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ENV.E.4

28th ELD Governmental expert Group Meeting

19 September 2023, 09h30 – 16h30, virtual meeting

Minutes

Executive summary

The 28th meeting of the Environmental Liability Directive Government Experts Group (ELD GEG) was organised by the European Commission, DG ENV.E.4 to provide an update on the most recent developments and on the next steps in relation to implementation and evaluation of the Environmental Liability Directive (ELD). It included 4 sessions dedicated to:

- ELD Implementation on training and capacity building;
- Infringement proceedings related to access to justice in the ELD cases;
- State of Play of the Fitness Check on the polluter pays principle;
- Evaluation of the ELD (with the focus on the supporting study):

  a) State of play of the ELD Evaluation

  b) Conclusions of the Study supporting the ELD Evaluation

All EU Member States, except Finland, Luxembourg and Poland, were represented at the meeting, together with ISPRA (Italian Institute for Environmental Protection and Research), IMPEL Network (EU Network for the Implementation and Enforcement of Environmental Law), EU officials from DG Environment Unit E4 (organisers) and Unit 0.1, and the external consultant in charge of the Study in support of the evaluation of the Environmental Liability

Directive and its implementation (the latter only participating in the last session of the meeting).

The minutes present the main points of the discussions held on each of the agenda items. The meeting agenda (DOC1) and the PPT presentations used at the meeting are available on the Commission's website:

Register of Commission expert groups and other similar entities (europa.eu)

The ELD GEG meeting was held as non-public.

1. Adoption of the meeting agenda

The representative of **the European Commission (DG ENV.E.4), acting as a Chairwoman,** opened the 28th ELD GEG meeting greeting all the participants and explaining the housekeeping rules. She reminded that the last ELD GEG meeting was held on 23 November 2022 in a hybrid format. She further presented the agenda (DOC1). The agenda was approved by general agreement.

2. Approval of the minutes of the previous meeting of 23 November 2022

The ELD GEG approved the minutes of the 27th ELD GEG meeting of 23 November 2022 (DOC2), shared with the members of the ELD GEG in advance.

The Chairwoman welcomed the new members of the ELD GEG. The meeting continued with brief self-presentations by all the participants.

3. ELD Implementation: training and capacity building

The **Chairwoman** gave an overview of the existing training on ELD. She presented the project which is to be partially outsourced through the ongoing tender procedure on ELD training. This was followed by an exchange of views with MSs on further training and training needs and other related issues.

In particular, she reminded about the need to identify volunteers to host workshops in the context of the upcoming project. DG ENV.E.4 will contact MSs separately on this, but would invite MSs to already start their reflection. The preference would be to identify volunteers by the end of the year, but it also depends on how the contractor will envisage organising this workstream, and this will only be known in October. The Commission would be interested in having MSs with different characteristics, e.g. MSs with a lot of ELD cases and with at least one with no ELD cases at all. Also, any comments on the scope of the training are very welcome.

More detailed information is available in the Commission's presentation on ELD trainings.

In addition, the Chairwoman explained that in the context of the new training project, the Commission would like to use the existing IMPEL training materials and also to have on board for the workshops the colleagues from the IMPEL CAED team to provide actual training on these materials. IMPEL is already organising their own trainings based on these materials. The intention is to put Commission and IMPEL resources together to have a better added value.

The expert from **ISPRA** explained that IMPEL CAED has been working in the last years on the ELD methodologies and training materials. IMPEL CAED is included in the Activity 1.3 of the Multiannual Rolling Work Programme until 2024 and they are committed to cooperate on the training project and notably to participate in the three workshops. He asked whether the workshops in MSs are going to be only physical or in a hybrid format and whether it will be possible to involve more than one MS.

The **Chairwoman** explained that the intention was to have physical meetings, but it also depends on the proposals from interested MSs, so there is no certainty at this stage. The Commission would really like the workshops to be interactive, to allow a constructive discussion on the challenges of the ELD implementation and it is better for this purpose to meet in person. A hybrid event is however not excluded. As regards how many MSs could be involved in each workshop, the intention was to cover one MS each time, because the idea of the workshop is to cover not only the ELD as such, but also the aspects which are specific to this MS, i.e. the rules implementing the ELD in this MS, as well as the interaction of ELD with other national rules, implementing other liability regimes, e. g. criminal environmental liability. This makes it difficult to combine different MS in one workshop. But there will be a part of the workshop covering general issues. This part will be recorded and made available to be used as e-learning materials.

The expert from **Lithuania** agreed that MSs could benefit from such project. She signalled the interest to be part of the project on the ELD training and the possible intention to volunteer to organise a workshop, subject to further internal confirmation.

The expert from **ISPRA** asked if MSs, who will potentially host the workshops, will be involved in the preparation and presentation of different materials related to the implementation and enforcement of ELD in their country and the legal framework in their country. He also asked whether the project will be expanded to also cover other experts that work with other directives connected to ELD. He highlighted the potential benefits of involving such experts.

The **Chairwoman** confirmed that the intention was to complement what the Commission knows with the expertise MSs have, to have a most useful final product. Regarding involvement of other environmental domains experts, she explained that the ongoing ELD evaluation strives to assess the interaction of the ELD with other European instruments and, building on the evaluation findings, it would be useful to complement this analysis with specific MS or with their experts as far as they would be willing to go.

The expert from **Austria** asked whether the workshop will be financed by the Commission.

The **Chairwoman** explained that the Commission would finance the preparation of the materials, the organisation of the interpretation and logistics related for the speakers and the trainers, but not the costs of the venue or the costs of travel and possibly accommodation for the actual participants.

The expert from **Spain** supported the initiative, which he considered to be very useful. He regretted that the workshops are limited to only three MSs. To make the most of this project and to make it useful for further MSs, he suggested to make it possible to open the general part of the workshop that addresses the European level materials to the audience from the other MSs and also to allow virtual participation. He suggested to record workshops and to publish them on the Commission's website or, to disseminate it as a general material available for any MS. As regards the second part that would be addressing specific MS, this could be very useful for other MSs to be able to participate as well.

