Presentation of the Environmental Liability Directive complements principles module because it is a key tool for the application of the polluter pays principle.
Slide 2

Actually, first considerations may date back to the early eighties, if not to the seventies of last century.

Remediation of environmental damage mentioned among the very first topics in the First Environmental Action Programme of the Commission of 1973.

The Commission thinking was long based on a civil liability approach. This changed only with the Working Document of 2001.

Compared with the long preparatory phase, the negotiations were relatively short (2002 – 2004), perhaps due to a lucky political moment, more likely due to the eminent accession of ten new Member States on 1 May 2004.

**Question:** Why may this process have taken that long?

Possible answers: politically very controversial, legally different national systems in place, economically and ecologically new and challenging concepts (still causing some headache, as for instance economic valuation of damage or compensatory remediation of damage)
Slide 3

Qu: What does “non-communication” mean? A: The Member State did not communicate the required transposing measures until the end of the transposition deadline.

Qu: What is a letter of formal notice? A: It is the first official/formal letter addressed by the Commission to the Member State concerned which opens an infringement case (within the administrative procedure before the Commission).

Qu: What is a reasoned opinion? A: It is the second formal letter addressed by the Commission to the Member State within the administrative stage of an infringement procedure. The Commission fixes its legal position in the reasoned opinion. The European Court of Justice takes the deadline set for the Member State to respond (usually two months after the reasoned opinion) as the crucial point in time for the judgement of the case (MS’s obligations etc.).
Objective and framework character

- EU framework based on the **polluter-pays principle** on the **prevention** and **remedying** of certain types of **environmental damage** (nature, water, soil)

- Leaving **wide margin of discretion** to EU Member States on certain important issues (scope, derogations etc.)

- **Minimum requirements** since EU Member States are allowed to maintain/adopt more stringent/far-reaching rules

Slide 4

The ELD is not a classical “framework directive” which produces several “daughter directives” (such as the Waste Framework Directive or the Water Framework Directive). The term “framework” is however justifiable in the sense that it just established a broad legal framework, leaving the particularities to the MS.

Examples for the discretionary/optional power of the Member States are:

- Decision to extend the scope of biodiversity damage to include also nationally protected species and natural habitats
- Decision to incorporate one or both of the optional defences of operators (permit defence, state of the art defence)
- Decision to oblige competent authorities to take preventive and remedial action where the operator is not identifiable or not required to bear the costs
- Decision to apply joint & several liability or proportionate liability
- Decision to include also preventive action into the right of enabled parties to request actions by competent authorities
- Decision to set up a mandatory or a voluntary system of financial security for Annex III-operators
- Decision to exempt sewage sludge from the list of dangerous activities in Annex III entailing strict liability
- Decision not to implement all exceptions (as Member States can maintain or adopt more stringent measures)
Slide 5

**Qu:** What is environmental damage? **A:** It is the “pure ecological damage”, not including elements of traditional damage, such as for example loss of income to fishermen due to damaged/reduced fish reserves.

**Qu:** Why is administrative or public liability better suited for tackling environmental damage than civil liability? **A:** One may say that there is not (enough) private interest for a private law suit, in particular where the damaged environment is not owned by a private property owner (“public good”). In such case the interest of the environment needs to be represented by an “environmental trustee” (US-American term), such as a public authority (in theory also certain NGOs, in the US “natural resource trustee” such as Secretaries of State for Commerce (marine NRD incidents) and Interior (national parks, public land, migratory birds, Indian land, endangered and threatened species)

**Q:** Why is “air” not included? **A:** A possible answer may be that damage to air is typically “diffuse damage”, i.e. cannot be assigned to identifiable polluters (but this may not always be the case)
Basic features

- Focus on **restoration in kind**: restore, rehabilitate or replace damaged natural resources and/or impaired services
- **Breaking new ground in Europe** on difficult technical issues as e.g. on complementary and compensatory remediation and remediation of biodiversity damage
- Financial security providers encouraged to develop products covering environmental liability, but **financial security is not made mandatory at EU-level**

Slide 6

**Restoration** in kind is the core objective. The ELD expressly **excludes monetary compensation** for damage (Article 3.3, Annex II.1.1.3)

While many Member States employ since long administrative liability rules regarding damage to water and/or land, this was rarely the case for biodiversity damage before the ELD took effect.

