THE IMPORTANCE OF THE RULE OF LAW IN BEATING POLLUTION: THE
ESTABLISHMENT AND REINFORCEMENT OF THE POLLUTER PAYS PRINCIPLE (PPP)
AND THE ENVIRONMENTAL RESPONSIBILITY IN THE WESTERN BALKANS

The need to improve implementation and enforcement of the Environmental Liability

Francesco Andreotti
IMPEL - European Union Network for the Implementation and Enforcement of
Environmental Law
ISPRA - Italian National Institute for Environmental Protection and Research
<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) EU MSs experience on ELD enforcement</td>
</tr>
<tr>
<td>2) IMPEL CAED project</td>
</tr>
<tr>
<td>3) Future implementation of the ELD: perspective</td>
</tr>
</tbody>
</table>
EU MSs experience on ELD enforcement

A BRIEF HISTORY OF ELD

**Environmental Liability Directive (ELD) 2004/35/CE**

- **2004**
  - 30 April

- **2006**
  - Transposition of the last country & 1st COM Report

- **2009**
  - Directive 2009/31/EC

- **2010**
  - Directive 2013/30/EU & 1st countries Report (next by Apr 2022)

- **2013**
  - 2nd COM Report & REFIT Evaluation (next by Apr 2023)

- **2016**
  - EP Resolution (2017) 0414

- **2017**
  - EU Regulation 2019/1010

- **2019**
  - EP Resolution (2021) 0259

- **2021**
EU MSs experience on ELD enforcement

UNDERLYING AND RELEVANT PRINCIPLES TO ELD

Principle of proportionality
Precautionary principle
Preventive action at source
Polluter pays principle
EU MSs experience on ELD enforcement

SCOPE AND APPLICABILITY OF ELD

Causality Link

Rule

Exception

Operational activities in Annex III of ELD

Operational activities not in Annex III of ELD

Land damage

Water damage

Damage to NHPS

Strict liability

Fault-based liability
EU MSs experience on ELD enforcement

PREVENTION AND REMEDIATION REQUIREMENTS

IMMINENT THREAT

[Diagram showing resource service level over time with labels for incident date, start primary/complementary remediation, baseline, interim losses, natural recovery path, and recovery path with primary or complementary remediation.]
EU MSs experience on ELD enforcement

**ADMINISTRATIVE ENFORCEMENT**

- **Operator** whose activity has caused an imminent threat of, or actual, environmental damage must prevent or remediate it.

- **Competent authority** determines which measures the operator must carry out.

- In case of damage, **operator proposes** remedial measures to competent authority.

- **Competent authority** requires an operator to do so if the operator has not already done so, also by giving instructions.
## EU MSs experience on ELD enforcement

**ANNUAL AVERAGE OF ENVIRONMENTAL DAMAGES (2014-2019)**

<table>
<thead>
<tr>
<th>Country</th>
<th>Annual Average of Environmental Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>0.14</td>
</tr>
<tr>
<td>Cyprus</td>
<td>0.17</td>
</tr>
<tr>
<td>Estonia</td>
<td>1.3**</td>
</tr>
<tr>
<td>Finland</td>
<td>0.3**</td>
</tr>
<tr>
<td>Germany</td>
<td>10</td>
</tr>
<tr>
<td>Greece</td>
<td>11.7**</td>
</tr>
<tr>
<td>Hungary</td>
<td>53.7</td>
</tr>
<tr>
<td>Italy</td>
<td>4 (2017-18)</td>
</tr>
<tr>
<td>Portugal</td>
<td>0.2</td>
</tr>
<tr>
<td>Spain</td>
<td>3.09</td>
</tr>
<tr>
<td>Sweden</td>
<td>0.5</td>
</tr>
<tr>
<td>Latvia</td>
<td>1.83</td>
</tr>
<tr>
<td>Lithuania</td>
<td>0.63</td>
</tr>
<tr>
<td>Malta</td>
<td>0.25</td>
</tr>
<tr>
<td>Poland</td>
<td>54.45***</td>
</tr>
</tbody>
</table>

* Some MS are not reported due to the absence of reported environmental damage.

** Aggregate number of cases of environmental damage and threat of environmental damage.

*** This number covers, in most cases, soil and groundwater contamination cases that, in some countries, are managed within the framework of the regulations on soil protection and reclamation.
CONTENTS

1) EU MSs experience on ELD enforcement

2) IMPEL CAED project

3) Future implementation of the ELD: perspective
The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) is an international non-profit association of the environmental authorities of the EU Member States, acceding and candidate countries of the European Union and EEA countries.