The **Chairwoman** reassured that they will take this into account. For directly joining the training virtually the main concern is linguistic, as it will not be possible to offer interpretation into all EU languages. The envisaged linguistic coverage is English and the language of the MS where the event will take place. But the events will be recorded and reused as part of the e-learning materials as well, and then the recording of the general parts could be translated into the other languages.

The **Chairwoman** concluded that they will be getting back on the subject to MSs. The Commission will have more information when the contract on ELD trainings is signed, before the end of 2023.

4. Infringement proceedings related to access to justice in the ELD cases

A representative of the **European Commission (DG ENV.E.4), Aarhus convention team,** provided an update about the ongoing proceedings concerning access to justice in the ELD context.

This issue was already addressed at the previous meeting of the ELD GEG.

In 2020 the Commission published a Communication on access to justice that highlighted that it is a priority matter for the Commission, also the need to focus on appropriate transposition and implementation when it comes to access rights of the public concerned, including individuals and NGOs having a privileged status. This is the cornerstone of the Aarhus Convention, which is a part of the EU legal order. The reason why the Commission focused a bit more on the provisions of the ELD on access to justice is because in 2015 there was the court ruling which clarified that under Article 12 there are three categories of persons: persons likely to be affected, those whose rights are impaired and those with a sufficient interest, and all these categories need to be provided with the possibility to make a complaint before the authorities. The court clarified that they also need to be able to go to court and challenge decisions by the authority or omissions.

As a result, the Commission took very seriously this indication by the Court of Justice and launched initially around sixteen infringement proceedings. Formal notices were sent out to the concerned MS, who did not ensure that all these categories of persons are provided standing.

Huge progress has been made and now there are only six open infringements in different stages: formal notices or reasoned opinions. Good progress is made with these MS to close the cases.

Additional important information: when the Commission was looking at the transposition and the implementation of these requirements - Articles 12 and 13 of the ELD, it tried to be as pragmatic as possible and to look not only for the possibility for a simple complaint, but also to look at what are the specific provisions in the MSs, which ensure that the members of the public not only make a complaint, but they can also challenge the response or the omission by the authority before a court of law. This was an important factor that the Commission considered.

An additional aspect that the Commission was looking for is how this can be implemented and used effectively by the public, if these rules are transparently provided on a website, if this is communicated clearly in a user-friendly manner to members of the public so that they have the possibility to challenge eventual decisions and omissions by public authorities and then eventually to go to court. Therefore, the Commission was looking at the legal framework and how clearly this is provided for under the legal framework and how this is communicated.

This was confirmed in a recent case, which covers access to justice and the broader context under the Aarhus Convention (C-432/21). It was delivered by the court in the context of forest management plans and how these can be challenged in an international context. The court clarified that it's not sufficient only to have a national practice and national implementation, but it needs to be a clear legal framework at the sufficient level of clarity and precision provided for.

He stressed two aspects: 1) that it needs to be clearly provided for by a national rule, 2) that it's not sufficient only to have the possibility to go to a national authority and file that complaint, but subsequently, it's also important to ensure the possibility also to go to court.

It's an important further indication by the Court of Justice that access to justice is a very important topic as it concerns the rights of the public and looking at the case law since 2007 about access to justice in environmental matters, you can see a significant increase in the jurisprudence of the Court of Justice. As a result, the Commission published in 2017 a notice on access to justice. It's a guidance document also covering the ELD. The Commission will adopt a new updated version with the case law developments since 2017.

The **Chairwoman** further clarified that while the perspective of this presentation was on access to justice, within the ELD the rules concerning the scope of the parties which are entitled to act are defined in Article 12 on the right of interested party to intervene, to

present the observations, to inform about the environmental damage cases and Article 13 of the ELD on access to justice makes reference to the same definition of the parties provided in Article 12. To conclude, in case of the ELD, access to justice rules have direct impact not only on who has access to justice, but also on who can act under Article 12 of the ELD.

5. State of Play of the Fitness Check on polluter pays principle

The **Chairwoman** explained that the Fitness Check exercise on the polluter pays principle (PPP), which is run currently run by DG ENV, is closely related to the evaluation of the ELD. This is a however a much larger exercise, which covers many different domains and subjects.

The representative of the **European Commission (DG ENV 0.1)** presented the item. He informed that the Commission will hold a stakeholder workshop, now scheduled for November 20th. The workshop will allow to discuss the emerging findings, thus providing further input helping the Commission to draw up the Fitness Check. The latter will take the form of a Commission staff working document and should be adopted in the second quarter of 2024.

Detailed information on this item is available in the Commission's presentation.

6. Evaluation of the ELD (with the focus on the supporting study) (Part 1)

a) State of play of the ELD Evaluation

The **Chairwoman** presented the state of play of the ELD evaluation, which has been ongoing for a year and a half now. The process of preparing the Study was quite long. She explained the evidence gathering process which has continued after the last update on the process at the last ELD GEG meeting. The gathering of MSs reports under Article 18 of the ELD has taken longer than anticipated. The reports were due by the end of April 2022. By the end of 2022 the Commission was still missing reports from several MSs. The last reports were received in Spring 2023, following numerous rounds of reminders. She has expressed the hope that the next time the process will go smoother. She noted very the different format and scope of the reports. She thanked MSs which have helped the Contractor, in preparing the enhanced summaries of the reports and the case studies, which constituted another important work stream under the Study. Finally, after the last ELD GEG meeting, a survey on costs and benefits of the implementation of ELD was launched. Only very few responses from MSs were received. She thanked MSs which contributed. All these elements provided evidence allowing to build the Study findings. The draft of the Study was shared with the members of ELD GEG before the meeting.

The Study is almost finalised, with only quality checks and formal validation remaining. She stressed that the difference should be made between the Study, supporting the

evaluation of the ELD and the Commission evaluation of the ELD – these are not the same products. The Commission has started the preparations of the evaluation itself in parallel.

MSs were invited to provide written comments on the draft Study by 6 October, especially comments regarding the Enhanced Summaries of Article 18 Reports and their publication (Annex J), comments regarding the Case Studies (Annex I) and their publication, and also any other comments on the Study findings and conclusions.

