



Workshop “Implementation Efficiency of ELD”

Brussels, 10 July 2009

Background Paper

THIS PAPER IS WORK IN PROGRESS

1. INTRODUCTION

BIO Intelligence Service (BIO IS) currently carries out a study on “The Implementation Efficiency of the Environmental Liability Directive (ELD) and related Financial Security Issues” for the European Commission DG ENV in collaboration with Stevens & Bolton LLP. It follows up work conducted in 2008 under the contract study “Financial Security in ELD” whose results can be downloaded here:

http://www.ec.europa.eu/environment/lgeal/liability/pdf/eld_report.pdf.

The current study aims at providing a first insight into the practical implementation of the ELD with a particular focus on questions of financial security. Thereby its objective is to provide the Commission with the necessary information to meet the reporting requirements as set in Article 14(2) of the Directive.

To provide the best available information for the report, the results of the first study will be updated and completed to in order to:

- Analyse the different approaches taken by EU Member States (MS) regarding financial security issues
- Complete the available information on the currently available ELD-related insurance products as well as alternative financial security instruments and other options
- Provide information on European ELD cases to get first ideas of the actual efficiency of the implementation of the Directive in terms of remediation
- Analyse further the position of operators regarding the implementation of the ELD (here emphasis will be put on businesses, but also on SMEs that may be subject to the ELD)

2. THE WORKSHOP

This workshop should serve as a platform for the different stakeholder groups to come together and discuss the ELD implementation and its impacts. On behalf of the European Commission, MS ELD experts, re/insurers, brokers, providers of alternative financial security instruments, operators, experts, and other interested parties and stakeholders (NGOs) are invited to exchange their experiences.



Following the workshop, individual presentations and contact details for further feedback will be provided to workshop participants on a dedicated workshop webpage. Further details will be sent to participants in due course.

3. PRESENTATION OF PRELIMINARY FINDINGS

This section provides first insights into the findings of this study. As none of the stakeholder consultations have been completed at this point these findings remain preliminary.

MEMBER STATE CONSULTATION

Member State (MS) ELD experts were contacted in order to update and complete information gathered during the study on “Financial Security in ELD, 2008”. Areas of special interest included features of national ELD transpositions; views on different financial security instruments with a focus on insurance products; further information on mandatory financial security schemes (if applicable); and information on the ELD-implementation in practice, including ELD cases.

Member States that had already answered a questionnaire for the 2008 study were interviewed over the phone to update and complete the information previously provided. At the time of writing, 12 out of 15 MS concerned have been interviewed. Those MS that had not answered the previous questionnaire were sent a reworked copy that was adapted to the new focus of the study. So far only one response has been received, thus a follow-up reminder has been send. The MS that have so far answered in the context of this consultation are Austria, Belgium (Brussels region), Bulgaria, Cyprus, Estonia, France, Germany, Hungary, Ireland, Netherlands, Poland, Slovakia, and Sweden.

Regarding the discussion of preliminary findings below, it should therefore be noted that they are only based on information provided by a limited number of MS. The discussion does not reflect the full spectrum of findings from this consultation but only the most complete and relevant for this workshop.

1. Most common features of specific national transpositions

The ELD leaves a large degree of flexibility to MS in transposition and thus implementation of the ELD of which a number of MS have made full use. The most commonly applied of the country-specific transposition features are discussed below:

