

3rd ELD STAKEHOLDER WORKSHOP – BRUSSELS

*'Experience gained in the application
of the Directive based on concrete ELD cases'*

26th November 2014

SUMMARY REPORT

Why did we have this workshop?

The main objective of the workshop was to enable an exchange of information and practical experience gathered in the application of the Environmental Liability Directive (ELD) between main stakeholders, experts and practitioners. Further, to evaluate the achievements and challenges of ELD implementation and to present the five REFIT evaluation criteria.

Who was present?

Four main ELD stakeholder groups (industry, financial sector, authorities, NGOs/civil society) took active part in the presentations and discussions. Altogether 120 participants signed the attendance list.

Morning Session

Welcoming Words

Hans Lopatta, European Commission/DG Environment, welcomed the participants to the 3rd ELD Stakeholder Workshop and presented a brief overview of the presentations and the World Café in the morning. He emphasized that the goal of the workshop is the exchange of ideas between the stakeholders from the different sectors (NGOs/civil society; industry; financial sector; authorities) and that a lively discussion is welcomed. *Erik Ballhausen* from the European Commission/EACEA then briefly introduced the concept of the World Café and its purpose, namely actively engaging in an exchange of thoughts and experience. He underlined that the results may be important for the Commission when drafting the upcoming ELD-Report.

Presentations Block I – Presentation of ELD cases (all presentations are online)

1st Presentation: Case Presentation: Remediation of Land Damage

Kim Bradley from the Scottish Environmental Protection Agency (SEPA) stressed that a good environmental quality is very important for the Scottish economy since the many of Scotland's industries such as agriculture, tourism and food and drink depend on Scotland's good quality environment. New Scottish legislation (regulatory reform) will offer additional enforcement tools and should strengthen the application of the polluter-pays principle. She presented two case studies, one concerning soil damage in a residential area (pollution with kerosene), and the other one was about an imminent threat of water damage. *Kim Bradley* concluded from the first case that there are challenges to remediation of environmental damages in residential areas and that the opinion of the people living there needs to be taken into account by the authority. The second case centred about the question at which point does a risk becomes an imminent threat under ELD. SEPA concluded that a threat becomes "imminent" if it is likely to occur unless action is taken promptly to deal with it. *Hans Lopatta* advised that he agreed with this interpretation.

Q/A

Valerie Fogleman (Stevens & Bolton LLP) stated with an eye on the second presented case that obviously preventive actions were taken in order to prevent the applicability of the ELD and asked who pays for the early stage preventive measures. *Kim Bradley* answered that in this specific case the operator paid the costs. *Phil Crowcroft* (ERM) stressed in a comment that the threat of applying a certain law can also be an effective tool to change certain behaviour. Where the threat of use of a law

achieves a better, faster environmental outcome than the actual application of that law, Regulators should consider this when assessing any particular situation. *Kim Bradley* agreed that this can enhance the willingness of the operator to cooperate or be pro-active.

José Luis Heras Herraiz (Pool Español de Riesgos Medioambientales) remarked that preventive measures are already part of ELD application. *Kim Bradley* agreed but indicated that the question SEPA had to address would be when an "imminent threat" starts/can be stated and therefore ELD applied. She also answered questions from *Anna Simpson* (NFU) on land damage cases falling under the ELD and from *Juerg Busenhart* (Swiss Reinsurance Company Ltd) regarding the remediation categories for land damage.

2nd Presentation: Environmental damage insurance claims: The insurer's perspective on adjusting large ELD losses (case presentation)

Karl Ortman and *Martin Wischott* (GDV, Germany). In the first presentation, *Karl Ortman* talked about the German environmental damage insurance market. The market for such policies is very big; in 2012, the milestone of one million insurances was reached. Almost every company that poses somehow a risk has such insurance and its acceptance has increased year by year. *Karl Ortman* stated that there is a considerable gap between the cases Germany reported to the Commission as ELD cases (around 60 between 2007 and 2013) and the insurance claims (112 in 2012 only). He underlined that there could be even more environmental liability insurance cases, but the statistics done by the insurer are categorizing the claims and often there are several damages and only one of them concerns environmental damages. It would also not always be easy to separate the ELD claims from other related claims. Main reason why companies ask the insurer for compensation is "operational disruption".

In the second part of the presentation *Martin Wischott* presented a case about an environmental damage of a shallow river in Germany, still in a very natural state and very rich of fish, caused by accidental release of chemicals (300 kg of fatty amine) of an industrial park. All species in the river were affected and also the birds for which the fish served as food source. *Martin Wischott* emphasized that often the assessment of the baseline conditions is a very delicate and difficult issue. In this specific case, it was possible to use the monitoring of the aquatic environment another permitted discharger was obliged to do every year, so sufficient information was available. He described the measures taken in close cooperation between fish experts and the local authorities with the insurance involved, to remedy the damage and explained which problems they were facing (e.g. problem to purchase enough wild caught fish).

Q/A

After a question by *Giovanni Faglia* from Pool Inquinamento on the reasons why Germany is the only country where there is a big market for environmental damage insurances even though the financial security is not mandatory, *Martin Wischott* explained that Germany has some kind of environmental liability already from 1991 on (a product developed on the basis of the German civil liability law for environmental damage), so an insurance market has developed early on which other products could be topped up and the market provides insurances to reasonable prices. In this regard *Nils Hellberg* from the German Insurance Association GDV supplemented that the price of the product is important but also the fact that brokers can be held liable if they do not advise to buy environmental liability insurance (and subsequently an environmental damage occurs) would contribute to the success of the

German system. Consequence is that basically every insurance company are forced to offer this kind of product.

Edward Brans from Pels Rijcken & Droogleever Fortuijn queried whether any compensatory measures for interim damage were taken. *Martin Wischott* answered that the authority apparently did not ask the operator to take any. His impression was that the competent authority was happy that something was done. He criticized in this regard that there is often a lack of awareness and knowledge on the side of the authorities and that they have very little experience with interim losses.

