

# Preparing, Negotiating and Implementing the ELD: The EU experiences so far

Alexandra Vakrou,  
EC, DG Environment  
*Paris, 3-4 December 2008*

## Key points of this presentation

- Presentation of the historical background for the development of the Directive
- Identification of some key choices made through the concept development and negotiations
- Key elements of the ELD

# Historical background

1976: Proposed Directive on toxic and dangerous waste

- provision for strict liability for personal injury from such waste has been deleted

1983: Proposed Directive on transfrontier shipment of hazardous waste

- provision for strict liability for damage caused by waste – but the proposed Directive not adopted

# Historical background

- 1984: Directive on transfrontier shipment of hazardous waste
  - statement that the Council will determine conditions for civil liability of producer for damage caused by hazardous waste and introduction of a “system of insurance”

# Historical background

- 1986 Sandoz – pollution of Rhine  
Council Resolution requesting Commission to propose Regulation imposing civil liability for environmental damage to Rhine and other main transportation routes in EU  
The Parliament issues similar Resolution

# Historical background

- 1987/8: Commission study shows few MSs have legislation imposing civil liability for environmental damage
- begins preparation of Green Paper on civil liability for remedying environmental damage
  - continues work on proposed Directive on civil liability for waste

# Historical background

- 1989: Provisions for liability for bodily injury, property damage and clean-up costs and for financial security in proposed Directive on civil liability for damage caused by waste
  - proposed Directive abandoned by 1991
- 1991: Provision for liability for property damage from waste in proposed Directive on landfill of waste
  - Provision abandoned by 1996

# Historical background

- 1991: Draft Green Paper on remedying environmental damage
- discusses possibility of integrating civil liability with joint compensation schemes



# Historical background

1993 Commission issues Green Paper on remedying environmental damage

Paper includes discussion of:

- various concepts of liability for environmental damage including past pollution incidents and retroactive implementation of liabilities
- adequacy of remedies including financial security by persons likely to damage environment
- liability system for remedying environmental damage similar to provisions in the US
- proposed Convention on civil liability for damage from activities dangerous to the environment

The GP Appears to favour **strict liability system** for environmental damage with joint compensation schemes (possibly reflecting the Superfund programme)

# Historical background

1993 to 96: Discussions and Comments on Green Paper and various meetings, hearings, draft papers and studies, including 1994 Resolution by the European Parliament requesting Commission to submit proposed Directive on civil liability for future environmental damage

But the Commission focus on whether to accede to the Lugano Convention or base Directive on it

# Historical background

1997: Communication from DG Environment to College of European Commissioners requesting decision on potential initiative on environmental liability

The Commission decides to issue a White Paper due to public/stakeholder amidst opposition to Directive

# Historical background

---

1999: *Erica* oil spill off coast of Brittany

2000: Commission issues White Paper on civil liability for environmental damage

# Historical background

White Paper suggests most appropriate option is Directive providing “for strict liability for damage caused by EC regulated activities, with defences, covering both traditional [bodily injury and property damage] and environmental [remediation] damage, and fault-based liability for damage to biodiversity caused by non-dangerous activities”

No requirement for financial security; recommends discussions with insurers and bankers to stimulate financial guarantee instruments

# Historical background

2001: Commission issues a Working Paper on prevention and restoration of significant environmental damage

- approach switches from civil liability regime and Lugano Convention approach to public law regime
- MSs have the option of requiring insurance for potential liabilities

# Historical background

21 February 2002 Commission submits proposed Directive

- no requirement for financial security, but MSs to encourage development of methods of providing financial security, including insurance, for occupational activities

# Historical background

2002/4 - Legislative process with Council taking lead

- Parliament originally favours gradual introduction of financial security for listed EC legislation

