites/default/files/Kornyezeti_felelosseg_esettanulmany_1.pdf)

We note that one of the most valuable sources of information is the EU ELD homepage where the body text of the 2014 national reports can be found

b. what kind of data is available in general on the number, locations, size of damage, procedural data, results of remedy operations, costs, timing

No systematic data is available, only sporadic ones from conferences, the literature or NGO sources. For the 2014 EU national report about the practice between 2008 and 2013 the Hungarian government made the environmental inspectorates do a survey with really detailed data, including the type and extent of the environmental damages, the time of onset of it, the date of revealing the facts, and the time of finishing and the result of the cleaning up operations. While the Government made efforts to collect information on the costs of the remedy operations either at the side of the
environmental protection authorities or at the operators are seldom known. Also, there are some data on when the activity that caused environmental harm was run on the basis of an environmental permit.

c. what do we know specifically on key issues, such as the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defences that save the operator from responsibility, public participation and the responsibility of the experts.

Based on the 2014 Hungarian Report on ELD implementation we should establish that Hungary has not implemented Annex III of the Directive, therefore strict liability is used for all kinds or ELD cases. We do not see that any defences offered by the Directive would be used in Hungary. Even in the cases, where the environmental authorities acknowledge that the activity which led to the accident or longer term pollution was based on an environmental permit, the operators cannot be free from the responsibility to clean up the facility and its environment or to prevent the (further) environmental harm. Literature sources and presentations (including presentations from environmental administrators and judges) state that no environmental permits entitle the investors/operators to cause endangerment/harm in the environment.

2. The most pressing needs to enhance the effectiveness of your national ELD system

a. for preventing and remedying environmental damage is ELD used exclusively or together with other already existing legal tools or rather only these old tools are used?

Hungary tried to organically embed the ELD related provisions into its general administrative code, code of nature protection, acts on water management and on waste management, governmental decrees on the protection of surface and underground waters. All the remaining specific rules that were needed for full harmonisation are included in two new governmental decrees on preventing and remedying environmental damages and on establishing the damage caused to natural environment and detailed rules of environmental damage. This system approach in the harmonisation of the ELD has prevented situations where the old and new rules of responsibility for environmental damages are competing each other.

b. how are the cost and timeliness of your ELD procedures?

Based on the sporadic knowledge of the merit of the cases (having information on less than the half of the cases), we can establish that in the Hungarian ELD practice there are three main groups of expenses: i) the operator’s own expenses that were spent on preventing or remedying environmental damages. These costs remain most frequently unknown, but in the majority of the reported cases they do not exceed a several hundred thousand HUF (500-1.000 Euro). In some of the major cases which represent 1-2 % of the total, the expenses are one-two grades higher, several millions HUF (5.000-10.000 Euro); ii) the second kind of expenses are typically below one hundred thousand HUF (100-300 Euro) and they are the fees, fines and direct expenses (e.g. expert fees) of the authority and they are duly paid by the operators almost without exemption, however, iii) in
some major cases these expenses under ii) might climb up one-two grades higher (1,000-10,000 Euro) and they are seldom paid to the authorities.

As concerns timing, i) the majority of known cases are revealed right after the emergency happened, the cleaning up and further prevention works start immediately and they are finished within a couple of days; ii) in less occurrences, similarly to i) the emergencies are noticed by the operators and the authorities but the cleaning up works are delayed with 6 month or a year maximum; iii) totally different group, that is estimated as one third of the total, the environmental pollution situation stands for several years, 2-3 or even more. In such situations the authorities typically cannot clearly establish the starting date of the pollution, they are confronted with an escalated situation, for instance deeply and widely polluted underground water bodies. Either the remedy works or/and the legal administrative arrangement of such cases, for instance a legal dispute about the person and the extent of responsibility prolongs the end of the pending environmental pollution situation.

c. is public participation (including request for action according to the ELD) and related access to justice working well?

