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# **ENVIRONMENTAL LIABILITY**

## **NATIONAL AND EUROPEAN CONTEXT**

### **30 MAY 2011**

## **Environment Portuguese Agency**

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# ELD – Transposition: Non-communication infringement case

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- **Transposition deadline:** 30 April 2007
  - **Letter of formal notice** addressed to 23 MS on 1 June 2007
  - **Reasoned opinion** addressed to 16 MS on 1 February 2008
  - **Court application decision** concerning 9 MS on 26 June 2008
  - **Court judgements** received by 7 MS: Finland, France, Slovenia, Luxemburg, Greece, Austria, UK
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# ELD – Report: Effectiveness Transposition process

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Transposition was finally only accomplished on **1 July 2010** (i.e. more than three years after the deadline for transposition expired).

The **Reasons** for the **slow transposition** are:

- **Existing legal frameworks** (adaptation, restructuring works)
  - **Challenging technical requirements** (economic valuation, remediation types)
  - **Framework character of ELD** (wide discretion and many options for MS leading to lengthy domestic debates and legislative processes)
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# Key definitions - Environmental damage

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## Definition of environmental damage

- **“Protected species and natural habitats”**: significantly affecting the reaching or maintaining of a favourable conservation status (with reference to Birds Directive 79/409 and Habitats Directive 92/43)
  - **“Water”**: significantly affecting ecological, chemical, quantitative status or ecological potential (with reference to the Water Framework Directive 2000/60)
  - **“Land”**: land contamination that creates significant risk to human health being adversely affected through introduction of substances, preparations, (micro-)organisms in, on or under land
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# ELD – Report: Effectiveness Implementation features (1)

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## Definition of damage to “protected species and natural habitats” - **Extension to nationally protected species and habitats:**

- **Yes:** Austria (depending on the region), Belgium (depending on the region), Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden, United Kingdom (England, Wales, Northern Ireland)
  - **No:** Bulgaria, Denmark, Finland, France, Germany, Ireland, Italy, Malta, Netherlands, Romania, Slovak Republic, Slovenia
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## Key definitions - Operator

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- Natural or legal, private or public person who operates or controls the damaging occupational activity (**absolute or "Community" scope**)
- OR**
- « where this is provided for in national legislation » (**optional or « national » scope**):  
to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or the person registering or notifying such an activity
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# ELD – Report: Effectiveness Implementation features (2)

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## Operator definition:

- Most Member States have transposed the **broad scope**, i.e. including the “national scope”: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Greece, Ireland, Italy, Latvia, Malta, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom
  - Remained with the **limited scope** (the “Community scope”): France
  - Went even **beyond the Directive’s scope** (“more stringent measure”): Estonia, Finland, Hungary, Lithuania, Poland, Sweden
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## Optional defences - Permit defence

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

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation given under applicable national laws and regulations

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## Optional defences - State of the art defence

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

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

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# ELD – Report: Effectiveness Implementation features (3)

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## Optional defences:

- **Both defences incorporated:** Belgium (regions), Cyprus, Czech Republic, Estonia (except GMOs), Greece, Italy, Latvia (except GMOs), Malta, Portugal, Slovakia, Spain, United Kingdom (except GMOs in Scotland, Wales)
  - **Both defences not applicable:** Austria, Belgium (federal level), Bulgaria, Germany, Hungary, Ireland (change planned), Netherlands (applicable only after check of reason), Poland, Romania, Slovenia
  - **State of the art defence applicable but permit defence not:** France
  - **Permit defence applicable but State of the art defence in general not:** Denmark, Finland, Lithuania
  - **Mitigation ground:** Sweden
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## ELD – Report: Effectiveness Implementation features (4)

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### Optional exemption of spreading of sewage sludge from Annex III:

- **Exempt:** Bulgaria, France, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia, United Kingdom
  - **Covered:** Austria, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Spain, Sweden
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# ELD – Report: Effectiveness Implementation features (5)

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## Multiple party causation:

- **All parties have full responsibility (joint & several):** Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom
  - **Each party obliged to pay only its share (proportional):** Denmark, Finland, France, Slovakia
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# Mandatory vs. voluntary financial security

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## Article 14(1)

### Financial security

Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.