Also, the Chairwoman asked **MSs to confirm whether they agree to the publication of Article 18(1) reports**. The enhanced summaries of these reports form part of the Study and will be published as part of the Study. The Commission intends to publish the reports themselves as well (together with the Study), as it was done for the first ELD evaluation. However, the reports are the documents authored by a third party, therefore the Commission will need MSs agreement for the publication, preferably in a voluntary form in order to avoid following formal access to documents procedure. The Commission will follow up with an additional email regarding publications.

The Chairwoman drew the Group's attention to the Study's extensive acknowledgements, including personal data of ELD experts in MSs. The contractor has obtained the consent as regards the publication of these data as part of the Study.

The Commission will not rework the Study findings and conclusions on the basis of the comments received (except in case of factual errors) from the ELD GEG, however, the Commission will do its best to take the comments into account while drafting the Commission staff working document of the evaluation.

Timeline concerning next steps: **the evaluation should be ideally finalised by January/February 2024** and in any case before the end of the mandate of this Commission.

The expert from **Germany** informed that the German report is already publicly available, therefore it has no objections regarding publication on the Commission's website. They will have comments on the Study regarding some factual errors.

b) Conclusions of the Study supporting the ELD Evaluation:

- **Effectiveness**

The external consultant, from Stevens & Bolton LLP (the Consultant), presented the Study in general and its conclusions, under the effectiveness criterion. Detailed information on the Study's conclusions is available in the presentation.

After the presentation of the conclusions on effectiveness, the **Chairwoman** commented that the main value of the framework set out by the ELD is the requirement to always remediate environmental damage in kind and the choice of remedial measures consisting not only of primary remediation meant to directly reverse the damage, but also complementary and compensatory measures. A case study presented at the workshop last year demonstrated that, even if the damage is not directly reversible through primary

remediation, the ELD offers means to remedy it in kind through complementary and compensatory remediation. However, in the evaluation process we have not been able to identify many cases of complementary and compensatory remediation. It seems, that they are not used a lot, and thus any further input from MSs on such remedial measures is welcome.

The Consultant mentioned one case from Finland analysed among the case studies where compensatory remediation was applied. But she agreed that most of the MSs did not apply any complementary or compensatory remediation, as notably they considered that it didn't take long to remediate the damage. What sets the ELD apart from any other environmental liability legislation, is complementary/compensatory remediation and if that's not applied, MS may as well apply other environmental damage liability regimes. She was not surprised that the operators are satisfied with the current situation where the complementary/compensatory remediation is underused, because the relevant measures may be very expensive but she was very surprised that the competent authorities didn't require such measures to be applied in the first place.

The expert from **ISPRA** commented, that the non-application of compensatory and complementary measures not only depends on cost. From the Italian experience, applying compensatory and complementary measures is often hindered by bureaucracy. Also the different criteria applied to assess the significant adverse effects under the Industrial Emissions Directive (IED) and environmental damage under the ELD, and the diverging standards of strict and fault based liability do not help. He asked what the Consultant thought about the possibility of incentivising harmonisation at a national level between the national legislation and the ELD legislation, because the ELD is not only substituting such national legislation, it can also be supplementary and even complementary to the existing national legislation. He further insisted that we need the criteria for water and land damage, as we already have for biodiversity damage. Therefore, maybe we could use existing national criteria, like the ones that already exist in some MSs, e.g. in Italy for land damage, and in the Netherlands for water damage. These criteria could be useful to help the implementation of the ELD at national level and to assist harmonisation of the existing national legislation with the ELD criteria. He enquired as to whether this could be the right path to follow.

The Consultant was of the view that this could be done theoretically, but from a legal point of view, probably not, because of the significance criteria on which the ELD is based. The ELD is not supposed to apply to every single case of damage. It's supposed to apply above a certain level defined by the significance criteria and the problem is that a lot of MSs, if not all of them, have set that level higher than what is envisaged in the ELD. The ELD significance criteria are based on a different approach than national criteria, where e.g. in Italy, if you've got above a certain level of concentration of a particular pollutant in the soil, you have to remediate. Instead, the significance criteria in the ELD are very ambiguous . The MS could apply those criteria to make the ELD more stringent, but not a single one has done so. In a previous study for the Commission, it was considered whether there the concentration level numerical criteria could be defined under the ELD for the

entire EU, but that simply won't work, because of all the different criteria across the EU. To sum up, the ELD can't do it, but the MS can by making the ELD more stringent and that would make the ELD work better.

The expert from **Spain** reacted to several points raised during the presentation. Regarding compensatory and complementary remediation, he reminded that for land damage the ELD does not require compensatory and complementary remediation. Land damage accounts for almost 50% of ELD cases in the EU. This could be one of the explanations why compensatory and complementary remediation is not reported. Another factor is that among the reported cases there are also cases of imminent threats of damage, where no remediation, even primary, is required. Finally where competent authorities have reacted and asked for remediation quickly, no compensatory and complementary remediation may be required according to their assessment. However complementary and compensatory remediation is useful and maybe in some future cases it will have to be applied and that's something new and unique to the ELD. What is unique in Spanish legislation, is that the law that transposes the ELD, established that the criteria for remediation can be used in the other administrative procedures, for example, as regards water damage, which is dealt with not under the ELD, but under water legislation. So theoretically, primary, compensatory and complementary remediation can be asked for within other administrative procedures (water, biodiversity legislation). This provides an interconnection between the ELD and the sectorial legislation, and this explains what is in the conclusions of the Study which refers to the low number of ELD cases.

He further commented on the conclusions of the Study, finding it worrying that the conclusions focus on the low number of ELD cases. He insisted that it depends on the angle from which you look at it. The ELD is based on two principles, the prevention principle and the polluter pays principle. The prevention principle comes in the first place. So, ideally the success of the ELD would be to have zero ELD cases because of prevention. He further criticised the fact that the conclusion of the Study on effectiveness is only based on ELD cases. There is the effect of risk management and of the implementation of mandatory financial security on the implementation of the prevention principle and it has an effect on preventing accidents. Not sure if this has been taken into account in the Study.

