

June 2015

Reviewing the Environmental Liability Directive

ClientEarth recommendations

Key recommendations

The Environmental Liability Directive (ELD)¹ is currently subject to a process of review and refit. So far, the ELD appears to have been of limited effectiveness. In order to enable it to achieve its objectives, we recommend the following key changes:

- Extend the scope of the ELD by redefining environmental damage, so that actual damage to different aspects of the environment is more effectively covered in practice (see part 4.1 on the scope of the ELD for our detailed recommendations).
- Remove and/or clarify the ‘significance’ thresholds in relation to all environmental damage under the ELD in order to remove excessively high barriers to the application of the Directive (see part 4.2 on thresholds for damage under the ELD for our detailed recommendations).
- Extend the application of liability by:
 1. making operators of all occupational activities strictly liable for all environmental damage they cause, or at the very least, by making operators of all occupational activities strictly liable for damage to biodiversity, whether or not listed in Annex III;
 2. removing the defences in Article 8(4) of the Directive, or at the very least clarifying that they apply in relation to costs, not liability.²
- Impose a duty on competent authorities to identify cases of environmental damage and to ask operators to take preventive and remedial measures irrespective of the way in which the relevant damage has come to the authority’s attention.
- Require the state/competent authority to bear the cost of measures under the Directive where the operator no longer exists, is unable to pay or does not comply with its obligations under the ELD.
- Expressly provide for rights of access to information and public participation in the competent authorities’ decision-making under the ELD, as well as rights of access to justice.
- Provide for national registers of ELD cases (actual and potential) and requests for action.

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

² See Implementation Report, p. 10.

Background

The Environmental Liability Directive (ELD) aims to prevent and remedy environmental damage. It seeks to achieve this through implementing the 'polluter pays principle'³ and making businesses that damage the environment legally and financially accountable for that damage.⁴

The ELD entered into force in 2004 in response to a series of environmental pollution incidents.⁵ It aimed to address environmental and health issues surrounding pollution and land contamination, and the dramatically accelerating loss of biodiversity.⁶ The effectiveness of its provisions - legally and in practice - must be measured against this purpose.

Restrictions on how and when the ELD can be applied mean that to date its use has been limited.⁷ The ELD has not yet been able to contribute to reaching its objectives. In particular, the restrictive definition of environmental damage and the limitation of the Directive's scope, mainly to operators undertaking 'Annex III activities'. Where the ELD is failing to meet its purpose in any of these respects it should be amended accordingly.

Introduction

Article 18(2) of the ELD requires the European Commission to submit a report on and make appropriate proposals for amendment to the European Parliament and to the Council before 30 April 2014. The report is now expected in 2015.

The report will need to include (amongst other topics) a review of:

- the experience gained by Member States in the application of the ELD;
- the application of the Directive in relation to protected species and natural habitats;
- the scope of the activities listed in Annex III.

This analysis sets out a number of recommendations, particularly in relation to the scope of the ELD, thresholds for damage, liability, governance, transparency and access to justice. The recommendations are based on a legal analysis of the relevant provisions of the ELD and related areas of EU legislation.

3 Article 1 ELD.

4 Ibid. Articles 5 and 6.

5 See Proposal for a directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (presented by the Commission) COM (2002) 17 final; 2002/0021 (COD) (the ELD Proposal).

6 See ELD Recitals 1 and 2.

7 See p. 13, 1st and 2nd bullet points in para. 4 in BIO Intelligence Service (2013), Implementation challenges and obstacles of the Environmental Liability Directive, Final report prepared for European Commission – DG Environment. In collaboration with Stevens & Bolton LLP (the Implementation Report).

Detailed recommendations and legal analysis

1 The scope of the ELD

The ELD only covers a very limited range of incidents causing environmental damage because it contains a very restrictive definition of what constitutes environmental damage and it limits liability in a number of ways (as explained below).

