



Environmental Liability Directive

Implementation and enforcement update

European Commission, DG ENV

April 2022

Overview:

- ELD 2nd evaluation 2023
- Court of Auditors' special report on the polluter pays principle
- European Parliament Resolution on the liability of companies for environmental damage
- Study – Facilitating the enforcement of the ELD by competent authorities
- Guidelines on Environmental Damage

ELD 2nd evaluation 2023 - Context

- Evaluation as part of the EU policy cycle and the Better Regulation agenda
- Specific legal obligation - Article 18 of the ELD,
- EU Action Plan: [‘Towards a Zero Pollution for Air, Water and Soil’](#)
- [Call for evidence](#) published in November 2021 on ‘Have your Say’ portal
- Supported by external experts through a study contract

ELD 2nd evaluation 2023 - Scope

Evaluation focus:

- ELD overall functioning
- Whether the Commission's and Member States' actions have improved the implementation and enforcement of the ELD, since the Commission's first [evaluation](#) of 2016
- European Parliament [Resolution](#) of 20 May 2021 on the liability of companies for environmental damage,
- Court of Auditors' [special report](#) of 5 July 2021 on the polluter pays principle.
- 5 Evaluation criteria: effectiveness, efficiency, relevance, coherence and EU added-value of the ELD, 14 questions defined in the Call for evidence

ELD 2nd evaluation 2023 - Questions

Effectiveness

1. To what extent have the objectives of the ELD have been achieved since 2016?
2. Are there any factors that have limited the effectiveness of the ELD?

Example subquestions:

- 2.5 What national legislation has been used to handle ELD occurrences instead of national ELD legislation (IED legislation, national liability legislation, etc.)?
 - 2.7 Have the preventive/remedial measures under national non-ELD legislation ensured the same minimum standard of environmental protection as the ELD?
 - 2.8 Can national non-ELD legislation be applied jointly with national ELD legislation instead of being applied instead of national ELD legislation?
3. What is the extent to which stakeholders have been engaged in the process of improving the implementation of the ELD at national level?

ELD 2nd evaluation 2023 - Questions

Efficiency

4. To what extent have costs of the ELD been justified, overall and for different stakeholder groups, given any benefits that the ELD has delivered?
5. Are there significant differences between Member States in implementation and efficiency, and if so, what is causing them?
6. To what extent have actions undertaken by the Commission and Member States since 2016 (particularly in response to the REFIT Evaluation) made the
7. Is the current approach, where financial security for ELD liabilities is not mandatory, appropriate?
8. Can the efficiency of the ELD be further improved?

ELD 2nd evaluation 2023 - Questions

Relevance

9. Does the ELD still correspond to the current needs of the EU?
10. Is the scope of the ELD still appropriate?
11. Has the ELD been flexible enough to respond to new and/or emerging issues?

Coherence

12. To what extent is the ELD internally consistent and coherent?
13. To what extent is the ELD coherent with other EU environmental policies and wider EU policies?

EU added value

14. What is the EU added value of the ELD compared to what is likely to have been achieved by Member States in its absence?

ELD 2nd evaluation 2023 - data sources:

- Previous studies
- Feedback received for the [Call for evidence](#)
- Member States Reporting: Article 18 ELD + Annex VI
- Desk research
- Open public consultation
- Targeted consultations and Interviews
- Case studies: covering both ELD and non ELD cases

ELD 2nd evaluation 2023 - Timeline:

- **November 2021** – Call for evidence published
 - November – December 2021 – feedback collection (4 weeks)
- **January - April 2022** – Study inception phase
- **March - October 2022** – Study execution: evidence gathering and analysis, stakeholder consultations
 - 30 April 2022 – Member States Reporting time limit
 - May - July 2022 - online public consultation (12 weeks)
 - 7 June 2022 - next meeting of the ELD Expert Group
- **September 2022- January 2023** – Study execution: conclusions and final report
 - November - Workshop with stakeholders
 - November - ELD expert group consultation
- **30 April 2023** – legal deadline to publish the evaluation

Court of Auditors' special report on the polluter pays principle

Adopted on 5 July 2021

Recommendations:

- Insufficient criteria used in definition of environmental damage (water and land damage)
- Insufficient take-up of financial security

Commission response:

- The Commission agreed with the concerns raised by ECA
- The Commission agreed to further consider both issues in the context of the evaluation

European Parliament Resolution on the liability of companies for environmental damage

Adopted on 20 May 2021(2020/2027(INI))

Places ELD in much broader context that includes civil liability, rights of victims, environmental crime, detection and enforcement, corporate due diligence and reporting, voluntary approaches, public procurement and trade

European Parliament Resolution on the liability of companies for environmental damage

Points relevant to ELD which go in the direction of new legislation:

10 from directive to regulation;

24 scope of environmental damage and operator;

25 alignment with the Paris Agreement;

28 scope of Annex III;

38 secondary and chain liability;

40 limit defences;

41 possible alignment with civil liability regimes;

43 mandatory financial security;

44 fall-back funds – either national or EU.

