



Workshop “Financial Security in ELD”

Brussels, 27 June 2008

- Background Paper –

THIS PAPER IS WORK IN PROGRESS

WHEN NEWLY ARRIVED DATA IS ANALYSED AN UPDATED VERSION WILL BE SEND TO THE WORKSHOP PARTICIPANTS

1. INTRODUCTION

Environmental liability is the term used for the process through which responsibility for the cost of damaging the environment is transferred back to those that cause the damage. The key to the operation of environmental liability is the assignation of a charge for the environmental damage caused. The Environmental Liability Directive (ELD) provides the legal framework for introducing environmental liability and the polluter-pays principle in European industrial operations. It was adopted by European Parliament and Council on 21 April 2004 and the deadline for its transposition in the Member States was 30 April 2007, though not all MS have transposed it yet in their legislation.

Article 14(2) of the Environmental Liability Directive (hereafter ELD), 2004/35/EC, requires the European Commission to report by April 2010 on the effectiveness of the ELD in terms of actual remediation for environmental damage, on the availability of insurance products covering ELD requirements and their costs and conditions, as well as other types of security for the activities covered by Annex III of the Directive. In order to initiate this analysis, this workshop is organised as a part of the study which aims at analysing state of the art of insurance and financial security of environmental liability under the ELD with an analysis of their gaps and limitations. Furthermore, the study will analyse the Member States’ (MS) response to financial security ELD requirements and to identify market-based instruments (MBI) that could serve as alternatives to insurance cover in the context of the ELD.

2. SCOPE OF THE ELD

The ELD covers:

- Protected species and natural habitats (protected by the 1979 Wild Birds Directive and 1992 Habitats Directive) at over 22,000 individual sites that form the Nature 2000 network covering nearly 17percent of the land area of the 25 EU states as well as 140,000 km² of marine area
- Water (covered by Community Water legislation)
- Direct or indirect contamination of land



The ELD differentiates between two types of liability regimes depending on the type of industry the operator is active in. Strict liability applies in respect to environmental damage or the imminent threat of such damage caused by the operation of activities listed in Annex III to the Directive (i.e. IPPC and waste permitted activities). These occupational activities are those regulated by Community legislation which are potentially particularly damaging to the environment. “Strict liability” means that it is sufficient that there is a causal link between the occupational activity and the environmental damage. No fault or negligence on behalf of the operator of the occupational activity is necessary to trigger liability. Strict liability covers all forms of environmental damage, i.e. damage to water resources and land, as well as damage to protected species and natural habitats covered by the Birds and Habitats Directives. Fault-based liability, on the other hand, means that the operator of the occupational activity, through a deliberate action or omission, or negligence, has caused the environmental damage. It applies to damage to protected species and natural habitats from all other occupational activities but not to water and land damage.

Where an operator is liable, he is responsible for preventing environmental damage or to prescribe remediation measures in case the damage has already occurred. Regarding remediation measures, the ELD differentiates between primary remediation, which implies the remediation necessary to restore the baseline condition of the affected site; complementary remediation, which implies the creation of an alternative site in cases where primary remediation is not possible; and finally compensatory remediation, which implies providing financial compensation for any interim loss suffered by the general public (e.g. loss of amenity, biodiversity services). Importantly, no monetary limit of liability has been set for the costs of these remediation measures.

The scope of the ELD is, however, limited by the following exemptions:

- It only applies to damage arising from events/emissions occurring after 30 April 2007
- It does not apply to activities covered by other liability agreements (i.e. the International Convention on Oil Pollution Damage)
- It does not apply in case of damage or imminent damage resulting from armed conflict, natural disaster, national defence, etc.
- An operator is not liable when the damage is caused by a third party provided that appropriate safety measures were in place
- An operator is not liable if the damage results from compliance with an order or instruction from a public authority
- MS have the discretion to exempt an operator if the damage results from an authorised activity (permit exemption) or the emission or activity was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time (state of the art exemption)

The Directive leaves a large degree of flexibility to Member States (MS) in transposition and thus implementation of the ELD of which a number of MS that have already transposed the ELD have made full use. Besides the possibility not to acknowledge permit and state of the art exemptions, the MS can also decide whether or not liability should be joint and several, or proportional. Furthermore, they can (and as it is discussed below there are already examples of MS who have done so) go far beyond the Directive



by, for example, introducing obligatory financial security and applying a reversal of the burden of proof.