The Network’s objective is to create the necessary impetus in the European Community to make progress on ensuring a more effective application of environmental legislation.

The core of the IMPEL activities concerns awareness raising, capacity building and exchange of information and experiences on implementation, enforcement and international enforcement collaboration as well as promoting and supporting the practicability and enforceability of European environmental legislation.
IMPEL CAED PROJECT

SCOPE

- Environmental Liability Directive 2004/35/CE
- Environmental damage to the natural resources protected by the ELD
- Environmental damage and the imminent threat of damage
- Administrative procedure
- The early stages of environmental damage assessment, referred to as the phase of ‘ascertainment’
IMPEL CAED PROJECT

OBJECTIVES

As regards environmental damages and imminent threat of damages:

- identifying **best practices** for conducting proper investigations
- providing a **practical guide** and **useful tools** to enhance competent authorities and practitioner’s capability
- identifying **criteria for the assessment** under ELD

*The CAED project was included in the Multi-Annual ELD Rolling Work Programme (MARWP) 2021-2024 of the EU Commission, in the area of capacity building activities, in particular as activity 1.3: Help(desks) for practitioners, providing information, assistance and assessment support for risk and damage evaluations*
### IMPEL CAED 1st Report

<table>
<thead>
<tr>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Analysis of a collection of <strong>32 case studies</strong> and <strong>ascertainment practices</strong> of ELD and non-ELD environmental cases in various MSs</td>
</tr>
<tr>
<td>✓ Identification of MSs <strong>common and different approaches</strong>, <strong>strengths, and weaknesses</strong> of the administrative procedure for the ascertainment</td>
</tr>
<tr>
<td>✓ <strong>Evaluation of the guidance</strong> provided by some MSs, with particular reference to the parts related to the determination of environmental damage</td>
</tr>
</tbody>
</table>

*The CAED report is the first of the IMPEL Network products concerning the ELD implementation and the environmental damage assessment in general, moreover, it is the first European report entirely devoted to the ascertainment/investigation phase of the whole process of the environmental damage assessment*
**IMPEL CAED 1st Report**

**NEW APPROACH FOR THE ASCERTAINMENT**

The 1st report proposed a **new approach**, made of three procedural steps:

<table>
<thead>
<tr>
<th>Screening Process</th>
<th>Determination of Clues</th>
<th>Determination of Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>The screening of potential environmental damage and imminent threat of damage cases</td>
<td>The determination of clues for the identification of candidate environmental damage and imminent threat of damage cases</td>
<td>The determination of evidence for the confirmation of environmental damage and imminent threat of damage cases</td>
</tr>
</tbody>
</table>

*The three steps may or may not be conducted in a sequential manner*
KEY FINDINGS AND LESSONS LEARNT

- **Speed** of initial investigation
- Sound **Evidence Base**
- Availability of **procedures/guidelines**
- Lack of **precedent**
- Importance of **routine inspections**
- **Collaboration** of public bodies
- **Communications** with operator
IMPEL CAED 1st Report

TRAINING NEEDS

- Practical cases and practical experience sharing
- Technical, procedural, organisational training
- Training to mixed groups of different authorities (and also national and local authorities)
- All inspectors involved in site visits should be trained on screening ELD cases
IMPEL CAED Practical Guide & Tables

PURPOSES

- Screen potential ELD cases/non-ELD cases
- Decide if further investigations are required to determine evidence of damage
- Determination of the clues of environmental damage
IMPEL CAED Practical Guide & Tables

PRODUCTS of the PROJECT 2\textsuperscript{nd} year

1. Practical Guide (DPSIR model adapted, Decision-making flowcharts)

2. Practical tables (including selected and pre-defined indicators)

3. Examples of the use of the Practical tables (case studies)

The current project year 2021-2022 IMPEL CAED is conducting training sessions on those products and a Webinar on ELD enforcement related topics
<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
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<tr>
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</tr>
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</table>
Future implementation of the ELD: perspective

KEY FINDINGS and CHALLENGES 2010 and 2016

2010
- Lacking ELD awareness of operators and other stakeholder groups
- Insufficient information exchange between stakeholder groups
- Interpretation needs of difficult ELD terms
- Unavailability of ELD experience and ELD cases