Other questions were asked by *Elisabeth Abrassart* (ASSURPOL) on the amounts and limits of involved insurance (*Karl Ortman*n: limits vary widely from € 10-12 mio. to € 2-5 mio. in the smaller sector or even less) and an GDV recourse (*Karl Ortman*n: within the lots of statistical information on collected data actual ELD cases are often buried in EIL cases under different headings and vice-versa; in any case we have also cases of compensatory remediation measures). *Edward Brans* asked whether residual liability would be covered and to what extent (*Karl Ortman*n: yes, there is coverage for 100% of ELD liabilities) and *Sandy Luk* (Client Earth) asked under which damage category the case fell. In response, *Martin Wischott* stated that the case was – formally – treated under the German Water Act rather than the law transposing the ELD. However, he explained further, that it would not be important according to the the German Environmental Damage Insurance concept under which specific law a claim for environmental damage is brought, provided that the claim is congruent with the ELD regime. *Pouli Stavroula* (Greek Ministry of Environment) queries whether there would be insurance cover in Germany for gradual pollution (*Karl Ortman*n explained that for their insurance "operational disruption" is the crucial term and therefore also gradual pollution is usually covered) and *Heimo Gruber* from Risk Consult commented finally that besides Germany also in Austria would be full insurance cover of all damage and remediation categories under the ELD.

The 3rd presentation on the Talvivaara case could not take place due to the absence of of *Pekka Erkinheimo* from the Talvivaara Mining Company Plc. (Finland) who apologised for not being able to join the workshop.

4th Presentation: *The Kwizda Case – NGO participation in the prevention and remediation of water damage in Austria*

Birgit Schmidhuber (Justice and Environment, and ÖKOBÜRO, Austria) presented a water contamination case that took place in Korneuburg, Austria. The production site of Kwizda, a company producing pharmaceutical products, is only a couple of kilometres away from the Danube. In September 2012, private investigations pursued by a NGO (Friends of the Earth) came to the result that the concentration of a substance is 500 times higher than the allowed threshold. As a consequence, groundwater wells were closed and the NGO informed the competent authority and requested proper remediation measures. She indicated that part of the damage and discharge happened before the Austrian ELD law took effect (continuous pollution took place over at least ten years, with the last incident in 2010). After the case description, *Birgit Schmidhuber* devoted herself on the unclear definition of damage and concluded that this leads to a deficient application of the ELD. She mentions that also the significance criterion poses a problem (it is under Austrian water law not understood as requiring a change in the water classification); in her opinion it should be assessed on a case-by-cases basis. She criticized that the authorities are often focused on the way how the damage happened and

not on the resulting damage and, moreover, that continuous and gradual degradation of the environmental media is not considered under the Austrian environmental liability regime since it applies only in case of an imminent and sudden damage. Proceedings would be still ongoing in this case. The second issue *Birgit Schmidhuber* addressed, was the participation of civil society. She observed that the authorities in Austria are not used to work together with the NGOs (as citizens, NGOs do not enjoy participatory rights under the Austrian Water Act) and seem to be sceptical. In her opinion it would however be to the benefit of the authorities since they could profit from the data collected and the experience gained by the NGOs. Furthermore, NGOs acting as "watchdog" for environmental issues contribute to better environmental protection. To fulfil these duties more adequately, the civil society would need the data collected by authorities. She concluded that NGO participation should be supported by the authority through sharing of information.

Q/A

Responding to a question by *Carmen Bell* (Insurance Europe), *Birgit Schmidhuber* clarified that the term "civil society" covers especially affected citizens, the environmental ombudsman and NGOs; more generally it refers to people different from the operator and the competent authority that can enforce the application of the ELD, but it has nothing to do with civil liability. *Jose Luis Heras Herraiz* commented that many enterprises were initially concerned about giving too much power and competences to the NGOs and the civil society because they fear that this would lead to harassment and long procedures, but that would have absolutely not been the case. In Spain not only NGOs but also third parties would have the right to request remediation of environmental damage. In response to this remark, *Birgit Schmidhuber* provided that it would be the same in Austria. Such harassment has not happened yet and is not in the interest of a NGO; in Austria only a few requests of private persons or NGOs were registered (only five or six such requests over the past five years – the objective is not to flood operators and authorities with requests).

Upon the question how an objective assessment of an environmental impact could be achieved, *Birgit Schmidhuber* answered that more environmental information is necessary. A transparent ELD register would be good, some Member States have already public databases and this concept should be taken over also by other countries. *Dawn Slevin* (Environmental Liability Services Ltd) mentioned that it was remarkable that it took so long for the authorities to respond to the pollution and asked whether Austria did not have proper legislation for water protection in place before the entry into force of the ELD. *Birgit Schmidhuber* replied that the competent authority took actions in accordance with the Austrian Water Act, the problem was however that other contamination was not detected for some time because they did a wrong assessment of the damage. That was also approved by *Florian Stangl*, European Commission/DG Environment, who furthermore mentioned that the remediation of the groundwater damage will take years and the estimated costs amount to more than one million Euro.

Birgit Schmidhuber clarified a misunderstanding about the position of NGOs as regards the natural restoration requirements under the ELD (remediation meaning *restitutio in integrum*), stressing that they do not get any money for requesting an ELD procedure. *Heimo Gruber* provided his opinion that the industry sector understood early that risk management is a crucial issue. The authorities, however, would not have the capacity, the resources and are not sufficiently equipped to collect all the data; the society should support them. Upon question, *Florian Stangl* clarified that indeed the Austrian Water Act was applied in this case.

Coffee break

Presentation: *The ELD training programme – feedback on 2014 trainings and key issues for the future*

After the coffee break *Ece Ozdemiroglu* (Economics for the Environment, eftec, UK) shared the experience eftec made with the ELD training. Eftec organized trainings for 9 Member States in 8 different countries and provided everybody interested with training material. The trainings were funded by the EC as regards the trainers costs and charges. ELD training information is publicly accessible at the Commission's ELD Homepage. She said that the aim of the trainings is to increase awareness and improve the ELD implementation. In total 273 people attended the trainings in the formats of 1-day or 2-days training sessions. *Ece Ozdemiroglu* expressed that they made really good experience with mixed stakeholder groups. The trainings were kept very simple on purpose. The answers were based on the ELD text and difficult questions or questions regarding transposing national law were left out. She explained that a lot of examples were given during the trainings and that the participants were invited to come up with their own experience and cases. Key topics that came up were, inter alia, "imminent threat", "service of natural resources", the assessment of the "baseline condition", "interim loss" and "compensatory remediation", "significance threshold", rights of "enabled parties" and "financial guarantees". *Ece Ozdemiroglu* showed also how the participants evaluated the trainings and that most of them were satisfied. She observed that general knowledge about ELD exists (but it would not be uniform across stakeholders and Member States) and that the "equivalency analysis" is still widely unknown, at least when it comes to its practical application. Several other uncertainties, especially regarding the baseline condition, the significance threshold and financial guarantees would exist.

