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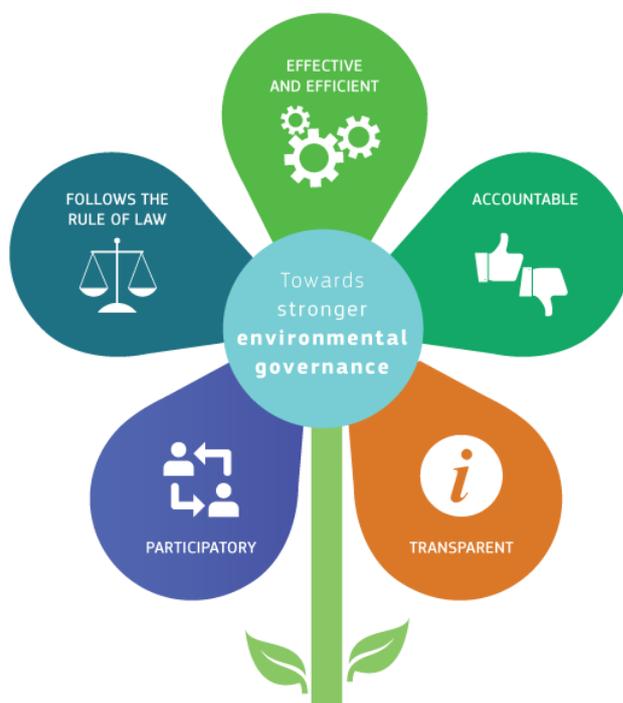


ENVIRONMENTAL LIABILITY DIRECTIVE 2004/35/EC (ELD)

MULTI-ANNUAL ELD WORK PROGRAMME (MAWP) FOR THE PERIOD 2017-2020

"MAKING THE ENVIRONMENTAL LIABILITY DIRECTIVE MORE FIT FOR PURPOSE"

(REV. VERSION: 28/02/2017)



Foreword

This Multi-Annual Work Programme has been developed by the Commission on the basis of the action plan set out in the Commission report (COM(2016)204) taking account the findings of the REFIT evaluation (SWD(2016)121). It was finalised as part of a consultative process with national experts from EU Member States. A first draft ELD MAWP 2017-2020 was sent out for consultation in September 2016 to the ELD government experts. Written comments were provided until early November 2016 and the draft MAWP was accordingly modified. In January 2017, the revised version was submitted to the ELD government experts group (EG) for endorsement at the 17th ELD government experts meeting in Brussels on 28th February 2017. The EG meeting endorsed this MAWP with some amendments as a result of the discussions at that meeting.

This work programme will be reviewed and, if necessary, updated or adapted on a regular basis. Reviews will take place towards the end of each year, starting with the next review in October 2017. It will be also important to critically review and evaluate the success and the effectiveness of the MAWP at the next evaluation stage for the ELD Directive which is likely to start by 2020.

1. Introduction

The Environmental Liability Directive¹ (ELD) entered into application nearly ten years ago. Member States presented reports on its application in 2013 and the Commission has reported twice:

- in 2010 on the effectiveness of environmental remediation and the availability of financial security under the ELD, and
- in 2016² on the relevance, effectiveness, efficiency, coherence and the EU-added value of the ELD based on a comprehensive REFIT evaluation³.

The present Work Programme has been developed in response to the REFIT evaluation, which showed clear knowledge gaps and implementation deficiencies that need to be tackled in a more structured and systematic manner. The Work Programme will be updated on a regular basis so to adapt it to growing knowledge and changing needs.

The final goal is the reduction if not prevention of future environmental damage. The outcome with regard to accidents, incidents and events causing environmental damage is to boost the ELD application, to support the national administrations as well as business, and to carry out research on the relevant issues via practical tools.

This Multi-Annual ELD Work Programme (MAWP) has been discussed and agreed with the ELD Expert Group on 28 February 2017. It is a commitment to a collaborative effort between the Commission, the Member States and other stakeholder experts interested in the ELD. The aim of this joint effort is to address the issues identified by the Commission's evaluation of the Directive and to implement the proposed follow-up actions. However, different actors may be interested and concerned by different parts of the MAWP in different ways. For example some Member States may not want to or may not be able to engage actively in some parts of the activities for particular reasons. Since this work programme is non-binding and informal, it allows for such a flexible, pragmatic and tailored approach to working with those Member States and experts most affected and committed to implementing a particular action.

2. Background and context

2.1. Evaluation

The results of the REFIT evaluation show that the ELD is working, but to a much lower extent compared to original expectations and with a great variation between Member States.⁴ There is also indication that the ELD is underused in the EU⁵, despite the fact

¹ Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56

² The reporting deadline of end of April 2014 was for various reasons delayed until its adoption on 14 April 2016

³ COM(2016) 204 final, SWD(2016) 121 final

⁴ "However, as the situation varies significantly between the individual Member States, it appears also difficult to find out general reasons for a diverging situation. This is an important issue to be further investigated on the basis of evidence provided by data which is at present available to a very limited and uneven extent." (REFIT evaluation, p. 62)

that a few Member States exploit its potential to a high degree and some others exploit it to a satisfactory degree. Eleven Member States did not record any environmental damage which was remedied according to the ELD's requirements within the reporting period between 30 April 2007 and 30 April 2013. This contributed to a finding of a 'patchwork of environmental remediation under the ELD', reflecting the ELD's legal transposition as well as its implementation.

The evaluation also revealed significant knowledge gaps in terms of the practical working and the effects of the ELD, in particular as regards its effectiveness and efficiency. These gaps concern, amongst other matters, the use of existing national liability laws or other national laws affecting the use of the ELD national implementing legislation, and the (administrative) costs of operators and of competent authorities.

Overall, the evaluation shows that the ELD may be reaching only a small part of its potential in terms of addressing environmental damage. It considers that, without making any legal amendments to the current text, the current use of the ELD could be increased significantly if Member States and the Commission work together on creating at EU level:

1. a better evidence base for the evaluation of the ELD,
2. tools and measures for a more even and increasing implementation of the ELD,
3. the basis for a sufficient availability and demand for financial security to cover ELD liabilities.