Less then 5 % of the known number of the cases happened with a certain level of participation of the local communities or NGOs. The Hungarian Greenpeace and the Environmental Management and Law Association together and independent from each other have had 4-5 cases in the last couple of years as they reported about in several conferences and publications. In one case (the widespread soil pollution of the Budapest, Illatos street chemical factory) the local municipality representative of the green party stepped up in the interests of the concerned dwellers of three districts of the capital city. None of the cases run into the court phase, and as it was reported by them the subjects of participation have had serious difficulties in accessing the data and information necessary for representing their communities/clients and also their rare motions were mostly overlooked by the authorities. A hint of success, however, from their side was that they raised awareness about these cases and this public pressure probably played a role in enhanced State efforts to handle these cases.

d. are the institutions of complementary and compensatory remediation of ELD used?

These terms are not used in the Hungarian ELD law and no data emerged about their practical implementation either.

3. Financial security in your country for the most serious environmental damages

a. how do you (and the relevant industrial circles of your country) evaluate the effects of ELD on the market competitiveness of the concerned companies?

As we have seen from the distribution of costs in Point 2.b) only a very little fragment of the cases entails with really considerable amount of expenses. The bulk of cases of environmental emergency situations cost much less, indeed if we evaluate cost and timing together we see that the majority of environmental damage instances is revealed and remedied within a couple of days – typically with
the expenses that are not meaningful for even a small and medium sized enterprise. This generally low level of expenses might be evaluated as having a neglectable effect on the market position of the companies.

In the literature we can find some consenting and dissenting opinions.

“The mandatory insurance for environmental responsibility – a possibility of ensuring recovery in the cases where the civil law damage payment rules will not work” by Sandor Kerekes, Erzsebet Kovacs and Monika Kek, Budapest University of Economics, 1997 (1-43). A basic study from the team of the leading environmental economist of Hungary from the time when the frames and the general content of the new and EU harmonized Hungarian environmental were clear. Kerekes has established many of the structural problems and principles of environmental responsibility that are unsolved and valid even today. Some of the problems Kerekes raises, however, were only existing in the special time and under the special circumstances of change of economic and political systems, such as abandoned sites of the Soviet Army or historical sites of certain economic or extracting industry from the time where practically no environmental norms restricted the economic activity in connection with “unlimited socialist industrial development”. The third case they mention is still an existing problem: some enterprises are aimed to gain short term, illegal purposes, and by the time they would have to respond for the damages they had caused in the environment, they transform or bankrupt. The law on bankruptcy put the environmental costs on the top of the list of priority expenses in vain: in such cases there are no money or other resources left for such purposes. A very important feature of the Kerekes study is that they do not suggest an overall environmental insurance construction for all the damages caused by the operators, in their – grades cheaper! – solution, the insurance company shall pay only when the perpetrator has disappeared with no other financial guarantees left.

b. are there alternative solutions to insurance available to achieve financial security and honour the polluter pays principle that do not entail with significant financial burden on your companies (e.g. financial incentives rather than liability regimes, national ELD fund with redress claim, targeting the responsible persons rather than the companies)?

In the mirror of the findings in the above Point 3 a) we might say that this question has minor practical relevance. Even if so, the market of financial security solutions should be complex enough and shall contain solutions such as:

- forming a security fund within the account of the companies dealing with environmentally dangerous activities; this solution has the advantage that the companies selecting this method might enjoy tax allowances or levies for the amount separated in the company security fund.
- depositing environmental security bond at a bank or on the account of the environmental authority; this is advantageous because enables the authority to take the quickest and most effective measures in a case of an environmental emergency;
- forming a pool of the companies that belong the same of ELD relevant category, running similar activities, using similar dangerous technology, etc.; an advantage could be that the financial safety construction is tailored exactly to the needs and specialities of the companies within the pool, also it can be cheaper than an offer from an outside insurance company or bank.
Slovakia

1. Data gaps in your national system

a. what kinds of sources of information (formal, informal) on ELD implementation exist in your country?