1.1 ClientEarth recommendations when revising ELD's scope

The definition of environmental damage

- Redefine environmental damage in a wider sense, so that it covers wider adverse effects on the environment, and not just limited cases of damage to biodiversity, water or land. This could be closer to the approach taken in the EIA Directive, though possibly not quite as broad (for practical reasons as set out in further explanation below).
- If the existing categories of environmental damage remain, they must be simplified so that actual damage to different parts of the environment is effectively covered in practice. In this case, wording must be inserted making it clear that water damage is not to be measured by reference to vast bodies of water, but rather by reference to the localised impacts of the relevant damage. It also needs to be clarified, either in the Directive or in guidance, how status categories can be affected, and when this qualifies as damage under the Directive (this is linked to the discussion of significance thresholds below).
- Biodiversity damage should cover all protected habitats and species in the EU, including nationally and internationally designated ones. Some Member States already apply the ELD to nationally protected biodiversity. The Marine Strategy Framework Directive applies to sites protected under international and regional agreements (and the ELD now applies to marine waters as defined under this Directive). If this became the general rule, the scope, and therefore the effectiveness, of the ELD would increase. In addition, there would be a much more level playing field and it would complement national environmental liability schemes, which often concentrate on soil pollution (for example the Contaminated Land Regime in the UK) and do not cover biodiversity damage.
- Biodiversity damage should be able to include wider effects on biodiversity, which are relevant to EU policy. How to do this effectively needs to be further considered.

Strict liability and Annex III activities

- Operators of all occupational activities should be strictly liable for all environmental damage they cause. This would also simplify and streamline the Directive by removing the need to determine on a case-by-case basis whether an activity is subject to the legislative instruments listed in Annex III or not.
- If strict liability is to continue to be limited to Annex III activities only, then the list of activities in Annex III needs to be extended. In addition, fault-based liability in Article 3(1)(b) should be

extended to all non-Annex III activities in relation to water and land damage also, and should not be restricted to biodiversity damage only.

- A careful review of all instruments that should be covered by Annex III needs to be carried out to ensure all relevant instruments are included. French national legislation has already included oil pipelines in its list of activities covered.⁸ Amending the ELD to include oil pipelines would be good, but it would make more sense simply to cover all the activities or projects listed in the EIA Directive and any other dangerous activities regulated by EU law (e.g. anything covered by the Seveso Directive⁹) in order to avoid the need for piecemeal extensions of Annex III, as cases arise. Other potentially damaging activities, such as fracking, should also be covered, even if there are no EU instruments that regulate them. Although the ELD does apply to offshore oil and gas operations under a 2013 Directive,¹⁰ it would make sense for Annex III to list the 2013 Directive too – to avoid confusion.

1.2 Further explanation

The definition of environmental damage in relation to the scope of the ELD

Splitting environmental damage into damage to land, water and biodiversity only, rather than covering environmental damage more generally (but including all of these), has a negative impact on the potential effectiveness of the ELD from the outset.

The ELD does not cover many types of water pollution or biodiversity damage, because it does not address diffuse pollution (in most cases).

It also limits the type of biodiversity covered to certain habitats and species protected under only two EU Directives, the Birds and Habitats Directives¹¹. It excludes EU sites protected under international and regional agreements (as referred to in Article 13(4) of the Marine Strategy Framework Directive)¹² and internationally protected biodiversity under biodiversity strategies and action plans under the 1992 Convention on Biological Diversity.

Habitats and species protected under national law are only covered by the ELD if Member States choose to apply the Directive to them.¹³ Some Member States and sometimes even individual federal states, for example in Austria, already apply the ELD to nationally protected biodiversity.

Important aspects of biodiversity form an integral part of EU environmental policy.¹⁴ These include ecosystems, ecosystems services and biodiversity more broadly, which are referenced

⁸ See Implementation Report at pp. 98-99, Coussouls de Crau case

⁹ Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

¹⁰ Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

¹¹ Directives 2009/147/EC on the conservation of wild birds and 92/32/EEC on the conservation of natural habitats and of wild fauna and flora.

¹² Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

¹³ Article 2(3) ELD.

¹⁴ See in general: EU Biodiversity Strategy (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM(2011)244 final.

in the EU Biodiversity Strategy¹⁵ in relation to ensuring there is 'not net loss'¹⁶, developing green infrastructure¹⁷ or enhancing ecosystems and their services¹⁸. Yet these do not fall within the ELD's regime. This is despite the fact that creating liability for biodiversity damage was one of the main drivers for the ELD in the first place, because it was not (and still is not) covered in national environmental liability laws.

Another problem is that defining environmental damage by reference to concepts in EU legislation, which are designed to work in completely different ways from what is required in a liability instrument (as in the case of water and biodiversity damage), makes for a unnecessarily clumsy and ineffective regime.