In its Chapter 6, the ELD report recommended that Member States should

- record data on ELD incidents and publish ELD registers if they have not done so already;
- gather systematically the necessary data that can document that the application of the Directive in their country is effective, efficient and in line with the overall situation in the EU;
- support their implementation efforts with proactive initiatives (such as guidance documents, training, electronic tools for risk analysis, baseline setting, and financial security models), as some Member States have already done;
- exchange administrative experiences and best practices and support each other in capacity-building efforts;
- review their interpretation of key provisions of the Directive, in particular in relation to 'significance'⁶.

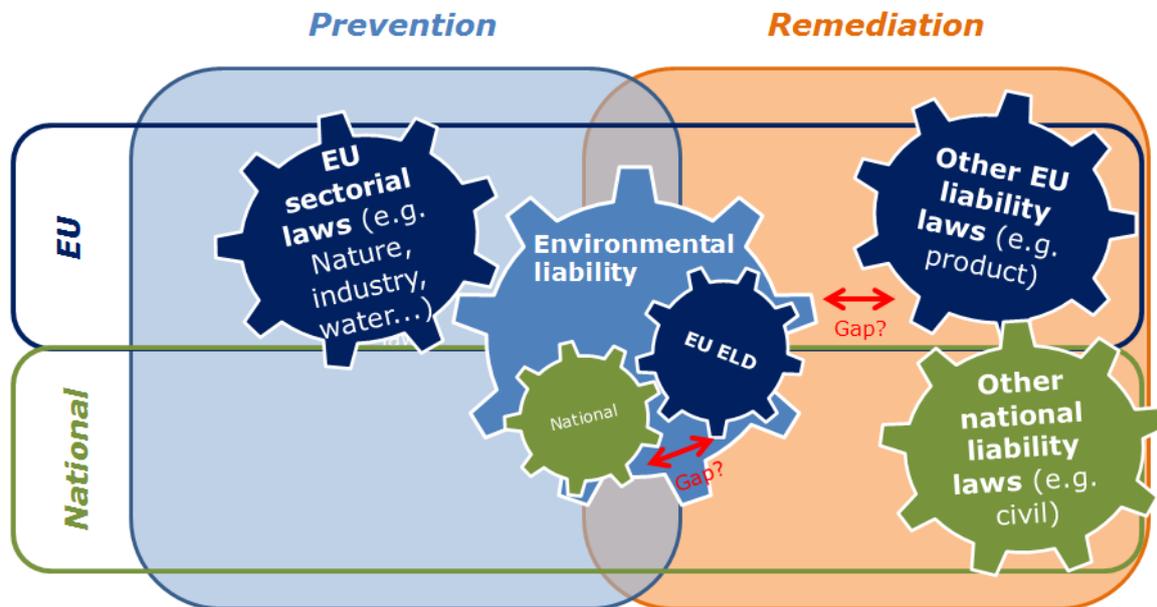
In addition, account should be taken of the wider results of the REFIT evaluation, as summarised in Chapter 7 of the Staff Working Document (which is annexed to this document). The evaluation points to the value of continued gathering of evidence on key themes such as the scope of strict liability, the scope of environmental damage, definitions and concepts, optional defences and financial security.

⁵ "While overall the Directive has gained more practical application resulting in better environmental protection, some features appear to remain particularly under-used as especially the complementary and compensatory remediation methods, which could potentially ensure better environmental outcomes than currently exist." (REFIT evaluation, p. 58)

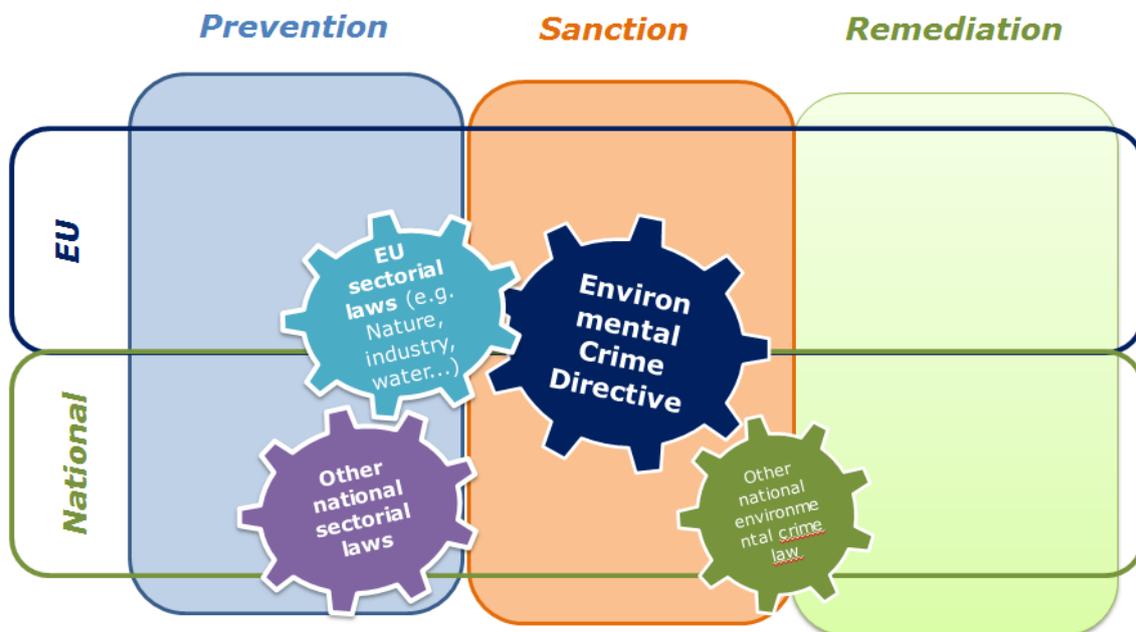
⁶ The translation of key terms and its consequences for the implementation should be considered in this context.