Still further he commented on whether the significance criterion should be applied with respect to water or to water bodies. He defended the view that significance must be evaluated at a water body level because the Water Framework Directive refers to water bodies, therefore it makes no sense to evaluate it other than water bodies.

Still further he wanted to know if the effect of risk management and financial security on the implementation of the prevention principle has been taken into account into the Study. While he understands that an accident that was prevented from happening is not in any statistics, there are indicators and there are other ways to take that into account.

The Consultant addressed the points raised by Spain. The idea of complementary and compensatory remediation came from the US under Superfund and the Oil Pollution Act.

There are many environmental damage cases in the US which are addressed through the equivalent of complementary and compensatory remediation. This system is effective in the US.

Regarding the prevention of environmental damage, preventive measures do not appear to work efficiently if the number of non-ELD environmental damage cases is not diminishing. Many such cases are described among the case studies as non-ELD cases. The number of non-ELD cases far exceeds the number of ELD cases. It would not make any sense that preventive measures work only in respect of the number of ELD cases and not on the number of non-ELD cases.

Regarding the allegation that effectiveness is only analysed based on the number of the ELD cases, the Study has actually looked at both ELD and non-ELD cases to conclude that unfortunately it is not working.

Finally, regarding water damage, the Commission guidelines clarify that the analysis can be done at a level which does not necessarily correspond to the water bodies. The reason for the focus on water bodies is that all water at some point will go through a water body. But even if the ELD should be only applied to water bodies, there is nothing in the ELD that requires an entire water body to be affected or the status of the water body to be lowered.

The expert from **Spain** agreed that different interpretations are possible. He noted that Spain and many other MS have put a lot of effort into implementing the ELD and therefore it is not fair to say that it's not effective because there is a low number of ELD cases. The fact that mandatory financial security or risk management have been implemented could be mentioned if not in the Study, then in the Commission's evaluation. It is very important to recognise the efforts of the national administrations and also of the industry, as these actors are aware that it's better to avoid an accident than to remediate the damage.

Regarding the question on how prevention has affected non-ELD cases, he underlined that only looking at the figures, we don't have the whole picture because we don't have statistics regarding non-ELD cases. Spain carried out a relevant study and a survey within the industrial sector (published on the webpage of the Ministry of Environment of Spain). Industry is of the view that the ELD and all the tools that Spain has developed have helped them to implement measures to avoid accidents from happening. The fact that industries must carry out risk analysis has helped them to identify possible causes of accidents and these accidents have been prevented. It is not possible to measure an accident that did not happen, but we cannot deny that this is a fact, and the industry has realised that for their image and for their economy it is better to avoid accidents.

The **Chairwoman** commented on the prevention, clarifying that, to some extent, it is covered in the Study. First, under the effectiveness criterion, where the way the different ELD objectives are fulfilled is analysed, one of such analysed objectives is the prevention in a large sense (not only prevention of imminent threat of the damage). Secondly, it is analysed in the context of the uptake and the need for mandatory financial security instruments. Both in Spain, and in the other MSs where the financial security is mandatory,

the relevant systems are based on risk analysis and linked with risk management measures, which of course has the positive impact on prevention.

She then announced the lunch break and promised to finalise the discussion after resuming the meeting for the afternoon session.

The **Chairwoman** reopened the meeting after the lunch break with a further reaction following the Spanish intervention in the morning, namely regarding the question of whether water damage should be assessed at the level of water bodies or whether it can also be assessed at the level of affected waters being part a part of a water body. The Commission position on this issue is very clear, as set out in the Commission Guidelines, stating that the entire waterbody does not need to be affected in order to consider that the ELD significance criterion is fulfilled. There is clearly a divergence in the interpretation given to these provisions by Spain and by the Commission, and while the Commission Guidelines are not legally binding, it is to be hoped that the court at some point will provide a binding interpretation of the provisions concerned.

She further referred to the recent ECJ case law developed under the WFD, which can be a good inspiration for ELD implementation in the context of water damage. The ECJ decisions concerned have been delivered in the context of authorising projects which have potentially detrimental effects for the water condition. The ELD was not concerned in such a case, but the interaction between the permitting legislation and the WFD is somehow similar to the interaction between the ELD and the WFD, namely in both cases the WFD has to be applied in conjunction with other rules which do not necessarily follow the same logic. The cases are interesting because the court decided that while the WFD defines the time schedule of the assessment of water bodies for the purposes of general management of the waters and relevant reporting to the Commission, such assessments may need to be carried out at an earlier time in case it is necessary to correctly apply other tools, notably to check compliance with the conditions of the project authorisation.

Still further, the Chairwoman enquired about the non-ELD damage cases to which the standards of remediation of the ELD can be applied in the Spanish system asking whether it can be assumed that such cases are then not handled directly under the ELD because they do not fulfil the significance criteria. She proposed to follow up bilaterally on this subject.

Finally, she referred to the Spanish expert's comments that the assessment of the ELD effectiveness should focus less on the numbers of the ELD cases and more on the efforts put into preventing the damage. She explained that both the Commission services and consultants carrying out the Study are well aware of the difficulties in assessing the effectiveness of the ELD. Notably, the Study provides a whole list of caveats explaining the weaknesses and limitations of analysing numbers of the ELD cases. However, it is the ELD itself which stipulates that MSs should report on the numbers of their ELD cases, setting out these data as a main indicator in the ELD evaluation.

In the ideal world, to assess the effectiveness of the ELD in remedying environmental damage, we should analyse all the environmental damage occurrences in the EU, then see which ones among them have been handled under the ELD and whether and how they have been remediated, comparing the cases handled under the ELD and under the non-ELD legislation. On this basis we should check whether and to what extent the required remedial measures complied with the ELD remediation standard, to which extent they have allowed the restoration of the environmental resource concerned to its baseline condition and whether the financial burden of remedial measures have been borne by the liable operators. This would be the most appropriate test, which would really show us whether this instrument fulfils its remediation objective. Unfortunately, we do not have the statistics which would allow us to carry out such systematic analysis. We have only been able to work on these questions based on examples analysed in case studies.