Regarding the future perspective, *Ece Ozdemiroglu* stated that the ELD trainings will also be continued in 2015 but the number of training events will depend on the funding by the EC.

Hans Lopatta clarified that if there are too much training applications for 2015, the Commission would be in favour of prioritizing those applications expressing the need for ELD trainings most urgent and have difficulties in affording the costs.

Morning World Café

After *Ece Ozdemiroglu's* presentation *Erik Ballhausen* explained the Morning World Café and asked the participants to answer - in two rounds - questions regarding the overall topic '*What can we learn from the experience gathered in the application of the ELD Directive?*'. The workshop participants gathered together in groups of up to 6 persons at the seating units (*bistro style*).

1st round: *What works well and why?*

2nd round: *What challenges still remain?*

Introductory explanation: Each bullet point provides the content of one harvesting sheet as faithfully as possible, unreadable text was either completed if deemed clear enough, otherwise disregarded.

1st round: *What works well and why?*

- Key insights: is it remediation or monitoring?; in Germany great expectations from the public, in Slovenia no ELD case; Switzerland begins to think about it
- Key insights: EU database with links to national databases (register); a clear list of damages to help insurance companies develop a product; mandatory insurance does not apply to all cases → some do not have legal support → optional insurance
- Key insights: preventive measure; compensation for interim loss; possibility for remediation.
- Key insights: existing national legislation works well alongside ELD; preventive role "appears" to work well, but this is inferred; insurance take up variable, but working well where established; breadth and continuity of insurance cover is positive; promotes quick damage control and responsiveness; when applied, compensatory remediation welcomed.
- What institutions/authorities should be involved: authorities, NGOs, international organizations, insurers, etc.

Key insights: chance to increase awareness about environmental risks; preventive measures; training sessions; application of the polluter-pays principle; more collaboration between administration.

- Key insights: the primary remediation works well; availability of financial security; technical analysis of physical damage; cooperation between operators and authorities.
- What institutions/stakeholder should be involved: industry – energy, raw materials: industry association – energy; education – universities; NGO – environmental lawyers; consultants.

Key insights (what works well): good to have monitoring data beforehand; German way of handling damage – not worrying too much about legal aspects; public liability works well; but challenges still remain: indirect consequences of industrial accidents, e.g. fire brigade use chemicals which pollute environment or pollution caused by multiple non identified entities (agriculture and nitrates polluting water reserves underground)

Unanswered questions: is there legislation restricting which fertilizers the agricultural sector is allowed to use? (in Belgium there is); difficulty to determine which environmental legislation applies because of numerous texts (legislative framework complexity).

- Key insights: sometimes operators (especially large companies) take action before competent authority asks them → pure effect of having ELD (preventive benefit), but just in case the competent authority "brings a case"; for these companies the costs of prevention/remediation is not important, it is the stigma of having an ELD case; ELD is stricter than national laws (e.g. the Dutch); previous national damage sometimes broader than ELD, e.g. in Italy for prevention of damage and air pollution; ELD implementation is better when combined with implementation of other environmental/industrial legislation; broadening the tools lawyers have to deal with damage cases; sometimes you implement the whole ELD but you apply a broader concept of remediation

than in previous national law; diffuse pollution can be covered by ELD (ECJ case) only if causation can be demonstrated

Unanswered questions: not all cases that could/should be ELD are reported as such to EC (this is OK if clean-up/prevention happens anyway); not enough practical examples to prove; more active sharing of information and experience is necessary (Austrian [KWIZDA] case).

- What institutions/stakeholder should be involved: example Belgium → there are different regions and not all at the same level of legislation.

Key insights: Awareness (possible liability plus civil; broader than liability, also about environmental risks); cooperation and organisation (between stakeholders, but also within companies → risk managers, directors, underwriters engage operators and internally); financial market and development (solutions) → financial impact on industry generate interest in products; increased responsibility → cross-border problems can be resolved (e.g. Danube river).

Unanswered questions: how do insurers get information necessary in order to offer products in other markets; need to know what operators need.

- Key insights: why did the German insurer (*probably meant: in the case study presented in Block I*) pay the claim that was discussed under the ELD without knowing whether it was an ELD claim?; If national law does not apply to preventive measures when there is no imminent threat what happens? For example no national law for biodiversity damage.
- What works well: EU communication

Key insights: nothing works well; lack of clarity as to what is the ELD (threshold level does not work); has encouraged more discussion about biodiversity, BUT no clear link to liability of clients; this is awareness of ELD BUT links to real exposure is not complete, questions are How am I exposed, what costs?; they are cases BUT how to disseminate; France looking to establish also a civil law as well because EU ELD does not work; there is the "how" available BUT in practice implementation is difficult and a burdensome; EU communication is good.

2nd round: What challenges still remain?

- Key insights: Biodiversity cases difficult, scientists are involved; takes time and lot of effort; monetary value of all things; looking outside the EU for other measures to solve problems; In France: civil court problems → financial compensation goes to NGO which often does not use the money to repair the environment but spend for other issues.
- Key insights: an "accident database" would be useful (especially for insurance sector); this is already existent in maritime sector; uncertainties in the ELD make it difficult to apply, e.g. significance; financial provision is complex, e.g. insurance will not cover illegal acts which can often be cause of pollution; implementation of ELD can be lengthy, in particular where it involves court actions → this could delay remediation; 2015 Commission report could help to bring more certainty to how the Directive should be applied.

- Key challenges: operators focus on prevention but are not aware of the environmental impact and not fully understand the consequences of an environmental habitat; more information on ELD cases (e.g. Polish ELD database); other legislative acts in force overlapping with ELD legislation; mandatory insurance prevents from being "innovative" → tailor insurance on a case by case basis
- Key insights: awareness raising: CA, GO, SME's: information gathering/exchange; clearer definition of ELD scope needed.
- Key insights: defining what is an ELD claim; defining what "imminent" means; calculation tool for "imminent losses"; assessment of significance needs to be translated into a tool; acceptability of tools to operators if they have not been involved in producing them; reaching consistency across MS; application of existing legislation is often preferred to ELD → hence, reporting very few cases.