The broader context is also worth mentioning. The ELD co-exists with other liability instruments and provisions, both at EU level and Member State level, and events that give rise to ELD liabilities may trigger in parallel criminal, civil or administrative law procedures.

This broader context for administrative and civil environmental liability along their principal objectives (prevention and remediation) and dimension (national and European) is reflected in the figure below:



The following figure is placing prevention and remediation within a broader enforcement context that includes administrative and criminal sanctions:



Liability and enforcement provisions that often coincide with or complement the ELD regime

<i>EU law</i>	<i>National regimes</i>
General principle that EU law offences should be subject to sanctions that are effective, proportionate and dissuasive	National environmental liability regimes that cover damage not covered by the ELD regime
Provisions of the Environmental Crime Directive	National criminal law (partly covered by the ECD)
Administrative obligations and responsibilities according to the EU nature protection law, water management law, waste law, industrial emissions law	National civil liability law as far as connected with environmental pollution/damage

Thus, legislation implementing the ELD sits beside other environmentally relevant legislation. While at EU level the situation is relatively clear (in terms of the ELD's relationship with other instruments such as the Environmental Crime Directive), at national level the situation is sometimes unclear, ambiguous and overlapping, and it is therefore necessary to investigate better the application of other national laws in parallel with the ELD. The aim is to ensure that if a diverse application of the ELD persists, it still ensures comparable results on the ground with a similar protection level for the environment and a level playing field for the internal market across the EU. Moreover, the use of the ELD is linked to national compliance assurance systems. E.g. if the use of the ELD in certain Member States is low it might indicate that the existing compliance assurance system is working well and that cases causing environmental damage could be prevented to a large extent.

A further contextual element is the Environmental Implementation Review (EIR), which the Commission launched in 2016⁷ and which aims at presenting Member States with country reports every two years on implementation challenges related to the EU environment *acquis*. Implementation of the ELD is within the scope of the EIR and is expected to feature in the first and subsequent country reports. It indeed features in the first country reports, adopted on 3rd February 2017 with two elements: ELD registry, financial security.⁸ The ELD is linked to the concept of "compliance assurance", which seeks to have an integrated approach to how competent authorities monitor and enforce compliance with EU environment law and prevent non-compliance. There are several networks of professionals active in the area of environmental compliance assurance, notably IMPEL, which mainly represents environmental inspectorates. IMPEL has taken an interest in the ELD, as will be apparent below.

2.2. ELD government experts' group

Soon after the adoption of the ELD, the Commission established an informal expert group – the "ELD government experts group" – with the objective of supporting the implementation of the ELD. Each of the 28 Member States can appoint one or more members. In addition, it includes observers appointed by Norway, Iceland and Turkey

⁷ [COM\(2016\)316](#)

⁸ COM(2017)63

(although Iceland and Turkey are currently not active observers) and is open to observers from candidate countries (i.e. Albania, FYRoM, Montenegro and Serbia). As appropriate, the group invites external participants from ELD stakeholder groups. For example, representatives from *Insurance Europe* (and its member organisations), the *Ad-Hoc Industry Natural Resource Management Group* and *Justice & Environment* have been invited. To date, it has not adopted any internal rules and its existence is not based on a legal requirement.

The group normally holds one or two meetings per year and has so far met 17 times. The main activities consist in exchanging information and best practice about the implementation of the ELD in the Member States and at EU level, and in contributing to ELD-related reports, evaluations, studies and compliance promotion (such as information and awareness-raising, training and development of guidance).

At the 16th meeting, which took place on 25th May 2016, the ELD report and REFIT evaluation were presented and discussed. The Commission outlined how it proposed to proceed with the implementation of an action plan. There was a broad willingness to discuss envisaged actions in more detail and to define a collaborative work programme whereby the Commission in cooperation and partnership with the Member States would aim at closing the identified implementation gaps and helping to better deliver the ELD's objectives. The Commission committed itself to submit to the ELD government experts' group a first draft of a Multi-Annual Work Programme (MAWP) in autumn 2016 for comments with a view to the MAWP's adoption in early 2017 at the next experts' group meeting.

Consequently, the draft MAWP as revised after having obtained comments from the group was presented and discussed at the 17th ELD government experts meeting on 28th of February 2017 and was endorsed by the ELD GEG after having agreed some further modifications and adaptations.

The ELD government experts' group will be the main partner of the Commission in developing and regularly updating the ELD MAWP.

3. Objectives and priority setting

The overarching objective for the ELD is to achieve better environmental protection:

- through prevention of damage to the environment (biodiversity, water, land) and
- where damage has occurred, through remediation of damaged natural resources and services to their baseline condition at the time the damage occurred, by fully implementing the polluter-pays principle.

As already noted, the ELD does not exist in isolation. Its objectives need to be complemented by civil liability, criminal liability and administrative liability legislation, both at national and at EU level.

It, therefore, results that the specific objectives of the implementation of the ELD is to increase the use of the ELD, in particular with regard to complementary and compensatory remediation, bearing the main goals in mind (i.e. halting biodiversity loss, ensuring clean waters, and decontaminating polluted soils), and assuring that liabilities can be covered through sufficient financial security, taking into account business costs. Moreover, the aim is to demonstrate that the instrument leads to:

- an effective and efficient prevention together with other relevant instruments (such as national legislation as well as EU environmental legislation such as nature, water or industrial pollution legislation),
- an effective and efficient handling of "incidents" causing "environmental damage" ensuring a similar level of protection and level playing field even in cases where the incidents are not recorded under the ELD.