Indeed, this type of general link to existing legislation without sufficient explanation has led to some very specific issues in relation to water damage. Some Member States require water damage to be measured by reference not to local water pollution and/or damage, but instead by reference to effects on entire water bodies/catchment areas.¹⁹ Legally, this distinction arises from a decision to concentrate on water *status* under the Water Framework Directive,²⁰ which is determined for whole water bodies, rather than on effects on the '*waters concerned*', which allows for effects at a much more local level (both of these are mentioned in Article 2(1)(b)(i) of the ELD). Similar, and even more serious, considerations (at an even greater geographical scale) apply to the significance threshold for marine waters, which have been covered by the ELD since 2013 (see Article 2(1)(b)(ii)).

Compared to this restrictive approach to what counts as environmental damage, it is interesting to note that the EIA Directive²¹ deals with effects on the environment in a much wider sense, including:

- human beings, fauna and flora
- soil, water, air, climate and the landscape
- material assets and the cultural heritage
- the interaction between all of these.²²

Of course, in some cases there are practical reasons for the ELD's more restrictive approach, for example in relation to diffuse pollution or air pollution, where remediation as provided for in the ELD – rather than financial compensation, which the ELD does not cover – is not practically possible.

Considering whether liability as an instrument for implementing the polluter pays principle, improving environmental protection and ensuring remediation, is appropriate in each area as a necessary and valid consideration. However, this should not lead to the situation that the scope

15 See in general: EU Biodiversity Strategy (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM(2011)244 final.

16 http://ec.europa.eu/environment/nature/biodiversity/nnl/index_en.htm

17 http://ec.europa.eu/environment/nature/ecosystems/index_en.htm

18 EU Biodiversity Strategy, target 2.

19 *Ibid.*, p. 15, 2nd bullet and p. 122, para 3.

20 Directive 2000/60/EC on establishing a framework for EU action in the field of water policy.

21 Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification).

22 See Article 3, EIA Directive.

of the ELD is not extended. Many of the areas listed above (for example with regard to water damage) do not fall in this category, and the Commission can and should consider them for future inclusion in the ELD.

Strict liability and Annex III activities in relation to the scope of the ELD

The 2013 Implementation Report highlights Annex III in particular as an issue.²³ Liability under the ELD (except for biodiversity damage in certain circumstances) only affects operators of ‘Annex III activities’ (a list of dangerous/hazardous activities regulated by EU law listed in Annex III of the ELD). Non-Annex III operators are never liable for water or land damage, despite the potential to cause significant environmental damage. Many more activities are listed in the annexes of the EIA Directive, for example. This necessarily restricts the scope of the ELD, thereby potentially making it less effective in meeting its stated objectives.

Moreover, in terms of the activities listed in Annex III, the ELD does not cover fracking or oil pipelines, for example, or operators of all of the activities/projects listed in the annexes of the EIA Directive. Similarly, it does not cover a number of EU Directives in relation to water pollution (for example the Urban Waste Water Treatment Directive²⁴) or the full extent of activities regulated by the Water Framework Directive, for example in relation to navigation, port construction and flood defence engineering, even though all of these can lead to serious damage.

2 Thresholds for damage under the ELD

The ELD aims to implement the polluter pays principle and to make operators responsible for environmental damage they cause on the basis of strict liability. It is also intended to create strong incentives to prevent such damage from occurring in the first place. It is crucial that the threat of liability is a real one, and not so unlikely that no incentive to prevent it is created. As explained further below, the current wording, or at least its interpretation, creates damage thresholds that are too high.

2.1 ClientEarth recommendations on thresholds in the ELD

- Remove the ‘significance’ thresholds for all environmental damage under the ELD, putting the emphasis on the details in Annex I. This would exclude *de minimis* impacts and natural recovery.²⁵
- Clarify that ‘significance’ thresholds do not require there to be ‘serious’ or ‘severe’ impacts, simply ‘measurable’ damage, as already provided for in the definition of ‘damage’ under Article 2(2).

²³ Ibid. p 15, point 4.

²⁴ Directive 91/271/EC concerning urban waste-water treatment.

²⁵ This is the approach taken for land damage in Poland, *ibid.* p.122, para 4.

- Again, the approach taken in Annex I should help to do this. Another possible solution would be to rely on the approach taken in the EIA Directive with regard to significant effects, where tried and tested metrics are applied that depend on issues such as location, sensitivity, abundance, duration, frequency and reversibility (see Annex III of the EIA Directive, particularly under points 2 and 3). Obviously, in this case, temporal aspects of the assessment of likely significant effects in the EIA Directive would only be relevant to the preventive provisions of the ELD.
- In relation to biodiversity damage, any impacts on protected habitats and species should be presumed to have 'significant adverse effects' precisely because they are protected (and therefore more vulnerable and sensitive).