30 April 2004 – Environmental Liability Directive enters into force

30 April 2007 – End date for completion of MS transposition



# Overview of the ELD

## Liable persons

- ❑ operator of occupational activity carried out under EC legislation listed in ELD is strictly liable for preventive or remedial measures due to imminent threat of, or actual, environmental damage to
  - land
  - water
  - protected species and natural habitats
- ❑ operator of occupational activity not carried out under listed EC legislation is liable for preventive or remedial measures due to imminent threat of, or actual, environmental damage to
  - protected species and natural habitats
  - provided that operator is negligent or otherwise at fault

# Overview of the ELD

## Environmental damage thresholds

- Land: significant risk of adverse effect on human health
- Water: significant effect on ecological, chemical or quantitative status and ecological potential of waters
- Protected species and natural habitats: significant adverse effect on attainment or maintenance of favourable conservation status

# Overview of the ELD

## Self-executing provisions

Operator must carry out necessary preventive measures “*without delay*” if there is imminent threat of environmental damage and must notify competent authority “*as soon as possible*” if such measures fail to dispel threat

Operator must take “all practicable steps ... *immediately* [to] control, contain, remove or otherwise manage [damage]” caused by operator and notify competent authority “*without delay*”

# Overview of the ELD

## Remedial measures

Land: removal of significant risk of adverse effect on human health

Water and protected species and natural habitats

- primary remediation (baseline)
- complementary remediation (alternative site)
- compensatory remediation (interim losses)

# Overview of ELD

## Key Elements

Prospective liability only

Joint and several or proportionate liability at option of Member State

30-year limitation period

5-year period for cost-recovery action by competent authority

No liability for bodily injury, property damage or economic loss

# Overview of ELD

## Exceptions

Mandatory “defences” – imminent threat of, or actual, environmental damage

- caused by third party despite appropriate safety measures
- compliance with governmental authority’s order

Optional “defences” – operator not at fault or negligent and environmental damage caused by

- compliance with permit
- state-of-the-art activity

**Involvement of civil society and non-governmental organisations**

# Overview of the ELD

## **No mandatory financial security**

MSs to “encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under [ELD]”

European Commission to submit report by 30 April 2010 to include “the availability at reasonable costs and on conditions of insurance and other types of financial security for [Annex III] activities [and] shall also consider ... a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security”

# What the ELD allows?

- The Directive allows for **great flexibility** through:
  - Subsidiarity of the Member States to be more ambitious if they wish so
  - Provision for both general and facultative exemptions
- The Directive leaves **wide margin** of discretion to Member States on certain important issues:
  - permit and development risk defences,
  - financial security,
  - joint and several or proportional liability
- Subsequently, the implementation of the Directive **will follow different models** according to the choices that Member States will make when transposing the Directive.



# ELD – Current state of transposition as of 1st December 2008

- **19 MS have notified complete transposition** as of today (in chronological order): Italy, Lithuania, Latvia, Hungary, Germany, Romania, Slovakia, Sweden, Spain, Estonia, Cyprus, Malta, Bulgaria, the Netherlands, Czech Republic, Denmark, Poland, Portugal, Belgium
- **8 MS are still failing to transpose:** Austria, Finland, France, Greece, Ireland, Luxemburg, Slovenia, United Kingdom

# Experiences with ELD cases in EU

- First reported case in Spain.
  - The case of **Gaviotas de Gran Canaria**
  - Spain used it as a pilot case for ELD implementation in Spain.
  - Main difficulty reported was the calculation of values for the Compensatory Remediation
  - Information and documentation of the case is available at:  
[http://www.mma.es/portal/secciones/participacion\\_publica/pdf/experienciapiloto\\_canarias.pdf](http://www.mma.es/portal/secciones/participacion_publica/pdf/experienciapiloto_canarias.pdf)
- Other cases have been reported in Germany.

# Commission's work on ELD

**Accessible at:**

**<http://ec.europa.eu/environment/liability/>**

## Some useful links:

**Link to the most recent MEMO (07/157), with Q&A:**

- **<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/157&#38;format=HTML>**

**Commission's Studies related to Environmental Liability  
(updated frequently when new reports are available)**

- **<http://ec.europa.eu/environment/enveco/liability/index.htm>**



*Thank you very much  
for your attention*