What institutions/stakeholder should be involved: broad inclusion if all stakeholders needed to maintain confidence in the process.

- Key insights: challenge 1: depends on a willingness/non-conservative competent authority; challenge 2: high thresholds in terms of definitions of "environmental damage"; challenge 3: access to justice
- Key insights: knowing the baseline conditions; competent local authorities: sometimes multiples → can cause conflicts; multiple layers of legal requirements, ELD is just one of them (from a company point of view); keeping flexibility in the range of tools available to ensure environmental protection (risk management measures, risk assessment before other financial solutions); 'orphan' issues where there are no owners or known polluters (abandoned sites)
- Key insights: extra-territorial application of the ELD; relationship with existing national regimes → lack of awareness of national authorities; ensuring solvency of the operators; raising awareness among national authorities and public; need for harmonising the practices of national authorities
- Key insights: instruments are there but not used, e.g. complementary remediation → interim remediation not applied; legal harmonization on a national base → authority education would benefit operators.
- Key insights: scope of the ELD is too restrictive for enough cases to be caught, e.g. fault-based, defences, thresholds
- Key insights: risk assessment; financial security schemes (mandatory or not?), financial guarantees and contracts; uniform framework; definition of what is an ELD case (define thresholds)
- Key insights: Annex III may not be working; suggestions to lower thresholds from "significant" to "tolerance"; difficult to assess what needs to be done (i.e. remediation)

Unanswered questions: how does ELD differ from national legislation? (this needs to be made clear); whose responsibility is this?

- Key insights: insurances face the problem to sell not enough insurances; more case studies and examples of much liability could be useful; Belgium (insurance mandatory) is federal but ELD implementation is regional → you can have 3 different implementations in such a small country;

difficult to market a new insurance product when everyone is cutting costs (very high overhead costs in small market like Belgium to develop new products); some cases could be considered as ELD but are not declared since the competent authorities apply old legislation they are more familiar with; many MS take the message from the ELD but not implement it fully

Unanswered questions: cooperation between insurance companies can be seen as infringing competition law. But in Germany that happened → Cheaper to develop new products → only way to cut down costs is to develop the product together → each company can charge different premiums of course → makes insurance more affordable; better integration of ELD and previous liability and other national legislation

- Key insights: lack of awareness about financial security solutions for ELD; lack of understanding about liabilities (statutory insurance does not necessarily raise awareness about responsibility); continued use of prior environmental legislation over ELD → sectoral legislation is applied; complexity of ELD (especially the term "significant damage" varies across the regions)

Unanswered questions: example of problem: French civil law being introduced with same aim as ELD but under civil law

- Key insights: lack of consistency across the EU, different transposition, different requirements etc. So it is difficult to compare the implementation across EU; differences in standards because some MS have developed faster than others; backlog regarding historic, ongoing/continuing damage → uncertainty regarding the application of the ELD; economic problems (polluter can't or won't pay) → who picks up the costs? Should the state pay?; definitions: how to apply them in practice, e.g. "environmental damage", "interim loss" etc. And how to apply the guidance on compensatory remediation (or in some cases, not even knowing that this guidance exists); lack of data on baseline conditions (especially for biodiversity) → leading to difficulties in establishing whenever there has been "environmental damage"; diffuse pollution → where several operators have contributed; cross border threats from outside the EU; lack of information about insurance; efficiency of insurance (lower premiums).
- Key insights: homogeneity of transposition and the implementation → many activities have established ELD within the body of law, existing legislation was broad enough; ELD sufficient, need to document experience; different countries have different needs

Lunch Break at the MCE

During the lunch break the plenary room AB was split in two separated rooms in which the Presentation Blocks II (room A) and III (room B) took place in the early afternoon (14.00-15.30)

Presentations Block II (Room A)

1st Presentation: *The challenge of enforcing environmental liability rules in Hungary; characteristic features of the Hungarian ELD implementation*

János Mikó from the Hungarian Ministry of Agriculture, Department of the Environment, reported that of the more than 1,000 environmental damage cases notified between 2007 and 2013 in Hungary after a further assessment 575 cases were identified as cases falling under the ELD. The reason for the high number would be that Hungary had not transposed the Directive separately but incorporated it into existing laws (altogether eight laws and government regulations). Moreover, Hungary had already a stronger liability regime which was maintained pursuant to Article 16 ELD. In addition, the significance threshold in Hungary would be much lower than the standard level in Europe; in practical application cases are automatically notified with significant adversary effects. These rules are applied by the authorities every day and the State Secretary had prepared respective guidance. On the other hand, more than half of the Hungarian officials may have never heard of the ELD before the report; they would normally not be aware of details of EU law.

Q/A

After a query by *José Luis Heras Herraiz* on the large accident at Kolontar in 2010, *János Mikó* provided that the remediation process would have been finalised; civil law and penal law cases would still be ongoing; the company had been nationalised but is in the state of near economic collapse. He further said that the insurance was incredibly low with only 12 mio. Forint (which only covered around 0.5% of total losses), so that the bulk of the measures were paid by the State, including the workers salary to keep the company alive. 10,000 families had been affected and many services depending on that activity were also heavily affected. He also stated that Hungary will have to learn from the accident and to improve the insurance situation. The State would push liability of big companies, including banks and the environmental inspectorates have a particular role to play, and they have also created a fund. Further, *János Mikó* answered extensively the questions asked by *Dušan Pichler* of the Slovenian Ministry of the Environment on how the company was nationalised, and by *Heimo Gruber* on the cost of damage (all damage remedied, only monitoring still ongoing). *Pawel Holnicki* enquired whether a fund has been already set up or not and how this fund can be in line with the polluter-pays principle under the ELD. *János Mikó* responded that the fund would affect the PPP only at second level; it would be criminal if the company acted irresponsibly because it knows that a fund is available; on the contrary through the fund the company could be pushed to undertake measures due to the obligations under the fund.