It is worth noting in this context is that under the EIA Directive, impacts on protected sites, species and habitats are likely to be significant *per se* because of their added sensitivity and vulnerability.²⁶ Therefore, it would make sense to create a presumption in the ELD that this should also be the case, excluding *de minimis* impacts and natural recovery (as above).

- Reiterate the importance of applying the precautionary principle in relation to any uncertainties surrounding the determination of whether or not damage meets the required 'significance' thresholds.

2.2 Further explanation

Significant adverse effects

The ELD applies to environmental damage (land, water and biodiversity damage) only if it has 'significant adverse effects' on:

- human health
- 'water status'
- 'environmental status of marine waters'
- 'reaching or maintaining favourable conservation status' of species and habitats protected under the Birds and Habitats Directives.²⁷

As already mentioned, the need to meet 'significance' thresholds has been identified as a major obstacle to the ELD's effective implementation in relation to all types of environmental damage.²⁸

A connected issue is at what level 'significant adverse effects' are measured. This is relevant both in relation to water and biodiversity damage.

²⁶ European Communities (2001) Guidance on EIA Screening: Screening checklist and Checklist of criteria for evaluating the significance of environmental effects.

²⁷ Directives 2009/147/EC on the conservation of wild birds and 92/32/EEC on the conservation of natural habitats and of wild fauna and flora.

²⁸ See footnote 1 and also *ibid.*, pp. 12, 15, 2nd and 3rd bullet points, p.121ff.

In relation to biodiversity it would appear that, legally, the ‘significance’ threshold has been misinterpreted as a ‘severity’ threshold, requiring ‘serious’ or ‘severe’ impacts, rather than merely ‘significant’ ones (i.e. sufficiently important to be worthy of attention).²⁹

In relation to both types of water damage, measuring impacts by reference to ‘status’ can make it very difficult to show that damage has occurred. In the marine context particularly, the criteria associated with (good) environmental status are so general, uncertain and diverse that proving marine water damage as currently provided for is arguably virtually impossible. This applies even in serious cases, for example that of oil pollution.

Clearly, if water damage is only possible when quality status categories across whole river catchments are affected, or ‘good environmental status’ of regional seas, then the likelihood of anything but a huge catastrophic event ever being covered is very low. This is not the original intention of the Directive. That this is a mistaken interpretation of the meaning of ‘significant adverse effects’ is very clear as soon as Annex I of the ELD is consulted (which explains and clarifies the meaning of this phrase). Annex I sets out a series of criteria to consider in a decision on whether damage is significant. More particularly, the last paragraph of Annex I clearly implies that even very small damage can be significant by stipulating that:

‘The following **does not have to be** classified as significant damage (see Annex I, last paragraph):

- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question;
- negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators;
- damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.’

It is obvious that if these ‘minimal’ types of damage ‘do not have to be’ classified as environmental damage, the implication is that as a matter of course they would be, thereby proving wrong all arguments about much higher damage thresholds.

Lastly, land damage in the ELD is defined by reference to significant effects on human health³⁰, rather than on soil, biodiversity or other aspects of the environment. Although this satisfies the polluter pays principle, it does not satisfy the purpose of the Directive itself, which is to remedy **environmental** damage, not effects on human health.

²⁹ Ibid. particularly at p.12 – see also footnote on dictionary meaning of ‘significant’.

³⁰ Article 2(1)(c) ELD.

Effects on conservation status

In relation to biodiversity damage, confusion has also arisen as to the scale at which impacts on favourable conservation status are to be measured (natural range, national or EU).³¹ This is because Article 2(4)(a) and 2(4)(b) define conservation status by reference to: ‘as the case may be, the European territory of the Member States to which the Treaty applies **or** the territory of Member State **or** the natural range of that habitat’ (emphasis added). This appears to have led to arguments that competent authorities/operators may disregard biodiversity damage that affects conservation status nationally, if it does not affect conservation status at EU level.³² One solution suggested was that word ‘or’ be replaced with ‘and’ (as is the case in Annex I, which refers to the different appropriate levels of assessment (with regard to significant adverse effects) being ‘local, regional **and** higher level including at EU level’ (emphasis added)).³³

However, from a legal perspective, replacing ‘or’ with ‘and’ in this context would neither clarify nor lower the necessary threshold for biodiversity damage. Rather, it would set an even higher threshold, as then it would be necessary to prove effects on conservation status at all relevant levels for damage to be established under the ELD. Instead, it appears very obvious that the interpretation of Article 2(4)(a) and (b) as set out above is simply wrong. The use of ‘or’ in the list, and of the words ‘as the case may be’, make it very clear that conservation status can be determined by influences at any of these levels, whichever they may be (all three might be determinative in relation to a particular habitats or species and site, or just one).