2016
- Implementation still varies significantly from one Member State to another in terms of the number of ELD cases and the way the Directive is implemented
- ‘Patchwork’ of environmental remediation, together with the lack of some key data on implementation and on the cost (both administrative and financial security)
Future implementation of the ELD: perspective

Relationship between national ELD and national liability legislation (1)

- Competent authorities in some Member States are continuing to enforce national liability legislation instead of national ELD legislation even when the ELD is more stringent.
- Key reason for continued enforcement of national liability legislation is the lack of knowledge (and capacity) by some competent authorities when to enforce national ELD legislation.
## Future implementation of the ELD: perspective

### Relationship between national ELD and national liability legislation (2)

#### Land damage
- National liability legislation in all Member States
- Waste legislation
- All Member States except Greece, Ireland, and Portugal also have regimes to remediate contaminated land (focus is on remediation of historic pollution)

#### Water damage
- National liability legislation in virtually all Member States
- Focus is on preventing and remediating pollution not other types of environmental damage

#### Biodiversity damage
- National liability legislation in some, but not all, Member States
- Potential gaps in legislation depending on ELD threshold for biodiversity damage
Future implementation of the ELD: perspective

MAJOR EU COMMISSION INITIATIVES

- ELD Government Experts Group
- Multi-Annual Work Programmes
- ELD stakeholder workshops and Conferences
- ELD Country Fiches
- Country Reports
- Commission Reports

Country Fiches
Multi-Annual Work Programmes

- Improving the evidence base
- Supporting the implementation
- Ensuring sufficient availability of financial security
GUIDELINES ON THE TERM ‘ENVIRONMENTAL DAMAGE’

Commission Notice

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

Table of contents

1. Introduction
2. The legal and wider regulatory context
3. 'Damage'
4. Overview of 'environmental damage'
5. 'Damage to protected species and natural habitats'
6. 'Water damage'
7. 'Land damage'
8. Conclusions
Annex 1
Court decisions cited

Brussels, 24.3.2021
C(2021) 1860 final
Future implementation of the ELD: perspective

**FINANCIAL SECURITY FOR ELD**

<table>
<thead>
<tr>
<th>No mandatory financial security requirements in ELD (only some MSs)</th>
<th>No harmonised mandatory financial security in EU</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Patchwork of environmental liability insurance markets</strong> that cover ELD costs</td>
<td><strong>No EU fund for industrial disasters</strong></td>
</tr>
<tr>
<td><strong>Only few MSs legislation prevents that operators avoid liability</strong> for the costs of preventive and remediation measures by e.g. entering into insolvency, including liquidation, proceedings</td>
<td></td>
</tr>
</tbody>
</table>
Future implementation of the ELD: perspective

RESOLUTION of 20 May 2021 on the liability of companies for environmental damage

- **ELD to be revised and transformed into a fully harmonised regulation**
- **Assess the introduction of a mandatory financial security system** with a maximum threshold per case; develop a harmonised EU methodology for calculating the maximum liability threshold
- **Assess the introduction of a secondary liability regime**, namely parental and chain liability for damage caused to human health and the environment
- **Examine if it is necessary and possible to extend the scope of the ELD** avoiding long and short-term damage to environment, **human health and air quality**
### EU ELD IMPLEMENTATION REFERENCES

**SOME REFERENCES FOR ELD IMPLEMENTATION**

- Valerie Fogleman, Consultant, Stevens & Bolton LLP, Professor of Law, Cardiff University School of Law and Politics, 2020, ‘Facilitating Enforcement of the ELD an ongoing follow-up study’
- COWI, Prospect, Justice and Environment, Sandor Fulop, 2020, ‘Improving implementation and the evidence base for the ELD’
- Francesco Andreotti et al., 2019, ‘Criteria for the assessment of the environmental damage project - final report’
- Milieu Ltd, 2017, ‘Towards a common understanding of ELD key terms and concepts - Support in the implementation of REFIT actions for the ELD – phase 1’
- Fogleman V., 2014, ‘BIO Intelligence Service - ELD Effectiveness: Scope and Exceptions’
THANKS FOR YOUR ATTENTION

Francesco Andreotti
+39 3294110852 francesco.andreotti@isprambiente.it

IMPEL - European Union Network for the Implementation and Enforcement of Environmental Law
ISPRA - Italian National Institute for Environmental Protection and Research