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# ELD – Report: Effectiveness Implementation features (6)

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## **Mandatory/voluntary financial security:**

- **Mandatory financial security scheme (1/3):**  
Bulgaria (04/2008 and 01/2011), Portugal (01/2010), Greece (05/2010?), Spain (from 05/2010 on possible), Slovakia (07/2012), Czech Republic (01/2013), Romania (date still to be determined), Hungary (?), Lithuania (considering)
  - **Most MS (2/3) rely upon a voluntary financial security scheme**
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# Competent authority

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- EU Member States have to designate the **competent authorities (CA)**
  - **Duties:**
    - ◆ To establish who caused damage
    - ◆ To assess the significance of the damage
    - ◆ To determine the remedial measures
  - **Powers:**
    - ◆ To require operator to carry out own assessment and to supply necessary information and data
    - ◆ To require operators and third parties to carry out the necessary preventive or remedial measures
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# Implementation

## Competent authorities (A)

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**Austria:** District authority

**Belgium:** Federal level: several authorities according to sector (environment, civil protection departments etc.), Walloon region: *DG Ressources Naturelles Environnement*, Flemish region: *Dep. Leefmilieu, Natuur en Energie*, Brussels region: *Brussels Instituut voor Milieubeheer/Institut Bruxellois pour la Gestion de l'Environnement (BIM/IBGE)*

**Bulgaria:** Minister of environment and water; Directors of regional inspectorates of environment and water; Directors of river basin directorates; Directors of national parks

**Cyprus:** Ministry of Agriculture, Natural Resources and Environment or by delegation another authority according to the type of damage

**Czech Republic:** Ministry of Environment, CZ environmental inspection, National parks and protected landscape areas services, military authorities

**Denmark:** Supervisory authorities

**Estonia:** Environmental Board

**Finland:** Centres for Economic Development, Transport and Environment; Regional State Administrative Agencies (related to water); Board for Gene Technology (related to GMOs)

**France:** *Préfet de département*

**Germany:** Technically competent authorities of the *Länder* in charge of nature conservation law, water law, soil protection law (as regards damage in the EEZ: federal Agency for Nature Conservation)

**Hungary:** Regional environment, nature conservation and water management inspectorates

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# Implementation

## Competent authorities (B)

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**Ireland:** Environment Protection Agency

**Italy:** Ministry for the Environment, Territory and the Sea

**Latvia:** State environmental authority

**Lithuania:** Regional environmental protection departments of the Ministry of Environment

**Malta:** Malta Environment and Planning Authority

**Netherlands:** Which authorities (State, province, community, waterboard) are competent depends on the specific case

**Poland:** Regional Director of Environmental Protection (before: *Voivodship* governors - regional authorities) except GMO damage (Minister of Environment)

**Portugal:** Portuguese Environment Agency

**Romania:** County Agency for Environmental Protection

**Slovak Republic:** Ministry of Environment or regional environmental offices or district environmental offices or Slovak Environmental Inspection (as regards IPPC activities)

**Slovenia:** Ministry of Environment, Environmental Agency of RS

**Spain:** Regional authority (as regards nature and land damage), Federal State (as regards water damage)

**Sweden:** Supervisory/inspection authority: normally the local municipality or the regional authority (country board), (environmental protection agency gives guidance)

**United Kingdom:** Natural England (biodiversity damage), Environment Agency (water damage), local authorities (land damage), Marine Fisheries Agency (marine biodiversity damage)

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# ELD – Report: Effectiveness Limited implementation (1)

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**Just 16 ELD cases** reported by end of 2009/beginning of 2010 from ELD experts for 15 MS (At present, based on extrapolation, a ~50 cases estimated for total EU, except PL)

## **Possible reasons:**

- **Challenging technical requirements** (economic evaluation, environmental remediation methods etc.)
  - **Limited knowledge** by operators
  - **Preventive effect** of the ELD
  - **Maintenance of existing laws** (more stringent MS laws on water, soil)
  - **Exceptions and defences** under the ELD framework
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## ELD – Report: Effectiveness Limited implementation (2)

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- Most of reported cases relate to damage to **water and land (except Germany)**
  - Most remediation is **primary remediation**
  - Total remediation costs range between **€12,000 and €250,000**
  - Duration of environmental recovery varies between **one week and three years**
  - Activities concerned almost exclusively operators in the Annex III (**IPPC, waste management, dangerous substances, etc.**)
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# ELD – Report: Functionality of national ELD systems

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## **Member States' preparedness variable**

- Guidelines developed by some MS
- Specialised financial security systems offered

## **Business awareness low**

- Preference for GTPL and EIL
- looking for clearer and more precise remediation rules

## **Insurance industry's reaction positive**

- Dissemination of relevant publications
  - Development of ELD products (specific and 'top-ups')
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# ELD – Report: Effectiveness and Functionality: Overall conclusion

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- **Slow transposition,**
- **Limited application and practice** and
- Wide **variety of implementation** features across the EU

## **Had:**

- Possibly an **impact on the effectiveness** and
- Certainly **delayed the development** of financial security products.

