

Improving implementation and the evidence base for the ELD

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COWI, Prospect C&S, Justice and Environment,
Sándor Fülöp, lead expert



European Network
of Environmental Law Organizations

General description of the project

- ▶ After the first wave of large comparative European studies that was based on the knowledge and data of the governmental reports.
- ▶ The ELD became more widely cultivated, its professional base has been expanded, during the last some ten years.
- ▶ There are more academic, court and other lawyers, technical experts etc. who are specialised in ELD matters and produce more information.
- ▶ In this project we have 27 country experts of non-governmental background (8 university professors, 3 former chief administrative/environmental judges, consultants and public interest environmental lawyers from the J&E network).
- ▶ They work between May 2020 and February 2021 in two phases: wide scoop data collection, thereafter an in-depth analysis and suggestions.

Methodological traits, inputs to the project

- ▶ Scientific literature and conferences (mostly environmental law);
- ▶ Statistics, other than ELD specific ones (such as environmental criminal statistics or statistics of the large insurance networks);
- ▶ Interviews with and case studies of NGOs focussing on environmental liability matters;
- ▶ Interviews with reports of ombudspersons responsible for human rights, environmental protection and public health;
- ▶ Information from other non-governmental State organisations, such as National Auditing Agency or the public prosecutors' offices and last but not least;
- ▶ Big Data, i.e. reports, analyses, pamphlets, communication chains of local communities and business groups - all available at the Internet

THE STRUCTURE OF THE DRAFT REPORT

- I. ELD numbers in the EU countries
- II. Using other laws than national ELD laws for possible ELD cases, comparative advantages of the ELD
- III. Evaluation, social appreciation of the ELD
- IV. Authorities charged with ELD cases
- V. Substantial legal institutions
- VI. The ELD procedure
- VII. Time dimensions
- VIII. Costs
- IX. Public participation

(I) ELD NUMBERS IN THE EU COUNTRIES

1. ELD official data flow (existence of ELD databases, certain data or certain years are missing, direct and full access for the public).
2. Access to ELD data through EU sources.
3. Not directly ELD sources at environmental and non-environmental authorities (dozens of relevant databases, 'state of the environment' reports), interconnection and harmonisation of databases is impossible.
4. State bodies outside the Government (statistical office, state auditor's office, ombudsmen, court statistics, criminal statistics).
5. Alternative information sources (Big Data in the electronic media).

(II) USING EXISTING SECTORAL LAWS, COMPARATIVE ADVANTAGES OF THE ELD

- ▶ Is the relationship between the old rules and the ELD clear? (national ELD laws subordinated to the sectoral laws or *lex specialis*?).
- ▶ The inertia of the system to apply the ELD (long term practice and jurisprudence; the old rules are more detailed and applicable; the ELD rules have much less connections, mutual references with other relevant rules e.g. in the field of permitting, monitoring and sanctioning; the old rules have wider scope and more flexibility; the definitions of the ELD have plenty of adjectives, like ‘significant’, ‘measurable’, ‘immediate’; old procedures, especially in respect to evidence taking are easier to apply).
- ▶ Comparative advantages: the polluter pays principle (rather than the polluter suffers’ principle), full remedy and environmental compensation, steps towards removing the corporate veil, with these traits, ELD could be more attractive for the media publicity.

(III) SOCIAL APPRECIATION OF THE ELD

- ▶ ELD in the media (inconvenient truth, ,kill the messenger' defences etc.).
- ▶ ELD in the business (support the win-win or low hanging fruit type of solutions, while would like to keep the media and the authorities out of such problems of theirs; ELD sites related business is another thing).
- ▶ ELD in science (an upcoming topic for legal and multidisciplinary researches as data shows in the electronic libraries).
- ▶ ELD and the authorities and courts (they expressed need for more guidance, but appreciate the strength and ambition of the ELD).
- ▶ ELD and NGOs (local communities and grassroots seem to be ignorant, even mainstream NGOs have difficulties in understanding it with few exceptions - they raised the necessity of capacity building in interviews).

(IV) AUTHORITIES CHARGED WITH ELD CASES

- ▶ There are specialised, usually small ELD units in the ministry and in the national environmental agency, but not everywhere; they do information servicing, guidance, supervision, coordination and can handle priority cases too.
- ▶ Many non-environmental authorities have important role (nature, plant, forestry, water management, fire and emergency, public health, transport, mining, police and defence authorities) coordination is seldom formalised, parallel efforts take place.
- ▶ Other state bodies, outside the government.
- ▶ Regional and local level: typically understaffed, poorly equipped, have limited training and experiences, frequently reorganised.
- ▶ Courts: their role could be decisive, if cases reached them.