2nd Presentation: An NGO perspective on limitations of the ELD: Environmental damage & access to justice

Andrew Jackson (An Taisce – the National Trust for Ireland) presented two major cases and themes: First, the environmental damage caused to a priority habitat type in Ireland (active raised bog) under the Habitats Directive, through mainly peat extraction activities at large scale (much of which can be classified as an 'occupational activity' owing to the involvement of paid contractors). He pointed in particular to the potential weakness of the ELD in terms of the definition of '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'. *Andrew Jackson* pointed out that this raises an issue of geographical scale: the ELD requires that damage has to be 'significant' in relation to reaching or maintaining 'favourable conservation status'. But under the Habitats Directive 'favourable conservation status' is a concept that is assessed at the national level. If the implication is that local site-related impacts on species/habitats and conservation status cannot be taken into account for ELD purposes, the ELD would be void of its intended purpose. A purposive approach to

interpretation should be adopted, he argued. His second case concerned a municipal sewage plant piping the sewage into a Natura 2000 site (priority habitat turlough), which would also require the application of the ELD, he argued. The EPA as competent authority in Ireland for ELD purpose has not taken effective (preventive or remedial) action under the ELD, despite formal requests for action under Article 12. The case highlighted how difficult accessing justice and ensuring that the ELD is properly applied can be where a competent authority simply denies that the damage in question reaches the relevant trigger threshold. Here, it would seem that the significance criteria for biodiversity damage under Annex I of the ELD would be fulfilled by virtue of a 'proven effect on human health'. For water damage, the EPA argued that the groundwater body's status had already been classified as 'poor', owing to phosphate from diffuse sources of which the sewage plant 'may' be one. Further, the EPA argued that Ireland's transposition of the ELD only applies to events or incidents which have taken place since 1 April 2009, and it would be 'extremely difficult to apportion any deterioration in the ground water body to the period since this date'. The result is that no action has been taken under the ELD, despite obligations apparently being triggered. However, to challenge these decisions at the national level would be extremely difficult because there is no EU Access to Justice Directive (pursuant to the Aarhus Convention) and there is no access to justice provision in the ELD (unlike the Environmental Impact Assessment Directive and the Industrial Emissions Directive, for example, which have dedicated access to justice provisions). The result is that challenging Ireland's competent authority's ELD decisions can be prohibitively expensive, despite the requirement under Article 9 of the Aarhus Convention that such procedures "must not be prohibitively expensive". That is, if one loses the challenge, the 'loser pays' principle applies such that the losing litigant will have to pay the competent authority's legal costs. This could easily run to tens or even hundreds of thousands of Euro in Ireland, which could bankrupt an individual or NGO if the case is not successful. This factor, *Andrew Jackson* concluded, is likely to deter individuals and NGOs from challenging the competent authority's ELD decisions in Ireland (e.g. a decision to do nothing about environmental damage under the ELD), even where such decisions appear legally flawed.

As time was running short, *Hans Lopatta* proposed to finish first with the remaining presentations and then see how/to what extent questions and answer can be taken.

3rd Presentation: Case presentations: Poland, focus on claims complexity including biodiversity damage

Pawel Holnicki from the Polish Insurance association and AIG/Poland presented his company which is responsible for central European countries including Russia. After presenting a short overview of the Polish legal framework on environmental liability and its main implementing features, he moved on to provide data on ELD cases. They had in a survey examined 9000 cases in 2012 and found something in 300 cases. 900 cases are introduced in the Polish ELD register as the number in the Polish ELD register would represent only the tip of the iceberg. He then presented the complexity of environmental damage case handling on the example of a rail accident (leakage of diesel oil requiring soil remediation) and of a renovation work of a bridge (nests with baby birds of black grouse dropped into the water affecting the conservation status of this species).

4th Presentation: Claims that have been, or should have been, filed as ELD claims

José Luis Heras Herraiz explained that 20 different environmental authorities are involved in the Spanish ELD implementation. In March 2014 Spain had 20 ELD cases (i.e. more than in the Spanish

ELD report of April 2013). *José Luis Heras Herraiz* pointed out as the two obstacles (1) the significance threshold and (2) the establishment of the baseline condition. He reported about the growing tendency to link environmental damage with pollution and presented two cases that have been treated in Spain: First, about a failure in a biological waste treatment plant in Navarra, which caused through a spill-over a pollution to a small creek in the size of some €20,000 of remedial cost, and an accidental fuel spill (6,000 t) causing pollution to underground aquifers in Catalonia (€15 million remedial costs with even €20 million total costs estimated). He then referred to a case of forest fire in a national park where the cleaning activity caused the destruction of 500 ha of forest (negligence by a contractor working for the regional administration). He emphasized on this example the inconsistent application of the significance threshold (due to regional diversity in ELD application) pointing also to the risk that setting the significance level too high would risk rendering the ELD ineffective in the long run. As forest fires occur frequently in Spain, they should be better covered in the relevant legislation.

Q/A

Asked about site restoration plans *Andrew Jackson* explained that Ireland indeed plans to apply for EU LIFE+ funding to restore the active raised bog Natura 2000 sites which have been damaged by unlawful peat extraction, but pointed out that by proceeding in this way rather than via the ELD, the restoration costs will be borne by the Irish (and EU) taxpayer rather than by the polluter ('polluter pays' being an aim of the ELD as well as a core principle of the Treaty). Regarding his turlough/sewage case study, he commented that it is impossible to see how a licence can be granted by the EPA to regularise the sewage discharge, in light of Article 6(4) of the Habitats Directive, which provides that a damaging project can proceed only where there are no alternatives; where there are imperative reasons of overriding public interest; and where compensatory measures are adopted.

Giovanni Faglia with reference to the Navarra case investigated about the possible negative consequences if the ELD is applied to small claims. *José Luis Heras Herraiz* replied that this would not be the case; there would not be a need to open a criminal or infringement case, but the environmental damage should be restored and the ELD would allow the authorities in all relevant sectors to collaborate towards this objective. Limitation to only big cases would undermine the effectiveness of the ELD, as the aim of it is to preserve the biodiversity in Europe.