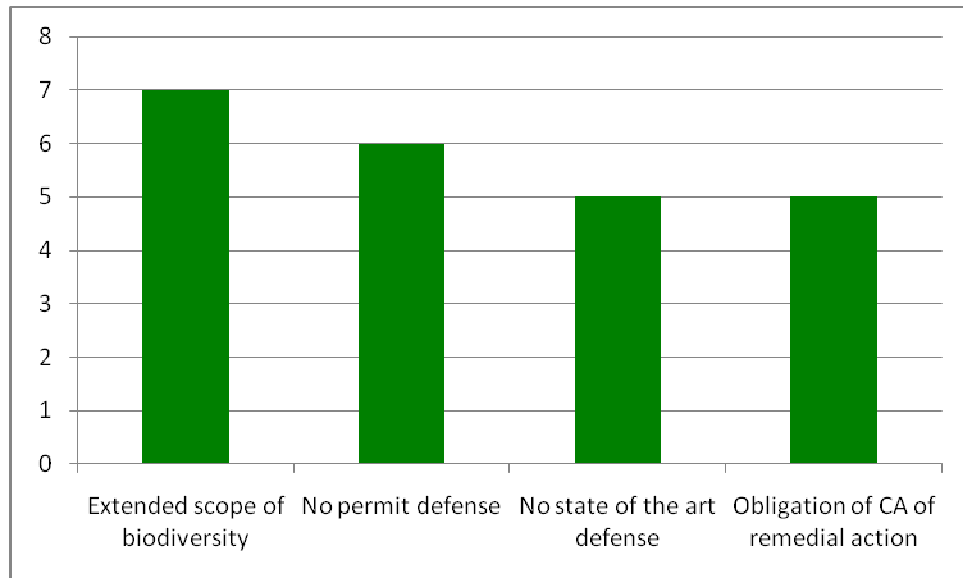
Regarding possible defences, five MS indicated that they do not foresee a state of the art defence (Austria, Germany, Ireland, Hungary, and Sweden) and six do not foresee a permit defence (Austria, Bulgaria, France, Germany, Ireland, Hungary, and Sweden). The case of Spain is particular in the sense that state of the art and permit defences allow operators to recover the costs or reparatory measures once fully implemented, but they do not exempt the operator from taking them. The Netherlands on the other hand do not foresee these exemptions, but do allow for some discretion in the context of a check of reason.

A number of MS also introduced a scope of biodiversity that is wider than that of the ELD. This is the case for Estonia, Ireland, Poland, Cyprus, Belgium (Brussels), Hungary,



and Spain. Finally, Austria, Bulgaria, Estonia, Hungary, and Poland introduced an obligation for the competent authority to take remedial action if the operator is not identifiable or not in a position to carry out the necessary measures.

Table 1: Most common country-specific ELD transposition features (number of MS):

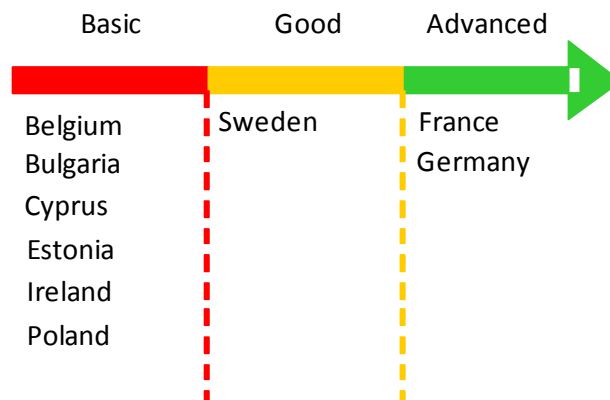


2. Development state of national environmental insurance market

MS were asked to describe the current level of development of the ELD-related insurance market in their country by choosing between three different levels:

- **Basic** meaning that many liabilities under the ELD still remain insurable.
- **Good** meaning that cover exists for most of the liabilities under the ELD but not for all.
- **Advanced** meaning that cover exists generally for all liabilities under the ELD.

Figure 1: Current perceived development of the environmental insurance market





3. Perceived main reason hindering further development of the environmental insurance market

As transposition of the Directive progresses, legal uncertainty no longer seems to be considered as a reason that hinders the further development of the environmental insurance market in European MS. However, more than half of the MS consulted consider that lack of knowledge by operators and unavailability of data are the main obstacles to a further development of the environmental insurance market in their countries (Cyprus, Bulgaria, Estonia, France, Ireland, Poland, and Spain).

Other issues that were named as obstacles are the lack of knowledge on the side of brokers, political resistance to impose extra burdens on operators, and difficulties in premium and risk calculation.

4. Availability of clear guidelines/models for damage assessment and remediation decisions

Several Member States point to the 'REMEDE' toolkit (Resource Equivalency Methods for Assessing Environmental Damage in the EU) as a possible source of information regarding guidelines or models for calculations relevant to the ELD (e.g. guidance on how to calculate the cost of compensatory remediation, or to assess natural resource damage, risk indexes, etc.).

A number of MS have integrated guideless on methodology, values and costs into their laws or are planning to do so in the future. At the current stage, however, most MS that were consulted do not have such guidelines or models in place. France is currently developing guidelines on environmental damage assessment to facilitate the understanding of ELD requirements. It is planned that two versions of this guideline will be distributed, one targeted at regional competent authorities (to help them assess damages) and another one targeted at operators. Spain is working on a decree that is meant to provide a method to determine the way damage must be assessed (including biodiversity damage) and restored. It should also include provisions on the calculation of compensatory remediation.