The situation is still different regarding the prevention of imminent threats. Under the ELD, such cases are in the first place subject to self- executing provisions and if they have been successfully handled by liable operators, there may be no trace, no notification of such a threat and, thus, no way for us to assess the functioning of relevant provisions.

The Chairwoman further invited national experts to share any comments and further ideas on how to identify further evidence allowing to better evaluate the ELD.

The expert from **Spain** explained that under Spanish law, the rules of remediation, including complementary and compensatory remediation defined in the law implementing the ELD can be applied also for non-ELD cases, i.e. cases handled under other, non-ELD administrative procedures, for example, under water law. Such remediation measures can be also applied by the courts. In some court cases this has already been applied and he offered to provide more information if needed.

He further reiterated his earlier argumentation against using the numbers of ELD cases as the indicator of its effectiveness, as it may wrongly lead to the conclusion that because of the low number or no ELD cases, the ELD is not effective. He insisted on taking into account the efforts that the MSs and the industrial sector apply to try to avoid accidents from happening. He agreed that it is difficult to quantify something that has not happened, but different indicators could be taken into account, such as the number of financial instruments in MSs, and the amount of money invested in risk management measures. There are many angles and many subtle things which can demonstrate that it is not necessarily that ELD that is not being applied correctly. He insisted on the need to further point out these aspects out in the Commission's ELD evaluation, in order to recognise the efforts made by MSs on implementing financial security, environmental risk analysis, raising awareness within the industrial sector, and the effect these efforts have produced.

The expert from **Austria** agreed with Spain. He signalled that he does not agree with the findings in Annex B, namely with the statement that in Austria the directive is not applied. It is true that in one case an NGO has been refused standing to request remediation of an environmental damage incident in court. But to conclude from this that the directive is not applied in Austria is incorrect. The background of this concrete decision was the position

taken by the Austrian Constitutional Court, which refused so far to recognise the subjective right of standing for NGOs. It is possible, that this position will change in the near future because anther case including these issues and concerning species protection is currently pending. He concluded that the statement on page 32 of Annex B of the report should be revised as it concerns only one concrete case in connection with the Directive.

The Consultant recalled the Austrian case of the farmer who breached conditions of a permit to build a road and who chopped down three trees whilst doing so, killing protected hermit beetles. She promised to double check any mistakes which may be left in the report and invited MSs to signal any cases which should be analysed for the purpose of the Study. She stated that she had tried to avoid negative statements on specific MSs and pointing out those that have not implemented the ELD. But with only one ELD case in Austria since 2017, maybe the competent authorities in Austria do not implement ELD as well as they could. In her Study she singled out Hungary, Poland and Greece where the numbers of ELD cases are the highest. However, when looking at some MSs with not a single ELD occurrence, how can it be possibly said that such MSs are implementing the ELD effectively.

The Chairwoman assured that they would check the wording in the Study. She agreed with the Consultant that the numbers of ELD cases cannot be simply ignored, while the evaluation analysis goes far beyond numbers only.

The expert from **ISPRA** reminded that the number of ELD cases shouldn't be just counted as it is but should be related to other numbers coming from incidental events, from particular installations and even pollution events (related to the Seveso Directive and the Industrial Emission Directive). The number of ELD cases should be considered and it was already matched with such other numbers.

The Consultant reiterated her invitation to provide further comments on the Study. She provided an example of ELD cases in Latvia. 31 cases were reported but, out of those, 26 cases originated from one person who illegally disposed pollutants at 26 different locations. This example shows why the number of cases requires all these caveats. Annex B contains two or three pages of caveats to those numbers. You have to look at the ELD and the non-ELD environmental damage cases together in order to draw relevant conclusions. Hungary in the second reporting period had several hundred cases of environmental damage and considered that only 14 to 15 of them were ELD cases. Regarding the preventive measures under the ELD, she insisted that they are very limited and not comparable to the preventive measures under IED.

The expert from **Greece** agreed that the number of ELD cases for Greece is indicative of implementation of the ELD. However, she insisted that MSs should not be categorised depending on whether they have many cases and MSs or not, because this distinction does not lead us to the right conclusions. This issue was raised many times. She asked the Consultant to explain how the findings of the report can help to reach a better conclusion about the level of implementation of ELD. For Greece, it would be very useful to find where the implementation is not satisfactory and what can be done to improve it. This

cannot be only indicated by the number of ELD occurrences; other ways are necessary for improving our performance, because we believe that there are many environmental damage occurrences that should be reported and are not reported. She concluded that it would be very useful to see in the report where the implementation is missing and how MSs can improve it.

The Chairwoman explained that the Study analyses how the implementation of the ELD works overall but not how it can be improved for each specific MS.

The Consultant agreed that the purpose of the report was not about what MSs can do better, but to evaluate ELD. The recommendations were developed but they are not part of the Study.

The Chairwomen confirmed that the Consultant's input as regards the recommendations will also feed into the evaluation of the Commission, which is ongoing. The Study itself is supposed to provide the background, evidence, all these elements on which we are building subsequent final conclusions of evaluation, which provide a basis to develop the recommendations. However, no specific legislative modifications will be analysed there. Such analysis should be left for a possible impact assessment exercise and not for the evaluation.

- **Conclusions of the Study supporting the ELD Evaluation: Efficiency**

The Consultant presented the conclusions of the Study, under the efficiency criterion. Detailed information is available in the presentation.

After the presentation, **the Chairwoman** asked about the relationship between the IED and ELD, in particular about the ELD provision stipulating that the IED applies 'without prejudice' to ELD and the ELD provision allowing MSs to maintain other rules more stringent than ELD. She argued that while based on the general principles of law, in case of conflict of rules, the more specific rules supersede the general ones and the posterior rules supersede the earlier ones (*lex specialis derogat legi generali*, *lex posterior derogat legi priori*), this relationship does not apply to the IED and ELD rules on damage remediation, as the former ones contain a clause whereby they apply 'without prejudice' to the ELD, which thus should apply. However, at the same time the ELD allows maintaining more stringent rules. In most cases, based on these provisions, the ELD should apply to all cases which enter into its scope (in particular in view of the significance criteria), as its standard of remediation is more developed and thus more stringent than the IED. However, in some cases it may be that the IED provides a more stringent solution, for example in case of land contamination which would have no impact on human health. The references of Article 7 of the IED and Article 16 of the ELD may appear to be confusing resembling a circular reference, however it seems that they actually reflect the logic of the ELD, which is to apply the most stringent response available. The Chairwoman asked MSs how they apply these rules in practice. What do they consider as more stringent between the two sets of rules?