Presentations Block III (Room B)

1st Presentation: Implementation of international conventions and of the ELD: the Erika case

Yvan Guiton (Region Brittany, France) presented the 'Erika case'. The Erika case is about an accidental discharge of oil from the tanker *Erika* on 12.12.1999 in the Bretagne. The maritime environment of Bretagne is one of the most important ones in Europe. As a consequence of the Erika accident, the EU legislator enacted several packages, which were called after *Erika*, in order to improve maritime safety. *Yvan Guiton* presented the content of the three existing legislative Erika packages. Erika I package brought especially port state control, the Directive on company classification and the phasing out of single hull oil tankers. The Erika II package improved the maritime traffic monitoring and control and led to the maritime workers legislation and the European Maritime Safety Agency. In the Erika III Package flag state responsibility and the classification of

companies was regulated and it contained provisions regarding accident investigation, ship owner insurances and what happens in case of damage of passengers. *Yvan Guiton* talked about a possible fourth Erika package, but this one would be still awaited. In his opinion it could further improve the safety of maritime transport, e.g. by extending the ERP to maritime ecological prejudice. He explained that the French highest court recognized in its judgment from the 25th of September 2012 the ecological prejudice as environmental damage at sea. *Yvan Guiton* concluded that it would be uncertain how to include the ecological prejudice in the ERP and that a uniform system in Europe for ship accidents and how to repair the resulting damages can be organized and would have positive effects.

2nd Presentation: *Handling of environmental damage claims by the IOPC Funds*

In the second presentation of Block III *Liliana Monsalve* (IOPC Funds, UK) explained that the idea behind the IOPC Funds (International Oil Pollution Compensation Funds) is to compensate the environmental **damages** resulting from spills of oil from tankers. A very important principle in this regard is to treat everyone equally. *Liliana Monsalve* stated that the legal roots of the Funds are the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution which got replaced by the 1992 Civil Liability Convention and the 1992 Fund Convention. In 2003, a Supplementary Fund was created in order to ensure higher compensation limits. Thus, in total there are now three tiers of funds, the two of 1992 (one funded by oil companies, the other one by ship owners) and the Supplementary Fund of 2003 (funded by oil companies). She mentioned that the IOPC created definitions of the terms "Pollution damage", for example "preventive measures" and "incident". The speaker then explained that the Fund steps in when the ship owner cannot pay. Various claims are recognized: clean-up costs or costs of preventive measures, property damages (e.g. fish net) or economic losses (e.g. no fishing possible); regarding environmental costs, the IOPC Funds distinguish three categories of environmental damage: Loss of profit from the use of the environment; cost of studies to determine if remedial action is required and reasonable cost of reinstatement of environment. *Liliana Monsalve* stressed that the Supplementary Fund has so far not been involved in any liability case. The 1992 and the older 1971 Funds, have been involved in 145 incidents in total.

Q/A

Replying to a question by *Barbara Goldsmith* (Ad-Hoc Industry Natural Resource Management Group) about the scope of the IOPC Funds, *Liliana Monsalve* emphasized that they apply to accidents happening in territorial waters or the EEZ (exclusive economic zone) of a signatory state and that incidents falling under the 1992 Civil Liability Convention and the 1992 Fund Convention are not falling under the ELD regime. In answering another question from the audience, she said that the Funds cover preventive and clean-up measures and complementary measures provided they are reasonable and correspond to measures for reinstatement of the environment.

3rd Presentation: *Direct effect of the ELD's effective date in a case concerning biodiversity damage*

Valerie Fogleman from Stevens & Bolton LLP and Cardiff University (UK) started her presentation with the statement that the loss of biodiversity was one of the key reasons for the adoption of the ELD. She noted that an operator who carries out an activity not listed in Annex III is liable for biodiversity damage only if the operator has been at fault or negligent. The Welsh legislation broadens the scope of environmental liability regarding biodiversity damage to include sites designated under national law

on nature conservation. *Valerie Fogleman* stated that the ELD is unclear regarding water damage. It uses the term "waters concerned" but at the same time refers to the criteria related to "water bodies". The Welsh transposing legislation defines the term "waters concerned" as damage only to "water bodies".

She stated that under the Welsh legislation, the ELD provisions were not applicable at 30 April 2007, that is, the effective date specified in Article 19(1) ELD (temporal scope of the ELD, cf. Article 17 ELD). Instead, the Welsh transposing legislation has an effective date of 6 May 2009, ergo more than two years after the ELD provisions should have been transposed.

After this introduction, *Valerie Fogleman* presented a case about a Welsh lake in which the number of *Arctic charr*, a fish with a unique genetic composition, has declined dramatically to the point at which the fish is on the verge of extinction. A sewerage system releases sewage into the lake, which is designated as a surface water body under the Water Framework Directive. On 11 July 2013, Natural Resources Wales, the competent authority, issued a decision that concluded, among other things, that there had been "water damage" to the ecological status of the lake but had not been "biodiversity damage" to the site of special scientific interest (SSSI), that is, the site designated under national nature conservation legislation. Natural Resources Wales based its conclusion only on damage that had occurred since 6 May 2009. Fish Legal, on behalf of the local angling society, filed an application for judicial review on the basis that the authority should have assessed whether environmental damage had been caused to the SSSI and waters of Llyn Padarn from 30 April 2007 instead of 6 May 2009. Natural Resources Wales and Welsh Ministers subsequently agreed that the temporal provisions of ELD have direct effect and that the effective date for liability under ELD is 30 April 2007. They therefore ordered Natural Resources Wales to re-assess the damage. On 6 May 2014 the Cardiff Administrative Court approved the consent order and confirmed that Article 17 ELD and the first sentence of Article 19 ELD have direct effect. Thus, environmental damage arising after 30 April 2007 must be taken into account. *Valerie Fogleman* stressed that this decision not only illustrates a key purpose of the ELD; to halt the loss of biodiversity in the EU. In addition, the other jurisdictions in the UK as well as 16 other Member States have adopted implementation and enforcement dates for liability under the ELD after the deadline for its transposition. She raised the question as to whether these Member States will, like Wales, now conclude that the effective date for the ELD is 30 April 2007. She referred to the CJEU judgment in *Raffinerie Mediterranée (ERG) SpA v Ministero dello Sviluppo economico* (C-378/08), in which the court stated that the ELD "applies to damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date".

Q/A

Florian Stangl raised doubts that the decision of the Welsh Administrative Court is in compliance with settled case law regarding the direct effect of secondary EU law. He argued that a prerequisite of direct effect is that a private person can use the Directive provision against the State. In the described case there would be a situation in which a public body (ELD implements a public liability) can apply a not transposed provision of a Directive (here: ELD) against a private person, so it seems that the Welsh court established a 'reverse vertical effect'. This has in his opinion to be seen critically. Responding to a question of *Florian Stangl*, *Valerie Fogleman* said that there is still a chance that in this case the CJEU could be asked for a preliminary ruling.