INSURANCE SECTOR CONSULTATION

In order to gain further insight into the development of the ELD-related insurance market, re/insurers and brokers were contacted for in-depth interviews. Companies were chosen that were either leaders in this market or that had decided not to enter this market in order to reflect viewpoints from both ends of the spectrum. At the time of writing, 13 in-depth interviews with insurers, one with a reinsurer, and two with brokers have been conducted.

The results portrayed below remain preliminary until all interviews have been concluded. They do not reflect the full spectrum of findings from this consultation but are the most complete and relevant for this workshop.

1. Are all activities listed in Annex III covered?

Whereas certain insurance companies in countries such as France and Slovakia state that their products cover all activities listed in Annex III of the ELD, this is not the case for most products that were discussed with insurers and brokers during the consultation. The most commonly named exclusion from insurance



cover relates to the handling of GMOs. Other sectors that were named as not being covered by currently existing ELD-related insurance products include waste management and disposal sites, the use of chemicals and other hazardous products in the agricultural sector, and deep mining.

It should be noted that in many cases these sectors are not explicitly excluded in the insurance product. It is rather a non-written policy by the company's underwriters that these sectors will not be covered.

2. What issues remain uncovered under existing insurance policies?

In order to evaluate the current insurability of ELD-related liabilities, insurers were asked whether their existing products cover the following:

- sudden and accidental events only;
- sudden and accidental as well as gradual events;
- primary remediation;
- complementary remediation;
- compensatory remediation;
- cross-border damage;
- environmental damage caused by state-of-the-art or expressly authorized activities (in countries where these damages are not exempt from the ELD scope).

The current results show that coverage differs significantly across insurance companies. Whereas several of them stated that their products cover all of the above-mentioned liabilities, gradual events and state-of-the-art or expressly authorized activities were named most often as currently uninsurable under their policies by the other companies.

3. Availability of reinsurance

At the time of writing there is no clear picture of how difficult it is for insurers to find reinsurance for their ELD-related products. Furthermore, there is no clear link between a MS and its insurers' assessment of reinsurance availability. Insurers describe this task from difficult to easy across the different MS. However, none of the insurers that were consulted stated that it was impossible to find reinsurance cover. It should also be noted that there are insurers which report to cover all of the above-mentioned ELD-related liabilities and to have no major difficulties in finding reinsurance.

4. Product uptake

The assessment of the current uptake of the newly developed ELD-related insurance products ranges from "disappointing" to "very good". It can be noted that the very negative assessment of the product uptake so far solely came from stakeholders from the UK. On the other side of the spectrum, the only notion of a very positive uptake came from a German insurer. A number of interviews did not reply to this question on the grounds that the products were still too new to judge their uptake.

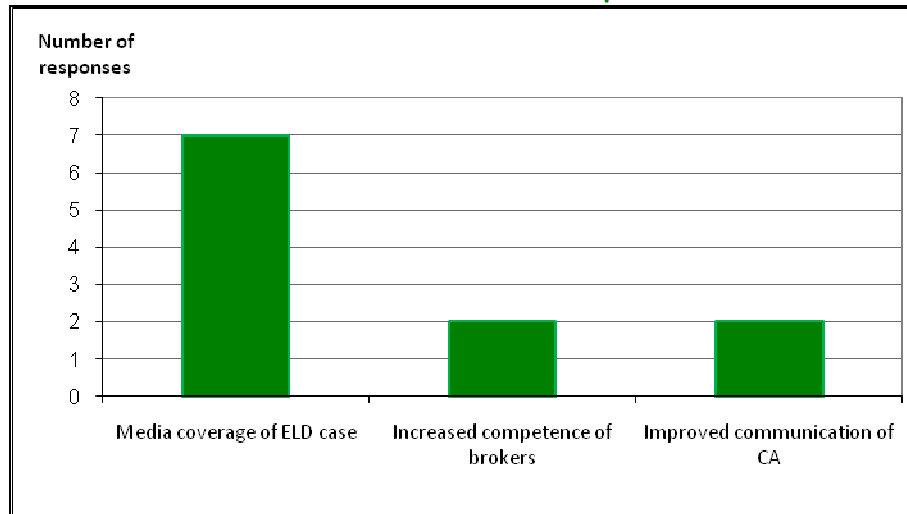


Another result of this question is that currently no correlation can be established between the uptake of products in a certain country and its financial security regime, i.e. whether there is a mandatory financial security scheme in place or not.