The rules on complementary remediation (restoration of the same or similar natural resources as close as possible to the damage site) and compensatory remediation (as compensation for the interim loss of natural resources between the damage and the full remediation) are for many Member States new. Their determination via economic/ecological methods is particular new and often challenging.
Slide 7

**Strict liability (see Art. 3 I a):** environmental damage and imminent threat when caused by specified occupations held to be dangerous to the environment (“dangerous activities”), listed in Annex III. There is no need to proof the subjective element (fault, culpa) if liability is strict (FR: responsabilité objective, DE: Gefährdungshaftung (als Ausformung verschuldensunabhängiger Haftung)). Strict liability is justified on the basis that the operator has been granted to carry out a dangerous activity. He must therefore also bear the disadvantages if he benefits from the advantages of such an activity. The general tax payer should not pay; channelling of liability.

**Fault based liability (see Art. 3 I b):** damage to protected species and natural habitats and imminent threat when caused by non-specified occupational activities, others than those mentioned in Annex III. The subjective element needs to be proved. This may be a time consuming and costly process with often uncertain outcome.

**Causal link** is however always required – but cf. C-378/08 (presumption of causality)
The Augusta roadstead, situated in the Priolo Gargallo Region (Sicily), has been affected by recurring incidents of environmental pollution dating back to the 1960s, when the Augusta-Priolo-Melili site was established as a hub for the petroleum industry. Since that time, numerous undertakings operating in the hydrocarbon and petrochemical sectors have been set up and succeeded one another in that region.

By various successive decisions, the Italian administrative authorities required the undertakings bordering the Augusta roadstead to carry out measures to remedy the pollution found in the Priolo region, which had been declared a 'Site of National Interest for the purposes of decontamination'.

Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, Syndial SpA and ENI SpA brought actions against those administrative decisions before the Italian courts. The Tribunale amministrativo regionale della Sicilia (Regional Administrative Court, Sicily, Italy), which must give a decision in those cases, referred a number of questions to the Court of Justice for a preliminary ruling concerning the application of the 'polluter pays' principle.

Case C-378/08

The Italian court seeks to ascertain in particular whether the ‘polluter pays’ principle precludes national legislation which allows the competent authority to impose measures for remediating environmental damage on operators on account of the fact that their installations are located close to a polluted area, without first carrying out an investigation into the occurrence of the contamination or any causal link between those factors and the pollution found.

Joined Cases C-379/08 and C-380/08

The Italian court asks whether the Environmental Liability Directive allows a substantial change in measures for remediating environmental damage which have already been implemented or begun to be put into effect. Moreover, the Italian court seeks to ascertain whether the directive precludes national legislation which makes the right of operators to use their land subject to the condition that they carry out the works required.
Causal link – ECJ Judgement in case C-378/08

- Whilst Articles 4(5) and 11(2) ELD require establishment by the competent authority of a causal link, the ELD does not specify how and MS have a broad discretion in laying down national rules giving concrete expression to the PPP.
- Accordingly, a MS may provide that a CA has the power to impose remedial measures on the basis of the presumption of a causal link.
- However, such a presumption must be based on plausible evidence, such as vicinity between the operator’s operation and the pollution or correlation between pollutants identified and substances used by the operator.

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In its judgment, the Court finds that the Environmental Liability Directive does not preclude national legislation which allows the competent authority to operate on the presumption that there is a causal link between operators and the pollution found on account of the fact that the operators’ installations are located close to the polluted area. However, in accordance with the ‘polluter pays’ principle, in order for such a causal link to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.
Slide 10

The first two bullet points mark rather classical defences for strict liability regimes (*Act of God, force majeure*).

“National defence, etc” is a traditional exception in EU environmental legislation. Their genuine value for this instrument may be questionable.

“Diffuse pollution” is only exempt to the extent that is cannot be assigned to individual operators.

The exception for certain International Conventions (mainly IMO Conventions) is particularly controversial, in the light that most of them provide for civil liability covering mainly only traditional damage. The Commission must look into this point due to Article 18(3) ELD when presenting its report on the application of the ELD in 2014.
‘environmental damage’ means:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;

(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;
Member States may decide to extend the scope of "damage to protected species and natural habitats" to include also nationally protected species and habitats. More than half of the Member States decided to do so. (Art. 2.3 c)
The extended scope is largely derived from the definition in the IPPC Directive 1996/61/EC which spread over a range of EU environmental legislative instruments.