4th Presentation: *Operator workout: Three composite ELD cases*

Barbara Goldsmith from the Ad-Hoc Industry Natural Resource Management Group (Group) reported about an ELD Best Practice Seminar convened by the Ad-Hoc Industry Natural Resource Management Group the day before (25 November 2014) where operators and Member State Representatives exchanged their experience concerning the ELD. Ms Goldsmith's presentation focused on a set of three composite cases prepared by the Group for the purposes of an Operator Working Session held in October 2014. The focus of the October Working Session was to apply the three composite cases to the Commission's ELD training material and the existing national Guidance Documents of nine MS in order to assess their practical suitability to operators. The analysis of the three composite cases, which were developed by combining facts of a number of ELD cases and sites, considered several questions, such as 'Is the environmental damage 'significant'? Why not?' or 'Are there any defences or exceptions available to the operator?'. In total, the Group used twelve different questions to assess the documents. *Barbara Goldsmith* then described the three different cases in more detail. The first case was about an abandoned power plant in Italy. She described the whole case including the accident, the damage and the actions taken in response to the accident and that they gained several results from this case study; a likely scenario was that the authority will take the necessary actions but will not be able to recover the costs from the operator because of bankruptcy. The second case was about a manufacturing plant in Belgium discharging substances which impaired the water quality in a protected habitat. In the third case, a mining project in England caused an imminent threat to a protected habitat and species. One of the key findings from the Group's October 2014 Case Study analysis was, according to the speaker, that the significance threshold is often difficult and unclear to operators. *Barbara Goldsmith* indicated that one activity the Group may undertake in the future would be to prepare a map of locations where ELD cases may likely arise, including sites near Natura 2000 areas, which can be provided to operators. In order to achieve this goal, and otherwise, the Group keeps on tracking and monitoring the developments regarding the ELD and maintains a database of ELD cases and sites.

Q&A

Florian Stangl asked whether the case study disclosed any shortcomings in the ELD training materials or in the guidance documents. In response to this question, *Barbara Goldsmith* explained that the Ad-Hoc Industry Natural Resource Management Group made a list with recommendations for the material and the guidance. Some terms and concepts would need some clarification. *Ece Ozdemiroglu* mentioned in this regard that the training material and the Member State guidance documents are different documents but the latter influenced the former. *Valerie Fogleman* said in response to a question of *Jean Depasse* (PRAXAIR/EIGA) regarding the future development of Article 14 of the ELD that the Commission launched various studies which dealt, *inter alia*, with financial security and which are available on the Commission's website. She emphasized that these studies are not binding for the Commission.

Coffee Break

The last part of the day focusing on the evaluation of the practical experience in the ELD application was introduced by

Presentation: *Overview of the ongoing Commission ELD evaluation and reporting exercise*

Hans Lopatta, European Commission, presented the main information sources (MS reports, studies, supplementary information such as the present workshop for example) and the basis (legally: Article 18 ELD with specific review points; COM 2010 report for some additional points; REFIT for the evaluation criteria) for the upcoming report. He also described a bit the main points and areas to be looked at and presented the objective of the comprehensive evaluation with the five REFIT evaluation criteria (relevance, effectiveness, efficiency, coherence, EU-added value) and the current developments and the future process on the way to the report, which will be a document consisting of a summary evaluation with a more extensive Commission SWD (staff working document) in annex.

After *Hans Lopatta's* presentation, *Erik Ballhausen* introduced the questions to be discussed during the second World Café.

Afternoon Word Café

Introductory explanation: Each bullet point provides the content of one harvesting sheet as faithfully as possible, unreadable text was either completed if deemed clear enough, otherwise disregarded

1st round: *What are my three top priorities for things to be improved?*

- Key insights: clear and objective criteria about the "significant" threshold or "imminent threat"; guidelines for the application of the concepts for the different stakeholders (→ foster uniform approach); continue to raise awareness of the ELD (incl. optional extension of scope under national laws).
- What stakeholders/institutions should be involved: NGOs; administration; insurance.
Key insights: Access to justice to challenge local decisions; develop some guidelines to define what is "significance".
- Key insights: awareness → prevention/behaviour; commitment of stakeholders.
- Key insights: unified umbrella legislation - everything could relate to – because the current application is not homogenous and not consistent; country and EU-level database; register of baseline conditions not just about damages claimed under ELD but also before (quality of biodiversity).
- What stakeholders/institutions should be involved: insurance; lawyers.
Key insights: awareness of biodiversity damage; loss records data.

- Key insights: transposition, implementation, enforcement; awareness.
- Key insights: definitions, criteria, threshold, defences, preventive measures; application of polluter pays principle vs. employment; relationship with other EU directives (e.g. Waste); legal costs for NGOs.
- Key insights: raise awareness (actors: governments, operators); checking on the authorities.
- Key insights: replace polluter-pays principle by "any environmental impairment must be restored"; make more clear "significant threshold"; clarify Annex III scope; highlight duties to implement in case of maritime damages (restore biodiversity).
- Key insights: improvement of enforcement by local authorities/transposition; resources and training for local authorities.

2nd round: *What are the next three steps to be taken to improve the implementation of the directive?*

- Key insights: need to improve ELD-implementation in MS (not ELD itself); more powers and independence to national regulatory authorities; to set up a framework for EU-wide implementation of the ELD.
- Key insights: eliminate the "significant" criteria; eliminate the mandatory financial security.
- Key insights: national authorities should raise awareness about the rules based on the ELD (communication campaigns for instance); promote tools including geographical information in order to help insurers and intermediaries explaining the need for ELD coverage.
- Key insights: define the term "environmental damage" more clearly, this will facilitate its implementation (especially regarding water damage and biodiversity damage); make MS apply the ELD; erase the word "significance".
- Key insights: guidelines on the application of the ELD; degree of causality (different concepts in the MS → no uniformity); raising awareness; competent authority → limited number (problem that in many MS are multiple competent authorities at local level).
- Key insights: in the eventual revision of the ELD define the "significance threshold"; re-define the polluter pays principle to "environmental impairment must be repaired"; collect data, establish data base on EU level (photos,...) and raise awareness: communication on the case studies, on products available; review Annex III to have wider scope and clarify what is within the scope; review exclusions for maritime and nuclear conventions.
- Key insights: further elaborate concepts that have caused implementation problems or inconsistencies in present ELD; promote more detailed and consistent reporting of environmental damage cases even if they have not been filed as ELD; continue promoting ELD awareness.