3. FINANCIAL SECURITY IN THE ELD

The ELD does not currently require operators to cover their activities by a financial security (e.g. insurance). However, looking at the liability conditions imposed by the ELD and their financial implications which can be very large depending on the damage caused, operators aware of these risks are expected to cover themselves. Even though experience shows that operators are often not in the know of their new responsibilities, insurance markets are expected to react to these new market opportunities and to provide adequate insurance solutions. It can furthermore be anticipated that there will be some public intervention on the insurance issue, to the extent that Member States have the obligation to encourage the development of environmental insurance products adapted to the terms of the Directive and also because the insurance market might not develop a sufficient range of products that cover all ELD responsibilities.

As indicated above, by 30 April 2010 the European Commission has to present a report on the effectiveness of the ELD, on the availability of financial security at reasonable costs, and on conditions of insurance and other types of financial security for the activities covered by Annex III. In the light of this 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.

4. CURRENT STUDY AND THE WORKSHOP

The present study analyses the problem at a macro level and to illustrate the critical issues with the help of case studies based on the results of a stakeholder consultation. Questionnaires were sent to the Member States and the insurance industry asking questions related to the transposition status and insurance products in the context of the ELD and several operators are being interviewed to understand the demand side of such products. The questionnaire responses will be analysed to understand existing financial security solutions along with the future developments in this direction. Further, the aspects will be analysed from the perspectives of the MS competent authority, the insurer, and the operator. The study will keep the scope to international level and get inspiration from similar work in other countries, in particular the USA where environmental liability insurance schemes have existed for some time.

This study attempts to answer the following key questions which will also be the focus of the workshop:

- What are the existing financial security products most relevant for the ELD?
- How is the insurance market reacting at the EU level and in the MS as the transposition process is progressing?
- What are the emerging insurance products with the arrival of ELD and their comparison with similar products outside EU? What are their gaps and limitations?
- Which market based instruments are appropriate in the context of ELD and how can they complement or substitute an environmental insurance market?



5. PRELIMINARY ANALYSIS OF MS RESPONSES

The facts presented in this section are to a large extent based on a questionnaire sent by the European Commission to Member States in order to assess the current level of transposition of the ELD and the choices made by national authorities during the transposition process. Till date 15 replies were received out of the 27 questionnaires sent (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Hungary, Ireland, the Netherlands, Poland, Slovakia, Spain, Sweden and UK).

The transposition of the ELD is still ongoing in many MS throughout the EU after the deadline of 30 April 2007. This leads to many unknowns regarding transposition choices made by national governments regarding the scope of the transposition, possible exemptions, financial security, etc. and hinders the development of insurance schemes that would cover the responsibilities under the new regulation.

Table 1 : ELD transposition status¹

YES	NO	
	Draft under discussion	No information about the transposition deadline
Belgium (Flanders and Wallon regions)	Austria	Belgium (Brussels capital region)
Bulgaria	Ireland	Luxembourg
Cyprus	UK	Greece
Czech Republic*	Finland	
Denmark*	France	
Portugal*	Slovenia	
Germany		
Hungary		
The Netherlands		
Poland*		
Slovakia		
Spain		
Sweden		
Romania		
Malta		
Estonia		
Italy		
Latvia		
Lithuania		

In countries where the ELD Directive has already been transposed into national law or where a draft bill has been published, different choices were made concerning the scope, exemptions, and financial security choices as compared to those proposed in the Directive, as mentioned in the Directive.

¹ Based on questionnaire responses, CEA (2008) and Commission's information.