There are interesting questions involved about who is the operator specifically or (under the broad definition) to what extent parent companies may be held liable for the damage caused by their subsidiaries.

All Member States except France transposed the broad scope of the operator definition (see next slide).
According to the Directive, the operator must inform the competent authority of the imminent threat only where it “is not dispelled despite the preventive measures taken”. (Art. 5)

“Imminent threat of damage” is defined (Article 2.9 ELD) as “sufficient likelihood that environmental damage will occur in the near future”.
Key requirements – Remedial action

- Any action (including immediate control, containment, mitigation and further prevention of damage) “to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative”

- Operator must
  - inform the competent authority of all relevant aspects
  - provide supplementary information
  - follow instructions by CA to immediately control, limit damage
  - identify potential remedial measures and submit them to CA
  - follow instructions by CA to take the necessary remedial action (→ see Article 6)

Slide 15
This is the **core objective**. The ELD distinguishes containment, control etc. of damage from the actual remediation measures. However, both fall in the ELD under “remediation” as distinct from “prevention”.

The **liable operator bears several obligations** including vis-à-vis the competent authority.
Remediation types (Annex II)

- **Primary remediation:** “any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition”

- **Complementary remediation:** “any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services”

- **Compensatory remediation:** “any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect”

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**Slide 16**

**Interim losses:** “losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.”

**Natural resources:** “protected species and natural habitats, water and land”

**Services and natural resources services:** “functions performed by a natural resource for the benefit of another natural resource or the public.”
Competent authority

- EU MS have to designate the competent authorities

- Duties:
  - To establish who caused damage
  - To assess the significance of the damage
  - To determine the remedial measures

- Powers (cf. judgement C-378/08 & C-379/08):
  - To require operator to carry out own assessment and to supply necessary information and data
  - To require operators and third parties to carry out the necessary preventive or remedial measures
  - To carry out preventive and remedial action ("getting the work done")

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Slide 17 - Overview over designated competent authorities in the EU:

- **Austria**: District authority
- **Belgium**: Federal level: several authorities according to sector (environment, civil protection departments etc.); Walloon region: DG Ressources Naturelles Environnement, Flemish region: Dep. Leefmilieu, Natuur en Energie, Brussels region: Brussels Instituut voor Milieubeheer/Institut Bruxellois pour la Gestion de l'Environnement (BIM/IBGE)
- **Bulgaria**: Minister of environment and water; Directors of regional inspectorates of environment and water; Directors of river basin directorates; Directors of national parks
- **Cyprus**: Ministry of Agriculture, Natural Resources and Environment or by delegation another authority according to the type of damage
- **Czech Republic**: Ministry of Environment, CZ environmental inspection, National parks and protected landscape areas services, military authorities
- **Denmark**: Supervisory authorities
- **Estonia**: Environmental Board
- **Finland**: Centres for Economic Development, Transport and Environment; Regional State Administrative Agencies (related to water); Board for Gene Technology (related to GMOs)
- **France**: Préfet de département
- **Germany**: Technically competent authorities of the Länder in charge of nature conservation law, water law, soil protection law (as regards damage in the EEZ: federal Agency for Nature Conservation)
- **Hungary**: Regional environment
- **Ireland**: Environment Protection Agency
- **Italy**: Ministry for the Environment, Territory and the Sea
- **Latvia**: State environmental authority
- **Lithuania**: Regional environmental protection departments of the Ministry of Environment
- **Malta**: Malta Environment and Planning Authority
- **Netherlands**: Which authorities (State, province, community, waterboard) are competent depends on the specific case
- **Poland**: Regional Director of Environmental Protection (before: Voivodship governors - regional authorities) except GMO damage (Minister of Environment)
- **Portugal**: Portuguese Environment Agency
- **Romania**: County Agency for Environmental Protection
- **Slovak Republic**: Ministry of Environment or regional environmental offices or district environmental offices or Slovak Environmental Inspection (as regards IPPC activities)
- **Slovenia**: Ministry of Environment, Environmental Agency of RS
- **Spain**: Regional authority (as regards nature and land damage), Federal State (as regards water damage)
- **Sweden**: Supervisory/inspection authority: normally the local municipality or the regional authority (country board), (environmental protection agency gives guidance)
- **United Kingdom**: Natural England (biodiversity damage), Environment Agency (water damage), local authorities (land damage), Marine Fisheries Agency (marine biodiversity damage)
Slide 18

Relevant question in this context may be the relationship between the optional defences (in particular permit defence) and strict liability.
Slide 19

This may be an interesting subject to be discussed with judges: To what extent would a permit defence water down strict liability (i.e. liability without fault) in normal court practice?