4. Working areas and key activities

Based on these objectives, the priority areas for the working together at EU level through this MAWP are to:

1. **Improve the evidence base** for the evaluation of the ELD, so that empirical knowledge about the functioning of the ELD yields a clearer picture (including on the interplay with national legislation and other types of liability), and contributes to the next REFIT evaluation of the ELD, to be expected between 2021 and 2023,
2. **Support the implementation** of the ELD so that the potential of the ELD is significantly better exploited, the ELD is used more evenly across all Member States as a standard instrument of liability in case of natural resources damage, through the development and application of accessible, user-friendly tools and other administrative support measures for the use by competent authorities, operators, loss adjusters, risk assessment experts, financial security brokers, environmental NGOs and other ELD stakeholders and practitioners,
3. **Promote the availability of financial security** for ELD liabilities across the EU, so as to ensure that potentially liable operators covered by strict liability have sufficient financial capacity to meet their liabilities, through available and appropriate financial security instruments at reasonable cost, thus meeting the requirements of availability, sufficiency and security, in particular by stimulating demand through adequate ELD enforcement and through a common understanding of the ELD.

4.1. Working area 1: Improving the evidence base for the evaluation of the ELD

This working area aims at improving the evidence base, needed to answer questions about the effectiveness and efficiency of the ELD. It should allow a better and more comparable assessment of whether the ELD implementation achieves its objectives and how Member States implement the provisions as well as identifying existing implementation gaps, e.g. as contribution to the EIR. This will not only require information about the application of the ELD across the whole EU but also information about application of the relevant national legislative frameworks to environmental damage incidents.

It is the intent to use, as much as possible, readily available data and information sources at EU level (e.g. Eurostat, E-PRTR) and any systematic data gathering across all Member States will be voluntary and in agreement with Member State experts since the ELD does not pose any further reporting requirements on the national authorities. However, some additional data gathering may be needed in order to ensure that a comparable set of evidence is available for policy evaluation, implementation and compliance promotion. The gathering of data may not create any unnecessary administrative burden for Member States which have not a register of ELD-cases and alternative ways of easy accessibility to the required data ensuring an

equal outcome should be considered (e.g. through internet pages or links to the information of the regional authorities regarding environmental liability cases).

So far as the ELD itself is concerned, the following areas should be looked at empirically as a priority:

- a. Scope of strict liability;
- b. Scope of environmental damage;
- c. Definitions/concepts to ensure full applicability and coherence with EU law;
- d. Effects of the two optional defences (permit defence; state-of-the-art defence);
- e. Need for measures as regards financial security.

The questions that arise, concern whether the ELD is fit-for-purpose to deliver its main objectives, i.e. prevention, remediation, application of the polluter-pays principle, and financial security. To what extent is it effective and how efficient is it?

The main data needed to monitor application of the ELD (besides the relationship with other national liability law, civil liability law, criminal liability law and other relevant instruments) relate to the following: the type of incidents that give rise to potential liabilities; the category or categories of environmental damage; the category of activity causing the damage; the time needed from detection (launch of procedure) to complete remediation; the costs of prevention and remediation, together with business administrative costs and the costs of legal proceedings.

Several Member States have also developed national registers which already collect such or similar information. The necessity of setting up national registers should be considered, taking into account the existing national instruments as well as the information which can be provided in this regard rather than within the framework of reporting on a pre-determined set of data. Having said this, the ELD does not require the setting up of such registers so it will be a choice for the Member State on what the best approach is in the context of their implementation effort.

Key activities in 2017 and 2018

Activity 1.1: Concept development (2017)

As a first step, a concept for evidence gathering will be developed which will include the idea of the development of an EU-wide comprehensive database/information system on environmental liability cases, covering ELD application as well as other liability cases under national laws. This concept will identify some key indicators or assessment criteria which would allow assessment on the evaluation criteria set out in the REFIT report. Moreover, the information and data needs will be identified to carry out such evaluations. Finally, the structure and process for an EU-wide system building on national registers or other available information will be developed. In this context, the application of the INSPIRE Directive could become useful. The concept will also include elements on how the available evidence is published and disseminated (e.g. in the form of scoreboards) so as to be clear about the use of the information from the outset. The timing of the subsequent activities (1.2 and 1.3) will be adjusted on the basis of the outcome of the conceptual phase, if necessary.

Activity 1.2: Testing the concept (end of 2017)

Based on the developed concept ideas, some testing and practical application on the most effective way of gathering such evidence will take place. This can and should involve some volunteering Member States, in particular those which already have a

register or which are willing to establish such a register. The testing will include the development of a toolbox which would allow Member States which are willing to develop a national register to use readily available tools which would also allow information exchange with the EU system in an easy and effective manner.

Activity 1.3: Implementing the concept (2018)

To support the second round of the EIR country reports, the concept will be implemented to the extent necessary and, if appropriate, in stages. The detailed work plan for this activity will be developed on the basis of the results of activities 1 and 2.

All these activities will be carried out with external support contracted by the Commission and regular consultation and involvement of the ELD government experts' group as well as ELD stakeholders.

4.2. Working area 2: Supporting tools and measures for more even and increasing implementation of the ELD

The task consists in identifying and developing the best support tools and measures at EU level, building on the past efforts, to improve the ELD's implementation, with a view to overcoming shortcomings, in particular as regards knowledge, capacities and expertise in some national administrations. Based on the initial discussions with the ELD government experts, the work in this area could focus, in line with the "Recommendations and next steps" in the ELD report, on the following measures:

- a. guidance or interpretative notices on key issues,
- b. training programmes,
- c. helpdesks for practitioners, providing information, assistance and assessment support for risk and damage evaluations.

Over the past years, the Commission has already developed information and training materials, organised workshops training programmes and thematic workshops, and exchanged practical questions of application as well as more fundamental or policy-oriented themes with practitioners, experts and stakeholders (see further in Annex 3).

These measures at EU level can only be successful if they are complemented by efforts at national level to:

- a. support implementation with proactive initiatives (guidance, training, electronic tools, etc.),
- b. exchange administrative experiences and best practices, and support capacity-building efforts,
- c. review the interpretation of key provisions of the ELD,
- d. record data on ELD incidents and publish ELD registries,
- e. systematically gather the necessary data to document that the application of the ELD is effective, efficient and in line with the overall situation in the EU.

Building on the past efforts, this present Work Programme will develop some specific measures and tools at EU and national level by setting priorities on those activities which are most relevant and most frequently demanded. These activities will be regularly updated and fine-tuned according to needs as part of the annual review of the MAWP.