The Consultant agreed with the Commission's opinion that the more stringent provision should apply. However, she expressed a doubt as to the meaning of the expression 'without prejudice'. The IED should be applied 'without prejudice' to the ELD. However, the expression is used in different legal acts and it seems to mean different things in different instruments. What actually matters is how this is implemented by the MSs. In practice, they apply the IED but not the ELD, even though the competent authorities have a discretionary power to apply the IED versus a duty to apply the ELD. It is up to MSs to change the practices in how they're implementing both instruments and implement them together.

The expert from **ISPRA** commented on the differences between the IED and the ELD. The IED is designed differently from the ELD, because the focus is different The IED is focused on the rapidity of actions to contain pollution and the effects of an incident and the rapidity of actions to clean up the adverse effect. Conversely, the ELD is focused on the effectiveness of the assessment of the environment and the effects, especially long-term effects, on these natural resources.

The checklist the operator should fill in under the ELD for the competent authority contains questions about the possibility that natural resources protected under the ELD are impacted by the incident and that there will be long-term adverse effects on these natural resources. That means also that competent authorities most of the time should require monitoring and ascertainment on the environmental natural resources.

Also, in case of Italy, if the operator notifies an incident only under article 7 of the IED, the ELD competent authority will not receive any notification. So, if the division that deals with the IED implementation has no protocol to communicate to the ELD competent authority, the latter may never learn of the damage. He concluded that IED application stops where the ELD starts.

The Consultant agreed that the IED is also looking at preventing further incidents and the prevention measures are a lot stronger. An operator who has an IED permit will be self-reporting any exceedances from the emission limit values, so it is very easy for that division of the competent authority to step in and give instructions to the operator and the operator is going to comply with them. The operator in such case is under tremendous pressure to comply because they don't want to lose their permit or they don't want it suspended. There are no suspending pressures coming from the ELD. She concluded that competent authorities in most MSs are doing it wrong.

The expert from **ISPRA** commented that the operators do not notify imminent threat occurrences under Article 5 of the ELD because they are afraid it may have a boomerang effect for them. Notably, the monitoring requirements to check the natural resources and their quality which may apply in case of an imminent threat of the damage are likely to be costly.

The Consultant reminded about criminal provisions that are tied very closely to the IED. There are many more powers under the IED, and it is thus much easier to implement and enforce it than the ELD. She expressed a doubt as to whether this could be turned around.

The Chairwoman suggested that it could be helpful to have guidance on the combined application of the ELD and the IED, developed by the Commission and which would give interpretation to these provisions and on the difference between the discretionary powers on one side and the duty to act on the other. This would benefit the environment. It seems that instead of applying these rules in a combined and coherent way, there is often a presumption that once you have applied the rules under one of these instruments, you do not need to undertake any further action, because the case is already handled and thus closed. However, the logic here is that you are supposed to apply these instruments jointly as far as we understand. It is of course a complex thing but it is for MSs to transpose it and apply it in a way, which gives it coherence and effect.

The expert from **Ireland** explained that Ireland, like many other MSs, tends to use the national non-ELD rules in the first place insofar as such legislation can deliver similar outcomes to those of the ELD. In a case where the non-ELD legislation fails to achieve the objectives, in terms of remediation and costs, the Environmental Protection Agency (EPA) will use its powers under the ELD. She mentioned cases which take a very long time to be resolved and decided, notably if there are judicial proceedings ongoing in the background or if an operator is taking long time to act, for example, to identify remediation measures. She enquired as to what is the right timeframe to issue a direction under the ELD in tandem with existing national legislation to ensure that remediation is implemented and whether it is wise to implement the ELD in parallel with the other proceedings still going on concurrently. MSs might be confused as to when to initiate a direction under the ELD.

The Consultant suggested that in case of a breach of an emission limit value it was easy to decide Because there was no need to look at significance criteria, the IED competent authority steps needed to act. The ELD cannot be applied at that point however because it was not known whether the significance criteria had been reached. However, the IED competent authority should notify the ELD competent authority in such case and then the ELD authority should step in to decide whether the significance criteria are reached. It is not very efficient, but otherwise the ELD will not be enforced, and thus the complementary and compensatory remediation cannot be applied to cases of water and biodiversity damage.

The expert from **Ireland** agreed that this was difficult, especially when judicial proceedings are going on in the background, and which should decide on the remediation measures. When should the ELD competent authority step in in such case? Even if the threshold of damage has been met and the case has been recognised as an ELD case (in Ireland this is being decided by the EPA directors' board), how long shall we wait? If the judicial proceeding are ongoing under Water Framework Directive or under the Water Pollution Act or replanting orders on regeneration of a forest are issued by a local authority, when does the EPA issue a direction under the ELD, if they are not satisfactory? It is a

question that we cannot seem to answer ourselves and probably some MSs may find it difficult to define whether a case is an ELD case when the proceedings are ongoing, so this may also explain why there is a discrepancy in the case numbers across MSs.

The Consultant explained that, under the ELD, the competent authorities have a duty to enforce it, and thus this duty applies immediately. Once, they know that it is an ELD case, they have to step in. It is not efficient in case of parallel proceedings and she agreed that the Commission should come up with some guidance on how to reconcile them. In case of ongoing judicial proceedings it is very difficult for an ELD authority to come in and say that the operator have not applied national ELD legislation and is not compliant. She suggested that in case of really ambiguous provisions in the ELD, an infringement procedure could help to obtain a binding interpretation from the court. She also suggested that the Commission should develop guidance working in cooperation with MSs.

The expert from **Ireland** asked how the operators should act in case they have been required to apply different measures under the existing (non-ELD) national legislation and under the ELD, which one should then take precedence?