- Key insights: current conditions of ELD must remain unchanged so that the stakeholders have legal certainty and can apply and practice the ELD as it is; remain the ELD trainings.

At the end of the second round the facilitators team thanked the participants for their feedback on the harvesting sheets and asked those willing, to present their top 10 priorities. *José Luis Heras Herraiz* presented as his four top priorities: to change or replace the polluter-pays principle by "any environmental impairment should be restored"; to set out clearer significance threshold(s); to clarify Annex III; to highlight duties as regards marine damage. *Elisabeth Abrassart* presented her two priorities as: raising awareness of biodiversity damage, and (to collect/publish) loss records data. **Mark Voss** (FUEDI) listed as three priorities the following: increase the awareness of the objectives of the ELD; ELD should lead also to damage prevention regarding small companies; public authorities should monitor or pressure monitoring. Finally, *Andrew Jackson* highlighted access to justice as a priority, in particular the need to find ways to ensure that challenging authorities' ELD decisions is not prohibitively expensive.

As the very last point on the agenda of a long and busy day *Hans Erik Ballhausen* asked the participants to provide as much as they can their views on the most important next three steps to be taken. Due to some exhaustion and several participants needing to leave earlier, the discussion was confined to the following contributions: *NN* (not verifiable any more): Definition of significant damage: delete the word 'significant'; make Member States to really apply the ELD. *José Luis Heras Herraiz* pointed as most relevant next steps to elaborate further concepts that have raised incoherence concerns, in particular the significance threshold; to continue promoting ELD awareness; and to promote more detailed and consistent reporting of ELD cases and of cases not considered ELD cases. **Dana Huranova** (Deloitte) mentioned as most important next steps pursuant to her opinion the review of Annex III ELD and/or to clarify what is in the scope and to review the exclusion of maritime Conventions.

Finally, *Hans Lopatta* thanked all remaining participants for their enthusiasm and active contribution to a successful day and asked them to fill in the evaluation sheets and to leave them at the tables.

The evaluation of the sheets after the workshop brought the following results:

Do you feel that

- | | |
|---|----------------------------|
| 1. you have learnt relevant information and facts today? | YES: 13/ PARTLY: 10/ NO: 1 |
| 2. you had sufficient opportunity to express your views? | YES: 21/ PARTLY: 2/ NO: 0 |
| 3. you had a chance to contribute to the overall outcome? | YES: 17/ PARTLY: 2/ NO: 0 |
| 4. the workshop met your expectations? | YES: 16/ PARTLY: 7/ NO: 1 |
| 5. the workshop was useful in meeting your objectives? | YES: 13/ PARTLY: 8/ NO: 1 |

Presentations were (scale 5 to 1, from affirmative on the left side to negative on the right side)

- | | |
|---|----------------------------------|
| 6. interesting – not very interesting | YES 6 – 11 – 5 – 1 – 0 NO |
| 7. of good – not so good quality | YES 5 – 11 – 6 – 1 – 0 NO |
| 8. useful – not useful for your work/responsibilities | YES 6 – 9 – 5 – 3 – 0 NO |
| 9. well – not well prepared/conceptualized | YES 9 – 10 – 3 – 1 – 0 NO |
| 10. about right in length | TOO SHORT 3 – OK 17 – TOO LONG 1 |

World Café conversation rounds

- | | |
|--|----------------------------------|
| 11. were about right in length | TOO SHORT 4 – OK 14 – TOO LONG 2 |
| 12. have generated new insights, knowledge | YES: 7/ PARTLY: 14/ NO: 2 |
| 13. have created more collective wisdom | YES: 10/ PARTLY: 8/ NO: 4 |
| 14. let you feel convenient | YES: 12/ PARTLY: 8/ NO: 1 |
| 15. have brought you together with new ideas or people | YES: 11/ PARTLY: 12/ NO: 0 |

Facilitators were

- | | |
|--|---------------------------|
| 16. good communicators | YES: 17/ PARTLY: 4/ NO: 0 |
| 17. attentive to the needs of participants | YES: 17/ PARTLY: 5/ NO: 0 |
| 18. well prepared | YES: 19/ PARTLY: 3/ NO: 0 |

Methodology

- | | |
|--|---------------------------|
| 19. The level of the workshop was appropriate | YES: 16/ PARTLY: 7/ NO: 0 |
| 20. The pace of the workshop was appropriate | YES: 18/ PARTLY: 8/ NO: 0 |
| 21. The length of the workshop was appropriate | YES: 15/ PARTLY: 7/ NO: 0 |
| 22. The workshop offered sufficient examples/exercises | YES: 16/ PARTLY: 6/ NO: 0 |

Organisation and logistics

23. The equipment was appropriate	YES: 20/ PARTLY: 2/ NO: 0
24. The workshop environment was appropriate	YES: 20/ PARTLY: 1/ NO: 0
25. You were satisfied with the administrative organization	YES: 20/ PARTLY: 0/ NO: 0
26. The workshop documentation was useful	YES: 20/ PARTLY: 2/ NO: 0

What should be improved for the next event of this kind? (open question)

- Give more time for specific issues that are of interest to many Member States; organise sessions for technical issues handling (evaluation criteria of environmental damage).
- Give more instructions about finding the place of the event. Thank you for the very informative and practical workshop.
- Too much paper used, we don't need slides printed full page and full colour. It is waste! Even this form could be printed smaller and should be on uncoloured paper.
- More time for world cafés (1 instead of 2!); some criteria in selection of table participants, some came to learn something but insisted in explaining their opinions; less paper (2 slides per page) in the documentation. Even with the unavoidable limitations these workshops are much further necessary!
- Point of view of industry (potential polluters) to ELD has not been expressed, they are the one stressed by the ELD → does it affect their operation? How did they face ELD cases?
- Presentations could be copied with 2 slides per page!
- I had a little déjà-vu feeling, specifically regarding the world café. Some questions as always, and nobody knows "the answer", so I am not convinced that this is very useful. I would also like to see more feedback from the EC regarding new evolutions and things in the pipeline: final speech of Hans Lopatta was really interesting but rather short. Maybe the day is too long, sad to see that 60% of the attendees took off early.
- The operators should be encouraged to participate more, now the insurance sector is dominating. Also Universities or research institutes could be involved more.
- Do not use plastic cups!