(V) SUBSTANTIVE PARTS OF THE NATIONAL ELD LAWS

1. Definitions - analysed all the words in tables, the majority of countries copied them, while quite some of them have introduced some alterations.
2. Responsible persons - the operator (user of the environment, permit holder; the questions of domicile, transporters, agricultural facilities).
3. Owners and possessors of lands - direct or secondary, conditional or parallel liability or responsibilities without liability.
4. Removing the corporate veil (owners, stakeholders) and liability of the managers.
5. State liability - it is rather a silent liability mostly.
6. Form and content of liability (strict liability, causal link, presumptions and burden of proof).
7. Exemptions and defences.
8. Parallel administrative, civil and criminal (petty offence) liabilities.

(VI) THE ELD PROCEDURE

1. Initiation of the ELD procedures by the CA (*ex officio*, based on monitoring data, inspections, survey of archives and by notifications, observations, complaints, as well as signals from other authorities).
2. Commencement of the procedure (on site inspection, publishing a notice, establishing of or correspondence with the operator, evaluation of the significance of the threat, ordering measures and further fact-finding, approval of the measures).
3. Measures of prevention and remediation (immediate measures and planned ones, determination of cost-bearing, measures taken by the CA, special situation of orphan, but not historic sites).
4. General procedural legal issues (evidence taking with guarantees, special role of the experts, inter-agency cooperation, legal remedies with injunctive relief, transboundary procedures).
5. Follow up (monitoring, cooperative and confrontational tools of enforcement, reclaiming the costs, managing bankruptcy cases).

(VII) TIME DIMENSIONS OF THE ELD CASES

1. Statistics are scarce on this aspect of the ELD cases, but the country researchers in this project have collected several dozens of examples on both, external (before the commencement of the administrative procedure) and internal timeliness of the practical cases - these data are not representative, though highlight the futility of using average numbers in this matter.
2. Reasons of delay include: inexperienced officials, rarity of cases; the contradiction between urgency and reasonableness of long considerations in such cases of extreme complexity and high economic interest.
3. Expedited procedures and legal remedies for ensuring timeliness exist.
4. Statute of limitation: differs in administrative and civil law.
5. Historical sites: viewpoints of prohibition of retroactive regulation confronts the necessity of handling environmental and public health effects of polluted sites present here and now (the environment does not make a legal evaluation, neither the public).

(VIII) COSTS

- ▶ Apart from the actual prevention and remediation measures: data collection and processing, planning, experts, lawyers, administrative and court fees and expenses, follow up and enforcement.
- ▶ No wonder that we still do not have a clear idea about the costs; again, visible cases show much higher costs than the average.
- ▶ Price of lost natural services.
- ▶ Payment of the costs: abilities and willingness - our researchers could not find them.
- ▶ Governmental funds.
- ▶ Alternative financial solutions, brownfield development.

(IX) PUBLIC PARTICIPATION

- ▶ Access to information in the concrete ELD cases, passive and active forms, culture of Aarhus works here well, presumption of accessibility, in some countries there are interactive electronic search platforms too.
- ▶ Appreciation of the role of public participation plays in the ELD cases.
- ▶ In case of ensuring standing for the public we see more reluctance.
- ▶ Request for action might be quite burdensome for a local community or an NGO.
- ▶ Lack of standing in court procedures might be overcome with *amicus curae* letters.
- ▶ Capacity building is the key, might be performed by the authorities, but also by the mainstream environmental NGOs themselves.

NEXT IN THE PROJECT: THE IN-DEPTH PHASE

The main goal of the in-depth phase is development of proposals:

- ▶ primarily on the national level, but on the EU level too;
- ▶ primarily with practical guidance and best practices, but with legislation and legal interpretation too.

based on:

- ▶ the summary report of the first phase;
- ▶ other sources (REFIT, MAWP, Parliamentary Resolution, country fiches).

Selection of the 12-14 in-depth countries is based on:

- ▶ *National situation* of transposition and implementation of the ELD (e.g. countries that reported exceptionally high or low number of cases, as well as countries where specific problems were revealed in the first phase).
- ▶ *Professional level* of the national studies in the first phase.