European Parliament Resolution on the liability of companies for environmental damage

Points relevant to ELD which go in the direction of non-legislative measures:

15 create EU task-force of ELD experts;

16 improve data collection;

18 and 19 support for victims of environmental damage;

26 study on diffuse pollution;

27 guidance on environmental damage.

Study – Facilitating the enforcement of the ELD by competent authorities

Original scope:

- Review of national ELD legislation and national liability legislation in each Member State
- Comparison of similarities and differences
- Analysis of differences and their effect on implementation and enforcement of the ELD
- Recommendations to Member States and the European Commission

Scope extension

- European Parliament recommendations
- Court of Auditors recommendations

Study – Facilitating the enforcement of the ELD by competent authorities

Main reasons for enforcing national liability legislation instead of national ELD legislation

- lower thresholds in the national liability legislation – so it is implemented first, before assessing whether the ELD applies
- changing to national ELD legislation may be inefficient and expensive
 - different competent authorities for national liability legislation / national ELD legislation
 - carrying out an assessment to determine whether the ELD applies is often expensive and lengthy
 - familiarity with national liability legislation versus unfamiliarity with national ELD legislation
- National liability legislation is more stringent

Study – Facilitating the enforcement of the ELD by competent authorities

Main reasons for enforcing national liability legislation instead of national ELD legislation (continued)

- National liability legislation is generally easier to enforce
 - Thresholds are more precise than 'vague' thresholds in the ELD
 - Anyone can be liable not only an operator
 - Lack of data on the condition of a natural resource at the time it is damaged
 - No need to determine whether damage reaches or exceeds a threshold under environmental permitting legislation
 - Liability automatically attaches because breaches of the conditions or unauthorised activities are an unlawful act
- Wide range of enforcement tools in environmental permitting legislation
 - warnings, cautions, prohibition orders, revocation orders, requirements to remediate land and water (and sometimes biodiversity) damage, fines, imprisonment

Study – Facilitating the enforcement of the ELD by competent authorities

Recommendations to Member States:

- Clarify application of national ELD legislation and national liability legislation to potential ELD incidents
- Improve consultation and screening processes for potential ELD incidents
- Integrate CJEU rulings into national ELD legislation and policies
- Applicable date of the ELD
- Significance threshold for biodiversity damage
- Precautionary principle
- Integrate Commission's Guidelines on environmental damage into ELD legislation and policies
- Geographical extent of water and biodiversity damage
- Strengthen implementation and enforcement of preventive measures
- Improve competent authorities' consideration of comments under public participation provisions

Study – Facilitating the enforcement of the ELD by competent authorities

Recommendations to the European Commission

- Consider extending the scope of biodiversity damage
- Consider combining land and groundwater (and surface water) damage
- Consider aligning the ELD with the Industrial Emissions Directive and the Environmental Crimes Directive

GUIDELINES ON ENVIRONMENTAL DAMAGE

- **Guidelines adopted by the Commission on 25 March 2021.**
- **Guidelines published in the Official Journal on 7 April. Reference: OJC 118, 7.4.2021, P1-49**
- **Article 2 defines damage to species and natural habitats protected by the Birds and Habitats Directives (biodiversity damage), water damage, and land damage**
- **Guidelines, but binding on the Commission**

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

Guidelines providing a common understanding of the term 'environmental damage' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage

(2021/C 118/01)

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1. INTRODUCTION

1. The purpose of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage ⁽¹⁾ (the 'Environmental Liability Directive' or the 'Directive') is to establish a framework of environmental liability based on the polluter pays principle, to prevent and remedy environmental damage ⁽²⁾. An amendment adopted in 2019 ⁽³⁾ requires the European Commission to develop guidelines providing a common understanding of the term 'environmental damage' as defined in Article 2 of the Directive ⁽⁴⁾. The present Notice sets out these Guidelines.

⁽¹⁾ OJ L 143, 30.4.2004, p. 56.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0035-20190626&qid=1568193390794&from=EN>

⁽²⁾ Article 1.

⁽³⁾ The Directive has been amended four times, by, respectively, Directive 2006/21/EC, OJ L 102, 11.4.2006, p. 15, Directive 2009/31/EC, OJ L 140, 5.6.2009, p. 114, Directive 2013/30/EU, OJ L 178, 28.6.2013, p. 66, and Regulation (EU) 2019/1010 (OJ L 170, 25.6.2019, p. 115).

⁽⁴⁾ The effect of the amendment is to insert into Article 18(3) of the Directive the following text: 'By 31 December 2020, the Commission shall develop guidelines providing a common understanding of the term 'environmental damage' as defined in Article 2.'

GUIDELINES ON ENVIRONMENTAL DAMAGE

Guidelines state among other things:

- Biodiversity damage: sufficient for adverse effects to occur only at a local level; not necessary for them also to occur at a national and EU level
- Water damage: can occur when damage affects only part of a water body as well as the entire water body
- Land: recognises that damage to land and groundwater from pollutants may occur at the same time



European
Commission

THANK YOU!