**But: increased awareness** and **information flows** between stakeholders

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# ELD – Report: Financial security Market developments

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- Most insurers describe the market development as **positive**: A growing and competitive market providing good cover
  - Market development has been delayed due to the **Financial Crisis**, while it has been more profoundly hindered by **lack of information dissemination (f. e. through brokers) and lack of interest of operators**
  - Level of **premiums** is **not** considered a problem for further market development
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# ELD – Report: Financial security Available products

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**MS have rather taken little action. ELD markets developed mostly at the insurer's initiative. The main financial security instruments in MS include:**

- ◆ **Insurance** and re-insurance: most popular instrument, all MS (within insurance most common: GTPL or EIL)
  - ◆ **Bank guarantees** (second most common): 8 MS
  - ◆ **Market Based Instruments** (MBIs) such as funds, bonds: 6 MS
  - ◆ **Insurance pools**: 3 MS
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# ELD – Report: Financial security Product limitations and gaps

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- **Insurance products do not cover non-predictable risks, for example re. GMOs**
  - **Some policies have an exclusion of:**
    - ◆ **gradual environmental damage**
    - ◆ **compensatory remediation**

**due to lack of data about ELD incidents and the inability to quantify potential losses.**
  - **Current capacity of (re-)insurance industry to cover efficiently ELD liabilities sufficient (?)**
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# ELD – Report: Financial security Barriers for insurance products

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**Lack of data** on loss frequency and loss severity

- ◆ Especially regarding gradual pollution and compensatory remediation
- ◆ Affects more GTPL than EIL market

**Lack of experience** in dealing with environmental liabilities

**Costs** of insurance policies

**Potential overlap** with other insurance products

**Variations in the transposition** across the EU

**Poor communication** about the ELD and related financial security products

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# ELD – Report: Financial security

## Financial security issues

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- **Gradual approach:** may concern risk types, industrial sectors, liabilities covered
  - **Ceilings for financial guarantees:** apply to mandatory and voluntary financial security mechanisms
  - **Exclusion of low risk activities:** based on a risk assessment or when EMAS or ISO 14001 is in place
  - Many of the above options are already implemented by MS. Some form of gradual approach would be necessarily part of any mandatory financial security, the other two options might or might not be employed by mandatory financial security
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# ELD – Report: Financial security EU Financial security market

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- Available instruments **exist** and progressively are **used** more and more
  - Still **some gaps** exist in insurance products and more design efficiency can be made
  - Member States that applied mandatory financial security are **progressing slowly**, however they may have more available information to report and also complete risk assessments
  - For the time there is **not enough experience** to justify a proposal for having a mandatory EU wide financial security system.
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# ELD – Report: Conclusion (1)

## Mandatory financial security

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- Slow transposition and the factors shown above resulted in **limited number of ELD cases and limited practical experience** (authorities had no rules, operators were unaware of their obligations, insurers were insufficiently aware of the rules their products have to comply with).
  - Therefore, **reliable conclusions** with regard to the introduction of a harmonised system of mandatory financial security at EU level **cannot yet be drawn**.
  - The developments in the MS which have established mandatory financial security as well as the developments in the MS which have opted for voluntary instruments **have to be further monitored and analysed**.
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## ELD – Report: Conclusion (2)

### Issues to be addressed

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- **Scope of Directive:** Gap of scope as regards **damage to water** beyond territorial waters
  - **Diverging national transposing rules** potentially create **difficulties for example to financial security providers**
  - **Uneven implementation** of the **permit and state of the art defences**
  - **Uneven extension** of the scope to cover **species and natural habitats protected under domestic law**
  - **Sufficiency of actual financial ceilings** of financial security instruments (cf. **Deepwater Horizon** spill and Hungarian Red mud pollution)
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## ELD – Report: Conclusion (3)

### Some further recommendations

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- **Improving communication and information exchange** between stakeholders at all levels (MS's authorities, operators, insurers, brokers, risk managers), f.i. on ELD cases and available financial security products
  - **Raising awareness** of operators and financial institutions by industry associations, financial security associations, competent authorities
  - **Developing interpretation guidance** at European level regarding Annex II and key definitions and concepts
  - **Establishing MS registers** of ELD cases
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# Outlook

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- **Stakeholder Conference on 8 November 2011 to deal with the 4 recommendations of the ELD Report:** Improving communication and information exchange; raising awareness of operators and financial institutions; developing interpretation guidance at European level; establishing MS registers of ELD cases
  - **Planned COM activities 2012:** Implementation study, support to training activities, information and awareness raising, other
  - **ELD amendment in context of Commission Offshore Safety Package planned in 2011**
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# Annex III – Offshore activities

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**Activities establishing strict liability in Annex III (14 numbers):**

**Annex III.7:**

**'Manufacture, use, storage, processing, filling, release into the environment and onsite transport of**

**(a) dangerous substances as defined in Article 2(2) of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances'**

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# Strict liability for offshore exploration and exploitation

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## CLP Regulation (EC) No 1272/2008