Key activities in 2017 and 2018

Activity 2.1: Developing a better common understanding on key definitions and concepts is a task which may be best launched and pursued in a staged process. The stages could be as follows:

1. Establishment of a list of concepts/issues needing clarification through cooperation between the Commission and the ELD government experts' group; the aim is to reach common understanding.
2. Collection of good practices, approaches and case studies applied by Member States
3. Establishment of a common structure and supportive basis for the elaboration of a common understanding document presenting the common understanding;
4. Final preparation, discussion and agreement on the common understanding document depending on the approach chosen.

The elaboration process will be carried out with ELD government experts (and involvement of key stakeholders), possibly with a specific drafting or sub-group supported by external facilitators, as appropriate. The aim is to finalise this process by the beginning of 2018.

Indicative timetable:

February 2017:	Agree mandate and details of activity
March 2017:	Draft list of key concepts/issues (for written consultation of the expert group)
May 2017:	Collection of national understanding, interpretations, applications and case studies.
September 2017:	Compilation of input and draft common understanding document for discussion at EG
Sept-Nov 2017:	Consultation of documents
February 2018:	Final discussion and agreement of common understanding document at expert group

Activity 2.2: Elaboration and implementation of an integrated capacity building concept, including ELD training

Based on the discussion with the ELD government experts group, the current training programme needs to be reviewed and further developed in order to making it more attractive; improving its outreach and effects. All possible options will be considered including simple continuation or simply abandoning ELD training as we know it. The experiences and current results should serve as a starting point. Some new ideas have also been discussed such as trainings more in the format of thematic workshops where several MS participate and/or trainings where concrete case studies or individual damage incidents will be discussed (damage assessment, valuation and remediation) and best approaches agreed. In this sense, such training workshops could complement the development of the above-mentioned common understanding/interpretation and be further integrated into a broader concept for administrative support.

As a first step, a review and a proposal for future training/workshop support will be considered and agreed by the ELD government experts group. Depending on the outcome, the new concept will be rolled out and tested in 2018. In 2017, some ad hoc support may be possible but will have to be agreed on a case-by-case basis.

At the same time, options for broader administrative support and capacity building measures for practitioners (covering competent authorities, operators, loss adjusters, financial security providers, affected individuals, NGOs, etc.) providing information, assistance and assessment support for risk and damage evaluations should be developed and considered. In the first phase, in 2017, the principle options should be considered and discussed between the Commission and the ELD government experts' group. At the end of 2017 and early in 2018 these options should be looked at more systematically, based on an evaluation of the concrete needs differentiated by Member States and practitioner groups. Based on the results, the most promising options should be tested in 2018 to achieve the first tangible and comparable results. These options could include

- a Commission tool (in close coordination with the developing common understanding-tool) providing answers to the most relevant and most frequently asked questions on the practical application of the ELD, and/or alternatively (thus building an ever growing wealth of practical knowledge covering legal, technical, economic aspects, taking account of interpretative guidance), or
- a network of experts sharing information in a communication platform, acting as clearing house with mandatory documentation of the main results for future use (thus building an ever growing wealth of practical knowledge covering legal, technical, economic aspects, taking account of interpretative guidance), and/or (supplemented by)
- IT tools pursuing the same aims as above (modelled after and learning from the Spanish ELD support tools MORA, VANE, IDM), and/or
- a concept for a Member States system of mutual learning and capacity building ("learning by doing"), modelled for example a bit after the Twinning programme and TAIEX (by taking account of recent experience of DG REGIO with existing Member States)

All these activities will be carried out with external support contracted by the Commission and regular consultation and involvement of the ELD government experts' group as well as ELD stakeholders.

Finally, with regard to the overall objective, the importance of co-operation, workshops and discussion with different parties, such as companies, associations and research institutions should be emphasized (see also point 5 below). The focus ultimately should be to prevent ELD-cases via the most appropriate and available tools starting with information and awareness raising.

4.3. Working area 3: Ensuring sufficient availability and demand for financial security to cover ELD liabilities

The activities under this working area need to take as a starting point the current baseline. This is characterised by a largely sufficient availability of financial security products for ELD liabilities in most Member States, but a demand that is significantly lagging behind in nearly all Member States. Problems identified by several Member States include the following:

- large losses due to major accidents, with operators lacking sufficient financial cover to remedy the environmental damage on their own;
- losses in respect of which operators cannot be identified,
- operators which have insufficient financial capacity or manage to escape their liabilities.

It is particularly necessary to take a closer look at liability cases involving bankruptcy and unknown operators. At the request of NEPA⁹, which started to look into this issue some years ago, IMPEL¹⁰ launched a project on Financial Provisions in 2016. The IMPEL project group has contributed to the 4th ELD Stakeholder Conference on 24th May 2016 with a workshop on "Financial Provision – Protecting the Environment and the Public Purse".

The project found that making financial security effective means ensuring that it is (a) available and taken up (i.e. that there is both offer and demand), (b) the amounts are sufficient to cover bigger losses, and (c) secure/fit for use (e.g. not superseded by other/priority claims). The IMPEL project report 2016/20 "Financial Provision. Protecting the Environment and the Public Purse" was adopted at the IMPEL General Assembly in Bratislava on 1 and 2 December 2016. It was presented together with an outlook of the IMPEL work in 2017 on a guidance document and a decision making tool at the 17th ELD government experts meeting.¹¹ When the IMPEL project has been finished it will be necessary to look at how the applicable environmental legislation and liabilities are taken care of.

The three options identified in the ELD evaluation may be recalled:

1. stepping up operator's risk-based behaviour through risk analysis, risk/environmental management system, taking out the appropriate financial security;
2. mandatory evaluation of financial viability or setting of securities (as for example on waste) of operators through the competent authorities at the occasion of issuing or upgrading/revising permits;
3. gradual phasing in of mandatory financial security at EU level (i.e. going beyond a voluntary approach).