According to the Act no. 359/2007 Coll. on prevention and remediation of environmental damages Ministry of Environment of the Slovak Republic has established the Information system on prevention and remediation of environmental damages. This system was established in order to gather information on concrete cases concerning environmental damages or their imminent threats. However so far it contains two registered cases. The system is administered by the Slovak Environment Agency who beside this task is also very important contact point and expert in this topic. Annually, in spring time, they gather information from all District offices and Slovak Environmental Inspections (competent authorities for ELD cases according to the Act no. 359/2007 Coll.) on cases of environmental damages and their threats. So the best source of information in respect to the implementation of ELD legislation is the Slovak Environment Agency¹⁰.

b. what kind of data is available in general on the number, locations, size of damage, procedural data, results of remedy operations, costs, timing

As it has been previously said there have been so far two cases registered in the online information system. It does not mean that environmental damages do not happen in Slovakia but rather that this legislation is not practically applied and cases are solved under other legal regime. VIA IURIS organized in 2016 information seminar for civil society organizations and activists and among other topics we informed participants on the ELD legislation and the manner it could be used by them.

Registered cases in the online system contain following data:

1. Data on location and time of the occurrence of the damage
2. Data on the operators (natural or legal persons)
3. Specification of the location
4. Description of the type and extent of the damage
5. Measures
6. Administrative proceeding according to the Act no. 359/2007 Coll.
7. Judicial proceedings
8. Annexes (e.g. evidences, photos)

¹⁰ [http://www.sazp.sk/en/the-environment/]
c. what do we know specifically on key issues, such as the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defences that save the operator from responsibility, public participation and the responsibility of the experts.

So far there has been little experience with implementation of the Slovak ELD legislation so with regards to some aspects of present question we can only provide theoretical answers.

According to the Slovak legislation there are cases of environmental damages where will apply strict liability and other cases where the fault of the operator has to be established.

National legislation equally to the directive differentiate two types of liable operators.

First there is a category of operators who operate or control occupation activities considered risky as such. These are for instance industrial or agricultural activities, waste management operations, transport of dangerous goods or activities related to GMO manipulation. All these activities are listed in the Sec. 1 par.2 of the Act.  
When damage or imminent threat were caused by an activity listed in this Section 1 par.2 of the Act there is no need to establish a fault of the operator to consider him accountable. So here strict liability applies. 
The second type of liability regime applies to operators who perform any type of occupation activity other than listed in Section 1 par. 2 which may cause damage on protected species and natural habitats protected under Natura 2000. However, this requires the establishment of operator’s fault or negligence.

In respect to the protected species and habitats of European importance (Natura 2000), Slovak Environmental Agency published a methodology of the evaluation of the environmental damages on species and habitats. This methodology prepared by the experts from Daphne- Institute of applied ecology contains methods and tools how to evaluate these damages and also how to choose adequate remedial measures. This manual may be very useful for public administration bodies in evaluating concrete cases.

Since 2016 VIA IURIS has been raising awareness among civil society ad environmental organizations on the existence of the ELD legislation. As a consequence of that few cases have been recently initiated under ELD regime. Among dilemmas that have been raised during these new cases by authorities and operators figured the issue of permit defence. The question was whether in case where permitting authorities give authorisation for the occupational activity and operator runs the installation complying with all permit conditions and despite that the damage occurs if rather state should not be held responsible. So for instance if authority has permitted activity under such conditions that occurrence of damage was inevitable who should be responsible.

In August 2017 civil society Slatinka presented request for action before the competent District authority in Levice, concerning the case of the damage caused by the hydroelectric power plant located on River Hron. Slatinka pointed to the damage on the water and surrounding biotopes which have been dried up since the installation of the power plant. A part from this continuous damages on water and biotopes, in June 2017 there happened a serious damage on migrating barbell fish.

Hundreds of these species migrating from Danube to river Hron for their spawning were found dead or dying close to the hydro power plant. Fish were cut by the power plant’s turbines. After request for action was presented before the District authority in Levice this authority denied its competence and forwarded the case to the authority who was permitting the operation. Slatinka with VIA IURIS’ assistance addressed them letter pointing to the wrong application of the ELD legislation. Finally this was clarified and District authority should be considering this case. So we are still waiting for the decision in matter.

2. The most pressing needs to enhance the effectiveness of your national ELD system

a. for preventing and remedying environmental damage is ELD used exclusively or together with other already existing legal tools or rather only these old tools are used?

There is very little experience with ELD application in Slovakia. With new recent cases we hope we could enhance its application by giving instructions to NGOs presenting requests for action and cooperating with the Slovak Environment Agency who on their side give instructions to state authorities. Only after this experience with application practice we will be able to evaluate the deficiencies of the system.