Therefore, biodiversity damage under the ELD will occur as soon there are relevant impacts on biodiversity at any of the levels (**either** national **or** EU **or** natural range). There is nothing in the wording of Article 2(4)(a) or (b) that implies any kind of discretion as to what level to measure impacts at.

Moreover the ELD is strongly connected with the Habitats Directive in its approach to the definition of conservation status of biodiversity, and it is very clear that under the Habitats Directive conservation status is to be measured by reference to the territory of a Member State (and natural range within this).³⁴ Therefore, it seems very clear that where environmental impacts to protected biodiversity occur, they need to be measured by reference to conservation status at a national and/or local (site) level. Impacts on EU level conservation status can either occur in conjunction with effects at national/local level, in which case all of them should be considered, or just at EU level (and not at local/national level), in which case this still qualifies as biodiversity damage under the ELD.

3 Strict and fault-based liability

In order to implement the polluter pays principle and operate an effective environmental liability regime, strict liability is required to create the right incentives for operators to take action to

31 See Implementation Report, p122, para 5.

32 See Implementation Report, p. 64ff in discussion of ‘Determination of significant adverse effects to biodiversity’, see particularly last paragraph on p. 64 and first paragraph on p. 65.

33 ELD Annex I, 2nd indent.

34 See Implementation Report, pp. 64-66, and in particular Commission v France, Case C-383/09, 2011

prevent damage from happening and to ensure that operators who cause environmental damage remedy it.

3.1 ClientEarth recommendations on strict liability:

- Impose strict liability for all environmental damage caused by any occupational activity (abolish Annex III – see below).
- Impose strict liability for biodiversity damage caused by any occupational activity, whether or not listed in Annex III.
- If strict liability is not extended, extend fault-based liability to all non-Annex III activities in relation to all types of damage.
- Remove the defences in Article 8(4) of the Directive.
- If the discretionary defences remain, clarify that they apply in relation to costs, not liability.³⁵

3.2 Further explanation

Fault-based liability for biodiversity damage caused by operators of occupational activities not listed in Annex III

Liability for biodiversity damage is only strict in relation to operators of Annex III activities. As regards other occupational activities, liability for biodiversity damage under the ELD is fault-based. Unsurprisingly, this has proved to be an issue in potential ELD cases in the EU.³⁶ Biodiversity damage was the one real advance made by the ELD in relation to the imposition of environmental liability in Member States. However, many instances of biodiversity damage are caused by smaller operators carrying out activities not covered in Annex III (for example in agriculture or aquaculture, or in future, for example in fracking cases).

Defences

The ELD contains a number of exceptions from liability, and defences as to costs. Article 8(4) in particular gives Member States discretion to allow operators not to bear the costs of preventive or remediation measures under the ELD if they were not at fault or negligent and if the emission or event was authorised by a permit under one of the Annex III instruments, or if the emission or activity was not considered likely to cause environmental damage according to the state of technical or scientific knowledge at the time.

³⁵ See Implementation Report, p. 10.

³⁶ Implementation Report, pp. 15 (point 5) and pp.124-126.

In the Commission's initial plans for the ELD, these defences were not included, and they represent a serious weakening of the ambition and future effectiveness of the regime.³⁷ They undermine the implementation of the polluter pays and precautionary principles with respect to the Directive and amount to the introduction of a fault-based liability regime through the back door (at least in relation to the obligation to pay for the costs of preventive and remedial measures).³⁸

4 A clear governance framework

As explained, the Directive creates an administrative regime that makes the application of the ELD in practice doubtful. It is necessary to ensure that operators have sufficient incentives to take action and notify authorities in cases of environmental damage, that competent authorities take action to apply the Directive's provisions, and that environmental organisations bring more requests for action.

4.1 ClientEarth recommendations on governance:

- Impose a duty on competent authorities to identify cases of environmental damage and to ask operators to take preventive and remedial measures irrespective of the way in which the relevant damage has come to the authority's attention.
- In this context, it would be helpful for the ELD to clarify that Member States need to address relevant rights of inspection and entry to property as regards the competent authority.
- In cases where environmental damage has occurred, or is about to occur, and the operator no longer exists, is unable to pay for the costs for the relevant preventive and remedial measures or does not comply with its obligations under the ELD, the state/competent authority should bear the cost of the relevant measures, possibly under national clean-up programmes. Provision for re-imburement of costs from polluters if they are found at a later stage would still need to be made.

