

Environmental liability review

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Environmental Liability Directive review

- ELD under REFIT;
- Main issues identified with the ELD;
- Financial mechanism;
- Recommendations.

REFIT criteria for ELD evaluation

“REFIT is not about deregulation but rather about regulating better.”

- Relevance;
- Effectiveness;
- Efficiency;
- Coherence;
- EU-added value.

Objectives of the ELD

- Establish a framework of environmental liability;
- Implement the 'polluter-pays' principle;
- prevent environmental damage;
- remedy environmental damage.

Key problems identified

- Definition of environmental damage;
- Strict liability and Annex III
- Significance threshold difficult understanding;
- Strict and fault based liability;
- Governance structure;
- Access to information and register of ELD cases.

Environmental damage

- Defined by reference to concepts in EU legislation, which are designed to work in completely different ways from what is required in a liability instrument;
- Splitting environmental damage into damage to land, water and biodiversity only, rather than covering environmental damage more generally;
- Compared to this restrictive approach to what counts as environmental damage, it is interesting to note that the EIA Directive deals with effects on the environment in a much wider sense.

Strict liability and Annex III

- Liability under the ELD (except for biodiversity damage in certain circumstances) only affects operators of ‘Annex III activities’;
- Non-Annex III operators are never liable for water or land damage, despite the potential to cause significant environmental damage;
- Annex III does not cover fracking or oil pipelines, for example, or operators of all of the activities/projects listed in the annexes of the EIA Directive.

Threshold for damage - significance

- The ELD applies to environmental damage only if it has 'significant adverse effects'.
- Annex I sets out a series of criteria to consider in a decision on whether damage is significant
- Significance is not severity:
 - Annex I clearly implies that even very small damage can be significant

Strict and fault based liability

- Liability for biodiversity damage is only strict in relation to operators of Annex III activities;
- For other occupational activities, liability for biodiversity damage under the ELD is fault- based;
- Many instances of biodiversity damage are caused by smaller operators carrying out activities not covered in Annex III;
- The ELD contains a number of exceptions from liability, and defences as to costs.

Governance structure

- Competent authorities are not required to identify instances of environmental damage or take action against operators of their own accord;
- In the Commission's proposal, subsidiary state responsibility was to be imposed in cases where the operator who caused the damage did not comply with its obligations under the ELD.

Transparency and Access to justice

- The ELD provides for rights of access to justice (good!)
- Some Member States provide national registers for ELD cases, for example Ireland, Poland or Estonia;
- Similarly, public participation rights are not expressly incorporated into the ELD;
- Public participation is required by the Aarhus Convention in environmental decision-making;

Recommendations

- Extend the scope of the ELD by redefining environmental damage;
- Remove and/or clarify the ‘significance’ thresholds;
- making operators of all occupational activities strictly liable for all environmental damage
- Impose a duty on competent authorities to identify cases of environmental damage;
- Provide for rights of access to information and public participation and create registers of ELD cases.

Thank you

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