However, what we already know it is the fact that the national ELD legislation exists in an isolation in relation to other sectorial laws on protection of the environment. ELD has been transposed as a separate law and no interconnection with other sectorial law was made.

For instance in case of damage on water there is a concurrence of the water law act with the ELD legislation. While under water law act Environmental inspection would be competent to address the damage on water and adopt some measures, under ELD legislation it is the District office of the territory where the damage occurred. This conflict of competence is not solved in the legislation. In practice the tendency is to lead the case under water act law which is already a well known regime. Though this act misses some aspects that has brought ELD regime. For instance under water act the civil society or environmental NGOs do not have any standing and cannot thus keep an eye on the process and evaluate whether the measures are adequate and sufficient to prevent further damage.

Other problem detected in respect to weak application of ELD in Slovakia is lack of personal capacities of competent authorities. In Slovakia in ELD cases are primarily competent district offices. However in each district office this agenda was delegated to one sole person who already had have some sectorial agenda. For instance a person in District office in Banská Bystrica apart from ELD is in charge of the EIA.

b. how are the cost and timeliness of your ELD procedures?

This is hard to evaluate because of lack of the cases.
c. is *public participation* (including request for action according to the ELD) and related access to justice working well?

This is to be seen in upcoming month with the cases that are still at the initial phase where competent authorities did not reply to the request for action yet.

d. are the institutions of *complementary and compensatory remediation* of ELD used?

Due to the same, previously mentioned reasons we cannot answer this question.

3. **Financial security in your country for the most serious environmental damages**

a. how do you (and the relevant industrial circles of your country) evaluate the effects of ELD on the *market competitiveness* of the concerned companies?

b. are there *alternative solutions* to insurance available to achieve financial security and honour the polluter pays principle that do not entail with significant financial burden on your companies (e.g. financial incentives rather than liability regimes, national ELD fund with redress claim, targeting the responsible persons rather than the companies).

In this respect we contacted Slovak Environment Agency who is the state coordinator and of the ELD agenda and who promote and monitor implementation of ELD in Slovakia. They also organize information seminar for state authorities but even for operators. They do not recall major protests from the side of the operators at introducing obligatory financial security. They remembered only one operator running the activity of the transport of dangerous substances who considered it as liquidating. Later on even pharmacies were protesting against prices offered by Insurance companies.

In Slovak Republic there is also possibility to opt for bank guarantees - form of purpose-bound account set up by the operator for the benefit of the state. In case of environmental damage the money is freed up for the implementation of the measures. There exists also a possibility of *common insurance and securities of several companies in the form of joint insurance.*
Spain

1. Data gaps in your national system

a. what kinds of sources of information (formal, informal) on ELD implementation exist in your country?

The website of the Ministry of Agriculture, Fisheries, Food and Environment contains general and some specific information to assist operators and economic actors to implement the environmental liability regime:


http://www.mapama.gob.es/es/calidad-y-evaluacion-ambiental/temas/responsabilidad mediambiental/comision-tecnica-de-prevencion-y-reparacion-de-danos-medioambientales/

http://www.mapama.gob.es/es/calidad-y-evaluacion-ambiental/temas/responsabilidad mediambiental/analisis-de-riesgos-sectoriales/

The website of the Department of Territory and Sustainability of Cataluña contains general info on the EL regime but nothing on implementation beyond transposition:

http://mediambient.gencat.cat/ca/05_ambits_dactuacio/empresa_i_produccio_sostenible/responsabilitat_ambiental/

The website of the Regional Ministry of Environment of Madrid contains very general information on the EL regime


Several guidelines have been elaborated providing information on the EL regime from a very general point of view. Some examples are:


These provide information on how to implement the EL regime but there is not available information on how the EL regime has been implemented in the course of the last ten years since the transposition of the ELD into Spanish Law.
b. what kind of data is available in general on the number, locations, size of damage, procedural data, results of remedy operations, costs, timing

None. There is no registry or database available in Spain providing this kind of information. To have access to it it is necessary to file an access to environmental information request to each competent body of the 17 Autonomous Communities in Spain. IIDMA carried out that exercise at the end of 2015. However, not all the competent bodies provided in an exhaustive manner the information requested.

c. what do we know specifically on key issues, such as the scope of using (reasons of not using) strict liability; key definitions (such as significant environmental damage), defences that save the operator from responsibility, public participation and the responsibility of the experts.