Optional defences – Permit defence

“The Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community in Annex III, as applied at the date of the emission or event;”

(Article 8.4.(a) ELD)
Optional defences – State of the art defence

“The Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.”

(Article 8.4.(b) ELD)

Slide 20

The same question as before could be also discussed with regard to the state of the art defence (or development risk defence).
Slide 21

As a result a quite divergent situation across Europe, perhaps limiting the effectiveness of the ELD because financial security providers may find it much more difficult to offer standard products and multi-national companies have to adapt to various situations (level playing field).
This is another example where Member States and the European Parliament could in the end not agree on a specific solution. As it stands, the provision is superfluous as the result would not be different in the absence of this article.
However, even Member States who implement joint & several liability often allow the major liable party the right of recourse internally against the other liable operators. This however, has to be proven before the authority or the court. An item with which (some) judges may be confronted with, hence may have some experience on this point. On the other hand, some of the Member States implementing a proportionate liability system may as well allow for joint & several liability under certain conditions.
Mandatory vs. voluntary financial security

“Member States shall take measures 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 this Directive.” (Article 14(1) ELD)

Slide 24

Relevant questions in this context may be the relationship between the PPP and financial security as well as why financial security is essential.
At present, only Bulgaria and Portugal already apply mandatory financial security for Annex III operators. Spain has undoubtedly developed the most elaborate system for mandatory financial security in ELD, according to which it is introduced sector-wise, following Ministerial ordinances. The highest cover of financial security may however exist at present in Germany, where at least around three quarters of Annex III operators have such security (insurance).

Most MS (2/3) rely upon voluntary financial security.
Temporal application

- The ELD is not applicable to damage:
  - based on incidents, events, emissions of more than 30 years
  - caused by incidents, events, emissions before 30 April 2007
  - caused by incidents, events, emissions after 30 April 2007, when the activity took place and was finished before that date
- C-378/08: The ELD applies to damage caused by emission, event or incident including where such damage derives from activities which were carried out before 30 April 2007 but had not finished before that date (“ongoing damage”).

Slide 26
With regard to ongoing damage, the Court stated however in Rada di Augusta that it is up to the national courts to ascertain on the basis of facts whether the damage falls within the above situation.
ELD Report 2010 – Effectiveness (1)

16 ELD cases reported by beginning of 2010
Possible reasons for limited implementation:
- Challenging technical requirements (economic evaluation, environmental remediation methods etc.)
- Limited awareness and knowledge of operators
- Preventive effect of the ELD
- Maintenance of existing laws (more stringent MS laws)
- Exceptions and defences under the ELD framework
- PLUS: the “severity threshold” (significant damage)

Slide 27

On the “severity threshold” see in particular the breakout group at the ELD implementation workshop of 8 November 2011 and the respective kick-off presentations by Prof. Gerhard Roller and Emil Waris, under: http://ec.europa.eu/environment/legal/liability/workshop081111.htm

The problem of the limited awareness is tackled by several measures of the Commission, intended to launch similar measures at national and/or industry level (information brochures and factsheets, training material, improved stakeholder communication etc., see slides below).

The problem with the preventive effect is that it is virtually impossible to ever prove a deterrent effect.

There is strong evidence that several Member States apply their existing legislation instead of applying the ELD transposing national law. This is justified as long as the traditional law covers fully the requirements under the ELD. There may be doubts that this is always the case.
Slide 28

In the meantime many cases have been added but the general trend of less cases than expected continues with the exception of Poland. At present Poland with more than hundred ELD cases (mostly regarding land damage and water damage) may outnumber the rest of the 26 Member States. In the meantime also more complementary and compensatory remediation cases have emerged.

Total remediation costs certainly exceed the €250,000 but we lack exact data about the most costly cases. For comparison: the red sludge accident on 4 October 2010 in Ajka/Hungary which cost severe losses of lives and devastated three villages and the infrastructure of a whole area included also all three categories of environmental damage under the ELD: biodiversity, water and land damage. However, only for traditional damage remediation and clean-up of soil so far about 115 million Euro were paid. A remediation plan for water damage and biodiversity damage has apparently not yet been even adopted.