The Consultant was of the view that the ELD is the strongest instrument. The authorities have a duty to apply it. However, in practice, it does not take a precedence over the IED, where the operator may lose their licence/ permit.

The Chairwoman explained that the ELD itself says that the actions should take place without delay, so we shouldn't wait for any other proceedings to end. At the same time the ELD does not define any rules of precedence, there is no provision saying that the ongoing administrative or judicial proceedings under other rules should have a suspensive effect on the ELD, or the other way around. The exception seems required for cases of criminal proceedings, where the identity of the actor to be liable and who is the one to remedy the damage is in doubt and thus subject to the court's decision. In principle, in all the other cases these measures should be complementary one to another and the proceedings should not stop the ELD application. However, it appears that on the ground this just doesn't happen.

The expert from **Belgium** referred to the Tereos case, which has been subject to one of the evaluation Study case studies. In this case the ELD procedure was carried out in parallel with the IED. There was also a criminal case behind. Belgium was able to go forward with both administrative and judicial action at the same time. Regarding the expression 'without prejudice', it is relatively clear that it means 'without harm to whichever other principle is being referred to'. It is a standard catch-all provision used when you don't want to go through the process of examining both pieces of legislation and picking out what should be chosen at each single step. At the time the ELD was elaborated, the IED was not yet there, instead we were talking about several different directives (including the IPPC, etc.). The legislator did not want to look at communication measures or emergency measures in every single different directive, but instead resolved that the ELD does no harm to those mechanisms, and at the same time, those mechanisms do no harm to the ELD. If we have an IED incident, the IED authority will be the first involved, with the ELD authority which

may indicate, once the relevant thresholds are reached, that this is an ELD case as well. You might have to review the permit and there might be criminal sanctions as well, but you also have to look at compensation and remediation. The idea is to apply the most stringent provisions across the board. If it is not the same authority which is competent for the IED and for the ELD, the IED authority should open the communication channels between the two. The same should apply in case of waste management procedures. There may be a lot of other activities covered by other legislation and the relevant authorities need to talk to each other. In France and in Belgium you can have a number of different administrative procedures that apply at the same time, and you have to comply with all of them. We do try to simplify it as much as possible. For a specific activity, you may need to have an administrative procedure on the environment, but also on a construction permit and regarding spatial planning and mobility and parking, etc. So it is not enough to say that once you have respected one of them you do not have to look at the others.

The Consultant added that the Tereos case also has an interesting transboundary aspect. The French authorities could not carry out complementary and compensatory and primary remediation under the ELD in Belgium. The remediation measures they decided on in France were inspired by ELD measures, but they were not formally speaking ELD measures. At the end these measures worked well.

The Chairwoman thanked Belgium for the explanation of the provision 'without prejudice' and confirmed that the Commission has the same understanding thereof. However, it does not change the fact that it is not obvious on the ground for all the authorities concerned in all MSs concerned, and then in many cases we end up having the ELD either applied as a last resort or not applied at all. It remains clearly an area where some kind of improvement would be good. This will be further analysed in the evaluation process and then on this basis the Commission will decide on further actions. If ever the Commission gets to developing the guidelines on this aspect, it will require MSs input, and will take into account their practical experience.

The expert from **Spain** fully agreed with the interpretation provided by Belgium. The expression 'without prejudice' is commonly used in Spanish law, not only for the connection between the ELD and the IED. It is clear that it means 'in addition to' (here - to the IED). In most cases in Spain the administrative body that deals with the IED is the same body which deals with the ELD. In some cases, if needed, the cases under both instruments can be opened. All the discussion on this provision seems a bit theoretical. If some MSs have issues, a guidance document from the Commission could indeed help.

- **Relevance, Coherence and Added Value**

The Consultant presented the conclusions of the study, under the criteria of relevance, coherence and European added value. Detailed information is available in the presentation.

The expert from **ISPRA** had a remark related to coherence between ELD and the Environmental Crime Directive (ECD). He agreed with the Consultant that there is no direct incoherence between the two instruments, but from the practical point of view there

are different issues which can hinder implementation of the ELD, e.g, he has experienced problems with ELD implementation in case of seizures of the installations on the sites applied by the prosecutors, and also with the confidentiality of investigations, because sometimes environmental local authorities cannot provide data about the measurements, samples or analysis, because they are protected by the confidentiality of the investigation. And the prosecutor decides in a sometimes arbitrary way on whether such data can be used in the ELD proceedings. Therefore, in practice there may be problems in case of parallel application of the ECD and the ELD.

The Consultant explained that she has looked at the ECD and the new proposal of the ECD revision. The requirement of confidentiality of the ongoing investigations tends out to come out from national criminal law or national criminal procedure law. It is mentioned as well in the Study. Moreover, in some MSs there is no possibility to look at the civil proceedings under the ELD until the criminal ones are dealt with. She agreed that it was a big issue.

The Chairwoman drew attention to some further elements concerning the ECD that are developed in Annex B of the Study.

First, regarding the proposal of the ECD revision, which, at this stage, is subject to trialogue negotiations, the outcome of such negotiations is still unknown. However, she explained the concerns raised by the proposals contained the General Approach document of the Council and concerning sanctions to be used in criminal proceedings. Namely, among such sanctions, the text proposes a sanction of restoring the environment to its initial state and for cases where the damage would not be reversible it envisages that the restoration is replaced with financial compensation.

She expressed a belief that this solution is potentially incoherent with the ELD logic, whereby any environmental damage occurrence should be remediated in kind, and if it cannot be remediated through primary remediation (using the ECD language, the damage is not 'reversible'), these are complementary and, in case this takes time, compensatory remediation measures, which should kick in. Such complementary and compensatory measures should be also applied in kind and cannot be replaced with a financial compensation. In her Study, the Consultant was able to identify practical cases where financial compensation was applied instead of remediation in the criminal proceedings, and indeed this concerned especially cases where full remediation of the damage through primary remediation measures was not possible. This happens today in some MSs, and we are now better aware of such cases, but such a situation is not compliant with the ELD, and such an approach has never been validated through European law. However, this may change, should the changes proposed by the General Approach of the Council become law. These developments may be very important for the future of the ELD.