Building on this important work, the Commission proposes to focus on cooperation with the IMPEL project, which may last at least two years (2016 and 2017), and to then investigate more systematically, with the possible help of external studies, the above described situation with regard to the demand for insurance and sufficiency of financial security.

Activity 3.1.: Investigation on availability and demand of sufficient financial security for ELD liabilities in the EU

⁹ Network of the Heads of the Environmental Protection Agencies in Europe

¹⁰ European Union Network for the Implementation and Enforcement of Environmental Law
<http://www.impel.eu/>

¹¹ <http://www.impel.eu/wp-content/uploads/2016/12/FR-2016-20-Financial-Provision-2016.pdf>

Hence, no specific activity is proposed for 2017. Instead, the IMPEL project will be regularly invited to present and discuss its project at the ELD government experts groups' meetings. At the end of this project, the ELD expert group will be invited to discuss and, if appropriate, support and encourage the use of the results of the IMPEL project. Moreover, the ELD expert group will – in agreement with IMPEL – discuss the need and possibility for a follow up activity of IMPEL as part of this work programme towards the end of 2017 to be carried out in 2018. That work could consist in a more targeted review of the offer and demand, as well as of the strengths and weaknesses of the available financial security instruments for ELD liabilities in 2018.

Such a possible future IMPEL project in 2018 could be later supported by a broader external investigation of the question whether financial security for ELD liabilities is available at reasonable costs in all EU MS to cover all types of environmental damages, in particular also major accidents/bigger losses. Therefore, a concept for a study on financial security for ELD liabilities, in accordance with the developments in 2017 should be developed. The objective of the study would be to investigate whether sufficient financial security is available at reasonable cost and could be used rapidly and effectively to cover environmental damages, in particular significant losses. The concept will have to take account of various options, including stepping up operator's risk approach/behaviour, assessment of the financial viability of operators through competent authorities, gradual approach towards phasing in mandatory financial security.

5. Stakeholder engagement

Following the first Commission report on the ELD of October 2010¹², the Commission services decided that it was necessary to step up the implementation of the ELD and to investigate further its strengths and weaknesses. In this context, the Commission launched measures to improve exchanges and communication with and between the ELD-relevant stakeholder groups. This was in addition to awareness-raising measures and measures to promote information and knowledge about the ELD and the development of training material and support for training measures,¹³ mainly targeting competent authorities, operators, financial security providers and NGOs.

An important milestone was the 1st ELD Stakeholder and Practitioner Workshop of 8 November 2011 which developed into the main vehicle for stakeholder engagement over the past years. Other ELD Stakeholder conferences and workshops followed at regular intervals in Brussels. Between 100 and 160 participants took part in each of these events, which had different themes. They have encompassed a general appreciation and evaluation of the ELD, examining its benefits and challenges, as well as a practical exchange on individual ELD cases and related experience. Common to all events was an objective of bringing the various groups together at regular intervals, in order to enable an exchange across the divergent interests, discuss problems, strengthen the common understanding of the ELD and foster a sense of ownership.

The 4th ELD Stakeholder Conference of 24th May 2016 provided an opportunity to present and discuss the 2nd Commission report on the ELD and the REFIT evaluation of

¹² COM(2010) 581 final

¹³ ELD information sheet, brochure and training material is available on the Liability website: <http://ec.europa.eu/environment/legal/liability/index.htm>

April 2016¹⁴ with around 100 participants from the four main stakeholder groups. In the afternoon, the main subjects of evidence base, implementation tools and financial security were discussed in more depth in three parallel workshops. The Commission had presented the main results of the evaluation (Action Plan) at the Conference and its suggestions on how the necessary follow-up should be implemented by a Multi Annual Rolling Work Programme to which all stakeholders had in principle agreed.

In future, the Commission will continue and strengthen its stakeholder engagement to ensure that those stakeholder groups (in particular industry, authorities, insurance, loss adjusters and risk assessors, NGOs, academia) interested and experienced in the ELD implementation can contribute to the implementation to this MAWP. For all the above-mentioned activities, it will be important to have full and continuous stakeholder engagement from the outset and to collect their relevant and available information and data as part of the implementation efforts.

The following approaches will be used:

- possibility to attend ELD government expert group meetings or organising meetings back-to-back to allow stakeholder input to all documents discussed at the ELD government expert group;
- written consultations of documents discussed at the ELD government expert group;
- dedicated, tailor-made stakeholder workshops on particular issues or at important milestones for gathering stakeholder input;
- ELD conferences but probably at less frequent intervals.

In addition, bilateral and specific contacts can be arranged with interest groups which express a particular request or which have a particular contribution to make to a specific activity. Moreover, national ELD experts will have the possibility to participate at dedicated stakeholder events, if possible, so as to ensure dialogue and cooperation.

6. Working arrangements and practicalities

The ELD Expert Group is, to date, an informal expert group of national authorities without rules of procedures. Following the inter-institutional agreement on better law-making, the Commission has recently adopted a new Framework for Commission Expert Groups (C(2016) 3300 final) which now has to guide all existing and future groups established by the Commission or its services. Details on these new rules and further explanations are provided at:

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>

As discussed at the 16th ELD expert group meeting, the Commission is required (and committed) to follow these new rules and proposes to introduce rules of procedures for the ELD government expert group in the form of an informal group, mainly consisting of government experts from Member States (type D experts) and observers from other countries (type E experts). In addition, this opportunity should be used to systematically engage with stakeholders (type C experts). Such rules of procedures will clarify the working arrangements and the ways in which the activities can be conducted and the results of any activity can be finalised and agreed in an effective manner. At the same time, the Commission services are keen to continue the collaborative, informal and

¹⁴ See footnote 3

consensual cooperation with government and other experts which was established in the past. The new rules of procedures and any other practical working arrangements will be discussed and proposed for agreement at the next ELD government experts meeting.