Strict liability has been used in limited occasions because sectoral regimes are in general applied.

Definition of environmental damage is the same as in the Directive but with cross references to national laws.

Prevention and avoidance measures are required to any operator of economic activities regardless they are in Annex III. In this sense, the Spanish regime is stricter than the ELD. The Spanish legislation provides the same kind of defences as those provided in article 8 of the ELD.

Public participation concerning some of the stakeholders such as economic operators have been very intense. However, NGOs participation has been very limited until now. We are only aware of a case in which an NGO used article 12 of the ELD in Spain to request the Autonomous Community of Cataluña to take action in a case of a potash mine for having caused damages to a water body.

2. The most pressing needs to enhance the effectiveness of your national ELD system

a. for preventing and remedying environmental damage is ELD used exclusively or together with other already existing legal tools or rather only these old tools are used?

In Spain in general competent authorities, mainly from Autonomous Communities have preferred to use the sectoral regime than the environmental liability regime. IIDMA finds that one of the reasons is due to the misinterpretation of one of the provisions in the Spanish Environmental Liability Law regarding the application of both regimes. Article 6.3 of that Law establishes:

If the application of other laws on prevention, avoidance and remediation of environmental damages had been accomplished by the liable person, the actions provided in this Law will not be taken.

However, sectoral laws do not provide the same level of measures. We note that the core of misinterpretation could be that the above provision of Art. 6.3 refers only to the measures the liable person shall take in order to handle the environmental emergency situation, not to the legal status of responsibility of the liable person.
b. how are the cost and timeliness of your ELD procedures?

Administrative procedures do not entail any costs unless you use a lawyer. In judicial procedures the loser pays principle applies but NGOs complying with certain requirement can have access to legal aid. It is almost impossible to provide an amount on the costs of a judicial procedure as it depends on the value given to it depending on the issue in contention.

In Spain procedures can be very lengthy. The Environmental Liability Law provides that the administration has to communicate the applicant of any environmental liability action request on its decision to proceed or not within 10 days after the request has been filed. However, it is important to highlight that in general, no public administration complies with their obligation to respect deadlines, such is the case of the one month deadline on access to environmental information requests or even the general deadline to provide a response to a citizen within a three months deadline from the filing of any requests established by the Spanish Administrative Procedure Law.

Judicial procedures are very lengthy as well. The average is around two years and a half.

c. is public participation (including request for action according to the ELD) and related access to justice working well?

See above on request for action. On access to justice at this date in general there is no obstacle for NGOs as the Aarhus Law recognizes legal standing to NGOs complying with the following criteria:

i) Having among their objectives stated in their by-laws the protection of the environment in general or of one of its elements.

ii) Having been legally established at least two years before the initiation of the legal challenge and having been active during that period to accomplish the objectives provided in their by-laws12.

iii) According to their by-laws, develop their activity within the territorial scope affected by the administrative act or omission.

a) are the institutions of complementary and compensatory remediation of ELD used?

In some cases in which the EL regime has been applied these institutions have been used.

3. Financial security in your country for the most serious environmental damages

a. how do you (and the relevant industrial circles of your country) evaluate the effects of ELD on the market competitiveness of the concerned companies?

Although Spanish Law provides for the obligation to have a financial security, this obligation has not entered into force yet 13. One of the main reasons precisely has been the pressure from certain

---

12 This requires legal registration in the specific registry of non-for-profit organisations: the associations registries or the foundations registries.

13 See Barreira, A. Is mandatory financial security helping to implement the polluter pays principle? - A summary on the Spanish situation – available at:
sectors. However, it is important to emphasise that if environmental damage that has been caused is imminent and the EL regime applies the fact of not having a financial security does not exempt from liability. Thus, from a competitiveness point of view this argument is a bit tricky as it can be worse not having a financial security.

b. are there alternative solutions to insurance available to achieve financial security and honour the polluter pays principle that do not entail with significant financial burden on your companies (e.g. financial incentives rather than liability regimes, national ELD fund with redress claim, targeting the responsible persons rather than the companies).

See answer above.