### repealing CLP Directive 67/548/EEC:

- **Definitions 'substance' and 'manufacturing': Article 2(7), (14) CLP Regulation**
    - **Substance: 'means a chemical element and its compounds in the natural state or obtained by any manufacturing process, ...'**
    - **Manufacturing: 'means production or extraction of substances in the natural state'**
  - **'Oil': Hydrocarbons etc. in Annex VI (more than hundred)**
  - **Repeal of Directive 67/548/EEC**
    - **Completion of repeal (Article 60): 1.6.2015**
    - **Transitional provisions (Article 61): From 1.12.2010 classification of substances applies in accordance with CLP Regulation**
  - **Dynamic interpretation of EU law: References in EU acts (directives, regulations) to other EU acts are in general dynamic references**
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## Environmental damage in marine areas (1)

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- (a) damage to protected species and natural habitats:** applicable within the jurisdiction of coastal States concerned, extending potentially to exclusive economic zone (~ 200 nautical miles) and continental shelf (~ 360 nautical miles), as applicable
  - (b) water damage:** see next slide
  - (c) land damage:** obviously irrelevant
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# Environmental damage in marine areas (2): "water scope gap"

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## Water Framework Directive 2000/60/EC:

- **Article 2(7): 'Coastal water'** means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters
  - **Article 2(1): 'Surface water'** means inland waters, except groundwater, transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters (12 nautical miles)
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# Damage to water – Possible ELD amendment to fill the gap

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“For the purpose of this Directive the following definitions shall apply:

1. ‘environmental damage’ means:

(a) ...;

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies, as well as any damage that significantly adversely affects the environmental status of marine waters concerned as defined in Directive 2008/56/EC, as far as not being covered already under the definition of water damage under Directive 2000/60/EC;

(c) ...”

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# Judgement of 9.3.2010 in Italian case C-378/08 (1)

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## *Augusta Roadstead-Case*

- **Facts:** Augusta roadstead in Sicily - Recurring incidents of environmental pollution since 1960s through numerous undertakings (i.e. petroleum industry) – Decontamination orders by the competent public authorities – Action by the current undertakings against those administrative decisions: making the current undertakings responsible without taking account of ‘polluter-pays’ principle, distinction between past and present pollution, any assessment regarding causation, fault, identification of polluters etc.
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## Judgement of 9.3.2010 in Italian case C-378/08 (2)

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- **The polluter-pays principle** in Article 174 EC (now: 191 TFEU) is directed at action at Community level (now: EU level) and **can therefore not directly be invoked** by individuals in order to exclude national legislation in an area of environmental policy for which **there is no EU legislation**
  - Where in the situation of environmental damage the **conditions for the application of the ELD are not met *ratione temporis* or *ratione materiae***, national law is applicable.
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## Judgement of 9.3.2010 in Italian case C-378/08 (3)

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- ELD applies to damage caused by emission, event or incident taking place after 30 April 2007 where such damage derives from activities carried out after that date **or activities which were carried out but had not finished before that date (“ongoing damage” for that part!)**. However, it is up to the national courts to ascertain on the basis of facts whether the damage falls within the above situation.
  - According to Articles 3(1), (5) and 11(2) ELD **the CA is not required to establish fault, negligence or intent** on the part of the operators but it must first carry out a **prior investigation into the origin of the pollution** found (but has discretion as to the procedures, means and length of such investigation).
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## Judgement of 9.3.2010 in Italian case C-378/08 (4)

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- Whilst Articles 4(5) and 11(2) ELD require establishment by the competent authority of a **causal link** between damage and the activity of the operator, the ELD does not specify how such causal link is to be established and **MS have a broad discretion** in laying down national rules giving concrete expression to the PPP.
  - Accordingly, a MS may provide that a CA has the power to impose remedial measures on the basis of the **presumption of a causal link**.
  - However, such a presumption must be based on **plausible evidence**, such as **vicinity** between the operator's operation and the pollution or **correlation between pollutants** identified and substances used by the operator.
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## Judgement of 9.3.2010 in Italian case C-379/08, C-380/08 (5)

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- The competent authority **may alter substantially measures for remedying environmental damage** which have already been implemented or begun to be put into effect if certain conditions are met: **operator and landowner heard, account taken of criteria in Annex II, grounds stated in decision.**
  - If justified by reasons of **preventing further deterioration of the area affected**, the right of operators to use their (decontaminated/not polluted) land can be made subject to the **requirement to carry out the remedial action necessary** (proportionate, least onerous) required by the authorities directed to the adjacent adjacent to their property (whole shoreline)
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<http://ec.europa.eu/environment/liability/index.htm>

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An aerial photograph of a dense forest covered in snow. The trees are dark green and brown, contrasting with the white snow. The perspective is from a high angle, looking down on the forest canopy.

**Thank you for your attention !**

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