In practical terms, the ELD Expert Group (ELD EG) will meet on a regular basis as necessary (currently proposed: twice annually with meetings in the first and third quarter). The main task will be the agreement and implementation of this MAWP. In addition, it provides a platform to discuss any other issue of relevance for the implementation of the ELD. Meeting documents will be discussed and, if appropriate, an opinion will be requested at the meeting. If necessary, written consultations will take place in-between meetings. Moreover, the ELD EG can consider setting up dedicated (smaller) sub-groups or it can be considered to organise specific workshops on certain subjects. Further details on the operation of the EG are laid down in the rules of procedures.

Draft Rules of Procedure for this expert group were presented and discussed at the 17th ELD government experts meeting. The agreement of the Rules of Procedure was postponed to the 18th meeting because some government experts expressed the wish for an extended internal consultation.

7. Conclusions and outlook

The ELD Multi-Annual Rolling Work Programme (MAWP) is designed to establish a thematically structured working basis with clear priority setting and respective practical arrangements between the Commission and the Member States (DG Environment and the ELD government experts' group), including appropriate involvement of ELD stakeholder groups. The MAWP covers the period 2017 to 2020, clearly identifying the working areas and main activities for 2017 and 2018. Activities for 2019 to 2020 will be laid down at a later stage building on the previous results. It is a rolling work programme, which is open for annual review and adaptations according to the needs and interim results of the work, including from studies or other deliverables from external contractors (the Commission will support the activities as necessary and feasible through contracts). The annual review will be undertaken by the Commission together with the Member States, in particular by monitoring the progress and delivery of the agreed actions and by identifying new activities to be included in the following year(s).

The MAWP aims at improving implementation and thereby following up the recommendations of the Commission's report in 2016. In addition, it will contribute to the Environmental Implementation Review as a new and important cross-cutting vehicle to ensure that legal commitments deliver the intended results on the ground. Moreover, the MAWP will help setting the frame for the next evaluation of the ELD and the Commission assessment on whether it needs revision at some point, which, at this stage, is expected to take place between 2021 and 2023.

Annex 1 (p. 60-62 of ELD REFIT evaluation)

The "evaluation showed that

- the Directive's objective *remains relevant* but its ability in achieving a high level of environmental protection and in preventing and remedying environmental damage in the EU is hampered by significant lack of clarity and uniform application of key concepts, and underdeveloped capacities and expertise,
- many Member States have made progress towards *effectively achieving the two main objectives* of preventing and remedying environmental damage within the reporting period, but studies have concluded also a 'patchwork of environmental remediation', expressed also in a number of cases with a few Member States with high record of cases and eleven Member States having notified no ELD instance,
- the latter may result from insufficient enforcement of the ELD (in some cases due to preference for other pre-existing legislation),
- the amount of better precaution is said by many stakeholders to have risen due to the ELD, but it is difficult to estimate,
- currently there is not sufficient evidence which would justify the amendment of the scope of strict liability (no proof of fault) and of the scope of environmental damage (biodiversity, water, land). Further evidence gathering and monitoring would be needed to also look at the wider liability regimes in place and address particular aspects (e.g. the transport of dangerous substances in pipelines, cf. *Coussouls de Crau* case),
- the *effectiveness is hampered* by diverging interpretations of the significance threshold, affecting in particular the trigger for preventive action, and hence a lower number of ELD cases,
- other reasons for lower application consist in the fact that some Member States use the flexibility under the framework character of the Directive to make more use of exceptions and limiting options and define broad concepts and definitions in a restricted way, such as in particular the 'significance threshold' and rely more on their national legislation,
- opportunities for better application of the ELD are provided through
 - publicly accessible registers of ELD cases,
 - access of interested parties to submit comments and to cooperate with competent authorities,
 - a secondary obligation of competent authorities to carry out preventive and remedial action if operators fail to do so,
 - the repeal of overlapping national legislation, and
 - the knowledge of the ELD by operators.
- precise data on administrative costs for public authorities are limited and quite divergent, and for business not available at all, which indicates the need for further research in future,
- some data on remediation costs are available showing that the average costs of remediation turn around €42,500 if the few large scale accidents are not considered in the calculation, but average costs per Member State vary as well between €3,559 (Hungary) and €1,070,341 (Sweden) (again by excluding five bigger cases),
- preventive and remedial costs were effectively internalised in line with the polluter-pays principle where the ELD rules were applied and the (solvent/sufficiently insured) liable operator could be identified,