5. Increase in product uptake

According to the current findings, the most effective measure to increase the uptake of ELD-related insurance products is believed to be the occurrence of a big ELD case that will be reported on in the media. Operators as well as brokers that are currently not very much aware of ELD-related liabilities or who decided to ignore these, would become more aware of the need to cover these liabilities this way. The second and third most important measures to increase uptake are perceived to be an increase in the level of competence of brokers and an improved communication of the Competent Authority about the ELD.

Table 2: Most effective measure to increase uptake of new insurance product

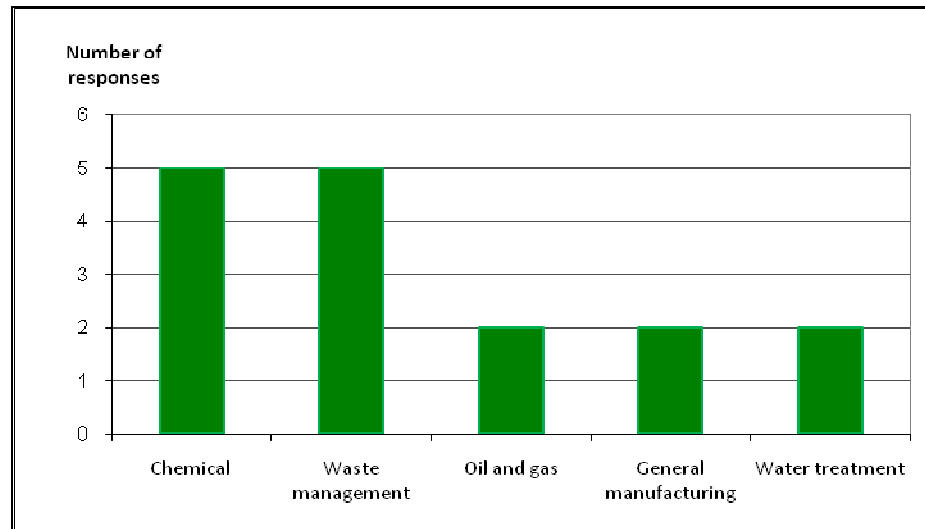




6. Sectors with highest rate of ELD-related insurance uptake

According to current findings, the sectors with the highest number of ELD-related insurance policies taken out are the chemical and waste management sector:

Table 3: Sectors with highest rate of ELD-related insurance uptake



OPERATORS CONSULTATION

In order to gain further insight into the operators' reaction to the ELD implementation, a questionnaire has been developed. It has recently been sent to operator associations in the following sectors:

- Agriculture
- Chemicals
- Coke and petroleum
- Food and beverages
- Metals
- Water supply and treatment

The main focus of the questionnaire is the operators' awareness of risk as well as their current and anticipated risk coverage (including insurance products and alternative financial security instruments).

A number of operators that were already identified during the last study have been/will be contacted directly.

ELD CASES

The importance of compiling information on actual ELD cases is of utmost importance to many of the involved stakeholders. While Member States might be more interested in an ELD case database for the establishment of best practices in the handling of incidents, insurers are keen to collect more information on claims and losses to improve their risk



calculations. Insurers see the absence of cases as one of the main reasons preventing them from producing better estimations of the financial risk, therefore preventing further development of their products. Some insurers said that a system such as the European rapid alert system called Rapex, which allows the rapid exchange of information between Member States on dangerous consumer products via central contact points and the Commission is an example to follow. The information that would need to be collected would of course differ, but the need for such a Europe-wide database has been stressed multiple times.

So far the creation of an ELD case database has been slowed down by the low number of cases that have been reported as potentially falling under the ELD in the different MS. However, potential cases have been reported for different Member States, such as Hungary, Poland, Spain, and the UK.

ALTERNATIVE FINANCIAL SECURITY INSTRUMENTS

Another aspect of the stakeholder consultation was the collection of information on financial security solutions for ELD other than insurance. Little information has been gathered on this topic so far and providers have proven difficult to identify. It can be noted, however, that bank guarantees are perceived as the most important alternative to insurance products to cover liabilities under the ELD.

Further information on alternative financial security instruments will be presented in the Final Report of this study.