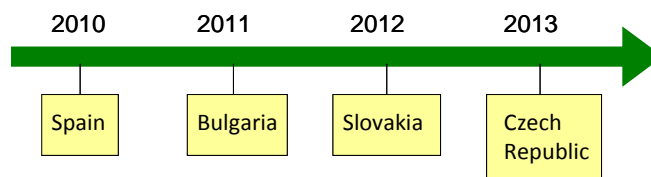


5.1 SPECIFIC FEATURES TO NATIONAL TRANSPOSITION OF ELD

5.1.1 COMPULSORY INSURANCE

Regarding compulsory insurance i.e. the requirement that all operators facing environmental liability subscribe insurance for their risks, all the countries that replied to the questionnaire chose not to immediately include this requirement in their national regulation. Five Member States (Ireland, Bulgaria, Slovakia, Sweden and Hungary) have already thought about introducing this measure at a future date.

Figure 1: Future introduction of compulsory insurance in the EU in some MS

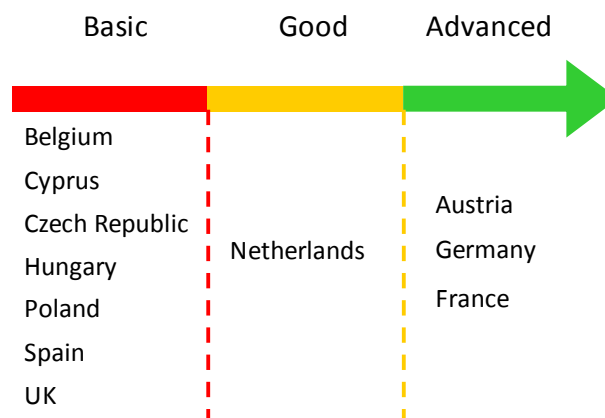


5.1.2 CURRENT MARKET DEVELOPMENT

MS were asked to describe the current level of development of the insurance market in their country by choosing between three different levels:

- **Basic** meaning that many liabilities under the ELD still remain insurable.
- **Good** meaning that cover exists for most of the liabilities under the ELD but not for all.
- **Advanced** meaning that cover exists generally for all liabilities under the ELD.

Figure 2: Current development of the environmental insurance market in some MS

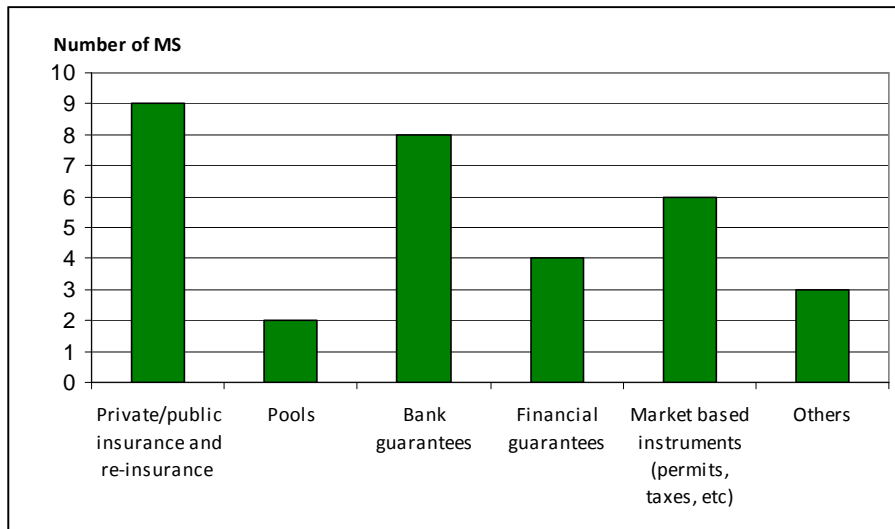


5.1.3 PRESENT COVERAGE FOR ELD

Coverage for ELD already exists in some MS through different sort of products. In order to assess the uptake of coverage instruments throughout the EU, MS were asked to characterize the different products available to operators available on their local market.



Figure 3: Level of development of coverage instruments in some MS



5.1.4 MOST IMPORTANT LIMITATIONS TO INSURANCE PRODUCTS

Figure 4: Most important limitations to insurance products as identified by MS authorities