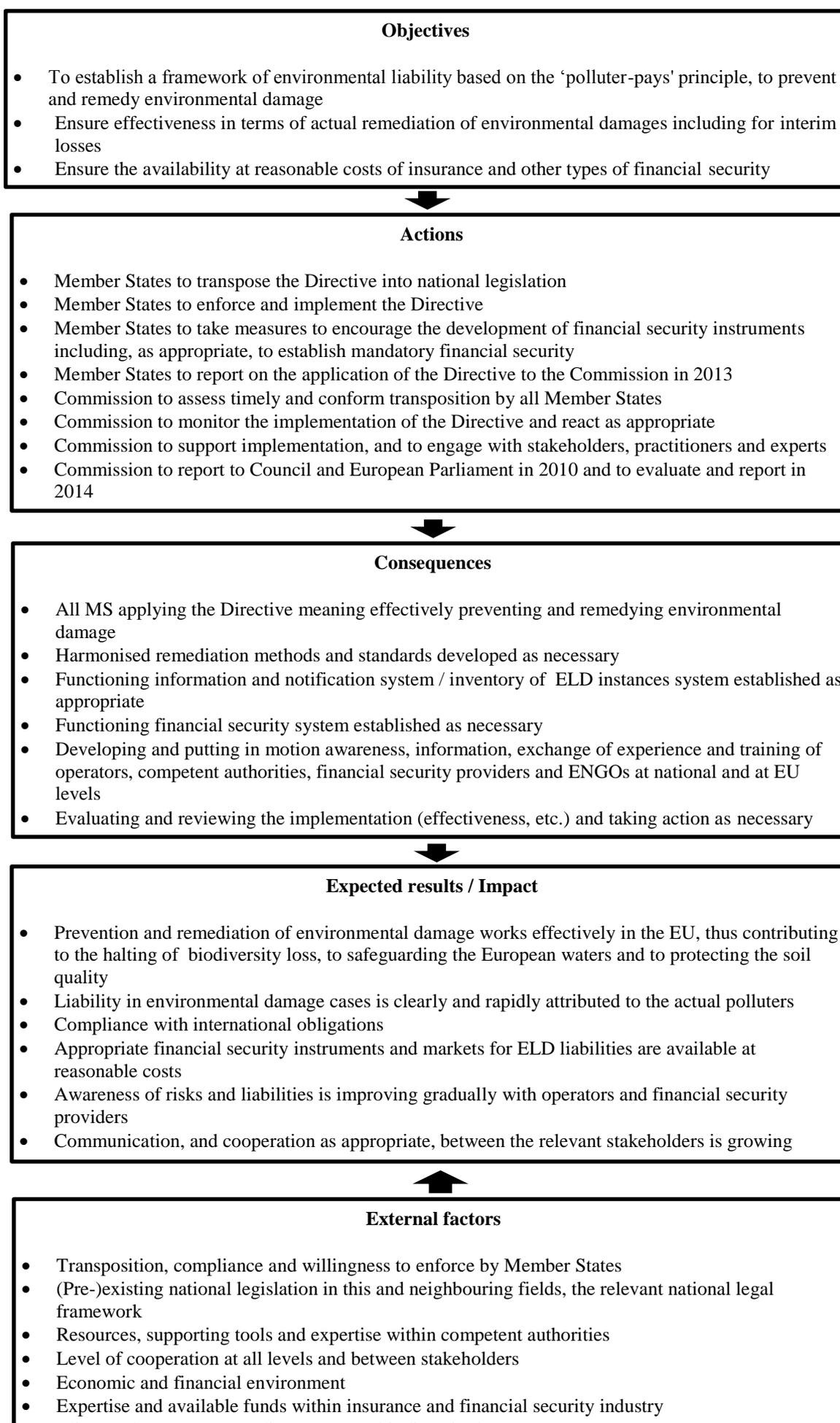
- sufficient insurance cover is available in most markets, including for complementary and compensatory remediation, but demand is in general low due to lack in reported incidents, sub-optimal enforcement and slower developments in emerging markets,
- the case of harmonised mandatory financial security at EU level is still weak in the face of the abovementioned recent upward trend in insurance cover for ELD liabilities in the EU; it is useful to consider further some options to improve financial security such as better examination of the financial viability of operators by competent authorities, promotion of better risk analysis of operators, and a gradual approach in introducing financial security starting by the most riskiest activities, and taking into account the advantages of tailor-made solutions at national level,
- major accidents and else large scale losses as well as insolvency/bankruptcy remain a problem for financial security in the EU, which could be targeted by appropriate solutions including well-designed and tailor-made industry funds or risk-sharing facilities but without jeopardizing the polluter-pays principle (i.e. ensuring that 'good' players do not foot the bill for 'bad' players), and without hindering the development of insurance markets,
- the two optional defences in the ELD (permit defence, state-of-the-art defence) may undermine the strong incentive of strict liability to invest in risk minimising technologies and to undertake additional precautionary efforts, but sufficient empirical evidence was not available and main stakeholders expressed a clear opinion in favour to keeping them,
- the ELD is, in principle, *coherent with the other parts of EU environmental law* (EIA, IED etc.), but
- some *particular coherence* issues need to be further considered, preferably by way of interpretation and guidance as regards the relationship between the ELD and the Habitats Directive, concerning in particular
 - the relationship between the significance threshold in the ELD and habitat deterioration and significant species disturbance pursuant to Article 6(2) Habitats Directive; and
 - the geographical reference of 'favourable conservation status' according to Article 2(4) ELD with the similar concept in the Habitats Directive, taking account of the need for a, site-related reference
- the exemptions to the ELD in favour of some international conventions in the field of maritime transport and nuclear activities should be maintained for the time being because IMO Conventions have, despite lower environmental remediation standards than the ELD a range of other advantages (no significance threshold, mandatory financial security, right of direct recourse against the insurer, three tier financial security for oil pollution damage, world-wide scope) and because nuclear liability should remain under the *Euratom* Treaty rather than under the TFEU to avoid controversial consequences,
- there were no incidents of environmental damage caused by genetically modified organisms in the EU and that the Directive fully implements the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety,
- there is no need to extend Annex IV or V of the ELD (exceptions to the scope of the ELD in the aforementioned fields of (mostly) maritime transport and nuclear activities after having assessed all potential candidates,
- the ELD works *complementary* to main pieces of EU environmental legislation to which it is directly or indirectly linked, in particular to the Habitats and Birds Directive, the Water Framework Directive and the Marine Strategy Framework

Directive and the Offshore Safety Directive (besides the Industrial Emissions Directive, CCS Directive, Waste Framework Directive, Landfill Directive etc.),

- the specific *EU-added value* of the ELD is linked with transboundary damage (transboundary water damage, biodiversity damage), and that
- the situation regarding environmental protection *without the existence of the ELD* would be worse with particular regard to prevention of damage, remediation of damage to the baseline condition, biodiversity damage, the remediation standards (primary, complementary and compensatory) and public participation and access to justice."

Annex 2 (p. 6 of ELD REFIT evaluation)

Figure 1: The intervention logic for the Environmental Liability Directive



Annex 3

Summary list of practical ELD implementation promotion measures undertaken by the Commission so far

- ELD Stakeholder Workshops/Conferences:
<http://ec.europa.eu/environment/legal/liability/workshops.htm>
- ELD Information Sheet and Information Brochure:
 - [Information sheet](#)

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 - [Brochure](#)

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- ELD Training Slides and Handbooks (for short, medium and long training sessions):
http://ec.europa.eu/environment/legal/liability/eld_training.htm
- ELD Training Programme:
http://ec.europa.eu/environment/legal/liability/eld_training.htm