4.2 Further explanation

Self-executing provisions, competent authority duties and subsidiary state responsibility

Instead of the civil law liability framework that was originally envisaged, the ELD is an instrument based on administrative law. However, it retains some of the original concepts linked to true civil

37 WWF and BirdLife (July 2004) The European Directive on Environmental Liability – "Polluter Pays": from principle to practice? An Environmental NGO commentary on the Environmental Liability Directive: its adoption at EU level and what it means for the future, p. 7, paragraph b) and p.8.

38 Ibid. p. 8, pp.32-33 and throughout Annex III.

liability (for example exceptions and defences). This is probably the reason why the Directive is based on what has been described as ‘self-executing’ provisions.³⁹

What this means is that operators must act immediately to prevent an imminent threat of environmental damage (or prevent further damage where damage has already occurred) and notify competent authorities as soon as the threat or damage has occurred.⁴⁰ Alternatively, environmental organisations or affected individuals can request the competent authority to take action against an operator.⁴¹

Competent authorities are not required to identify instances of environmental damage or take action against operators of their own accord. This is a serious shortcoming of the ELD, as relying on either operators or environmental organisations to be sufficiently informed, resourced and incentivised (and maybe honest) to apply and enforce the Directive is not realistic or practicable.⁴² This creates a danger of the complete lack of application and enforcement of the Directive due to a governance vacuum.

One EU Member State (Poland) has addressed this at least partially by imposing a duty on competent authorities to carry out remedial measures if the operator cannot be identified.⁴³ In the Commission’s initial proposal for an environmental liability directive, subsidiary state responsibility was to be imposed in cases where the operator who caused the damage did not comply with its obligations under the ELD.⁴⁴ Even in the absence of a duty to identify and deal with cases of environmental damage, this approach would create a strong incentive for competent authorities to do so, in order to avoid being responsible for preventive and remedial measures themselves.

5 Transparency and access to justice

Particularly given the serious issues with cases of environmental damage under the ELD being picked up either by competent authorities or operators at all (see above), the public rights of access to information, public participation and justice guaranteed to EU citizens under the Aarhus Convention should be expressly incorporated into the ELD.

5.1 ClientEarth recommendations on transparency and access to justice

- There should be express provision for rights of access to information and public participation in the competent authorities’ decision-making under the ELD, as well as rights for access to justice.
- There should be provision for national registers of ELD cases (actual and potential) and requests for action.

³⁹ See Implementation Report, p. 11 and 18, also p. 140, para 6.

⁴⁰ Articles 5(1) and 6(1) of the ELD.

⁴¹ Article 12, ELD.

⁴² See Implementation Report, p. 92, paras 4-6, also p. 129, paras 3-5.

⁴³ See Implementation Report, p. 89.

⁴⁴ Articles 4(4) and 5(2) of the ELD proposal.

- The discretion for Member States to remove the right to request action in cases of imminent threat of damage should be removed.

5.2 Further explanation

The ELD contains provisions that allow affected individuals and environmental organisations a right to request competent authorities to take action where they can bring some evidence of cases of potential damage.⁴⁵ It also provides for rights of access to justice (judicial/administrative review).⁴⁶ This is a real strength of the ELD and should be preserved, although under the current text of the ELD it is possible to remove the right to request action in cases of imminent threat of damage.

However, what is completely missing in the ELD are provisions for access to information, which are implied by virtue of Directive 2003/4/EC on access to environmental information, and are provided for, for example, in the EIA Directive.

In this context, a number of Member States already do provide national registers for ELD cases, for example Ireland, Poland or Estonia, though Ireland's register is not published, and is only accessible on request.⁴⁷ The requirement for public registers is a normal part of EU law.⁴⁸

Similarly, public participation rights are not expressly incorporated into the ELD. Yet public participation is required by the Aarhus Convention in environmental decision-making and such rights are standard in other horizontal environmental measures, such as the EIA Directive. In addition, in some Member States, for example in Poland, interested parties can participate in proceedings brought by competent authorities against operators.⁴⁹

45 Article 12, ELD.

46 Article 13, ELD.

47 See for example p. 71 of the Implementation Report.

48 For example, a number of public registers are provided for under the EU's Common Fisheries Policy or under pollution laws.

49 See Implementation Report, p. 51, para 2.

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