Secondly, the Chairwoman referred to the Consultant's presentation regarding the provision of article 16 of the ELD related to 'more stringent" rules, which MSs are allowed to apply instead of the ELD ones. She explained the discussions held with the Consultant on the actual meaning of this provision. Article 16 applies both to national provisions

transposing the ELD in a more stringent way and to provisions within other, non-ELD legal instruments, governing liability for environmental damage. For the latter cases, it is very important to distinguish whether the stringency is compared at the level of rules as such, or whether we need also to compare the stringency of the response which is required in a concrete case.

Taking into account the objectives of the ELD and not to devoid the ELD provisions of their purpose, we believe on the one hand that indeed a MS can maintain parallel national non-ELD liability rules in place, in case they consider that in some aspects of such rules are more stringent than the ELD, for example, they cover a larger scope of damage, or they are based on the principle of strict liability for all damage cases. On the other hand, it does not mean that such rules can be applied to the detriment of the ELD and its remediation standards. When a concrete case is being handled, the MS concerned needs still to see whether the ELD would apply to such case and in case of a positive conclusion, check whether the ELD or the non-ELD rules provide a more stringent response to this concrete case and given its concrete circumstances.

In general, it seems more likely that national rules will prove more stringent regarding cases of land damage as the ELD offers a relatively limited response to such cases. It also seems that only very rarely will national rules prove more stringent in case of biodiversity damage, which enters into the scope of the ELD. Also for water damage, national non-ELD rules would rarely provide a response which is more stringent, unless the culprit is not an annex III operator.

The concrete assessment of stringency may be of course even more complicated, as you have cases which are only partially covered by the ELD, because of the damaged resources or because of the timeframe of an older damage; also the standard of liability under the ELD will vary depending on whether the operator carries out an activity listed in Annex III, whereas the liability under national rules may be based on strict liability for all cases, etc. However, if both regimes apply to the occurrence at hand, it is likely that the ELD, with its developed remediation system, will provide a more stringent response.

To conclude, the Chairwoman encouraged the participants to share how they understand this provision and how it is applied in their national law. However, given the delay in the meeting schedule, she asked MSs to provide such further comments in writing. She explained that there is still space to take such comments into account in the context of the preparation of the ELD evaluation, and they would be very useful, especially comments based on practical experience in the ELD application.

The Consultant addressed her thanks to the Commission ENV E4 team, the members of the ELD GEG and their colleagues, as well as to the members of the Commission inter-service steering group for their help in preparation of the Study. She reiterated the invitation to MSs to share information on further cases which would illustrate any further aspects of how the ELD is being implemented or why it does not happen, for example, how the IED works with the ELD, and confirmed her willingness to still look at such

further cases. She may also ask MSs to review any such further case studies she would prepare.

7. Any other business

The expert from **ISPRA** gave a presentation on the **IMPEL project on Criteria for the Assessment of the Environmental damage (CAED).** He presented CAED products of 2023 and announced the plans for the next year. He confirmed IMPEL's willingness to co-operate with the Commission on the training activities. More detailed information is available in the presentation, including the link to where all documents developed by CAED can be downloaded from the IMPEL website. He reminded that the IMPEL CAED project is meant to finish in 2024, but maybe there will be an extension. The expert from ISPRA will coordinate the current project until its end.

The Chairwoman informed that for the purpose of communication within the ELD GEG and having in mind that it is strictly advised by the Commission not to publish any personal data/contact data online, they consider setting up of a dedicated space on CIRCABC application, open to ELD GEG members but closed to the public.

The expert from the **Netherlands** supported the idea of using CIRCABC, considering it interesting to see the comments from other MSs or other experts on the documents. This would also be a way to share information within the group, which is otherwise not possible.

8. Next meeting, closing remarks

The Chairwoman informed that the date for the next ELD GEG meeting is not set yet. This will depend on the two upcoming subjects: (1) next stages of the evaluation of which the Commission will want to inform MSs and have on board for it, (2) the process regarding the training, which will start with signing of the contract.

Next steps:

- MSs are asked to send their comments on the draft Study **by 6 October**; such comments will be taken into account when drafting the evaluation document;
- However, we will try to incorporate still in the Study any comments that MSs may have on any factual errors, in particular on the enhanced summaries of reports under Article 18 of the ELD and comments on the case studies (Annexes I and J of the Study);
- The Commission would like to ask MSs for their agreement for the publication of their reports under Article 18(1) of the ELD; and
- As explained, the Commission will be looking for volunteers for the development of the new training project. The interested MSs are invited to contact the Commission bilaterally. More calls for volunteers in this subject will be forthcoming after the signature of the contract.

The Chairwoman state that any MSs, which would like to make a presentation at the expert group meeting, to share information on any interesting developments at national level, e.g. any interesting national case law, new methodologies, new applications, etc. to inform the Commission before the next meeting.

The expert from **Germany** asked whether MSs are also encouraged to comment on the overall conclusions of the Study. The Commission announced that its evaluation will be published together with the Study at the beginning of the next year. She asked whether the Commission's evaluation will be shared with MSs before publication. Or if at least it would be possible to have a stakeholder meeting before publication.

The Chairwoman confirmed that MSs' comments on the overall conclusions of the Study are requested already now and that they will feed into the next step of the process, i.e. the ELD evaluation. She explained that the Study itself will not be further reworked to take such comments into account (only MSs specific parts and possible mistakes will be corrected now in the Study). All MSs' comments on the general Study findings will serve as a basis for producing the final product. She will check whether there would be a possibility to organise another meeting at a further stage of the evaluation process, but a lot of different consultations have already taken place. It will thus probably depend on the timing of the evaluation approval by the Commission. She will respond to this question in writing.

List of participants (i.e. members only)

Austria

Belgium

Bulgaria

Croatia

Cyprus

Czechia

Denmark

Estonia

France

Germany

Ireland

Italy

Latvia

Lithuania

Malta

Netherlands

Portugal

Romania

Slovakia

Slovenia

Spain

Sweden