

Insurance Europe response to EC consultation on the evaluation of the Environmental Liability Directive (Directive 2004/35/CE)

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Referring to:	Environmental Liability Directive (Directive 2004/35/CE)		
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Part I: General Questions

1. *The polluter pays principle is enshrined in the EU Treaties and is a fundamental principle in environmental policy to protect the public from paying for pollution caused by economic activities. The ELD aims to bring the principle into practical application so that operators pay the costs of remediating and preventing further environmental damage caused by their activities. Do you agree that it is necessary to have a dedicated legislation to implement the polluter pays principle?*

- Strongly agree.
- Agree.**
- Neutral.
- Disagree.
- Strongly disagree.
- I do not know/ No opinion.

2. *Prevention of environmental damage and its rectification at source are two other major principles enshrined in the EU Treaties. The ELD in its current form requires economic operators to take action to prevent environmental damage in case of an imminent threat and to remedy the damage when prevention fails. Do you agree that it is necessary to have legislation that requires companies to prevent and, when this has not succeeded, remedy the environmental damage?*

- Strongly agree.
- Agree.**
- Neutral.
- Disagree.
- Strongly disagree.
- I do not know/ No opinion.

3. Have the following expected benefits of the ELD occurred? That is, has the ELD assisted in the following?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
Preventing and remediating damage to biodiversity in the EU.	X					
Preventing and remediating damage to land in the EU.	X					
Preventing and remediating damage to surface, ground, transitional and coastal waters in the EU.	X					
Preventing and remediating damage to marine waters in the EU.	X					
Application of the 'polluter pays' principle, with costs of preventing and remediating environmental damage paid by liable operators instead of the public.	X					
Ensuring that liable operators carry out preventive and remedial measures (including primary, complementary and compensatory remediation) as applicable.	X					
Raising awareness of environmental issues.	X					
Preventing contamination of further sites.	X					
Encouraging the availability to operators of financial security instruments at an affordable cost.	X					
Allowing interested persons to request competent authorities to take action in case of environmental damage occurrences.	X					
Allowing interested persons to request competent authorities to take action in case of imminent threat of environmental damage occurrences.	X					

4. Do you consider that the absence of mandatory financial security for ELD liabilities at EU level has limited the effectiveness of the ELD?

- Yes.
- No.**
- I do not know/ No opinion.

5. Are there any factors that you consider have meant that the ELD has not worked as well as intended (prevented it from fully meeting its objectives and/or led to unintended negative consequences)?

- Yes.
- No.**
- I do not know/ No opinion.

6. Are you aware of the public participation mechanism of the ELD that allows interested persons to request competent authorities to take action in case of an imminent threat of, or actual, environmental damage, and to provide comments and to have access to justice?

- Yes, and I haven't used it.**
- Yes, and I have used it.
- No.

If you wish, please explain about your experience.

Insurance Europe is aware of the public participation mechanisms of the ELD that allow interested persons to ask competent authorities to take action in case of an imminent threat. However, as a business association representing the insurance and reinsurance industry at EU level, it has not made use of it.

8. Are you aware of the existence of information on the ELD and registers of ELD occurrences (i.e. occurrences of environmental damage handled under the ELD) at national level?

- Yes, I am aware and I have accessed such information or registers.
- Yes, but I have never tried to access either such information or registers.
- Yes, but I have had difficulty accessing such information or registers.**
- I have never heard of such information or registers.

Part II Technical Questions

9. In your view, have the following factors decreased the effectiveness of the ELD?

The questions concerning the significance criteria refer to the definitions of land, water and biodiversity damage in the ELD in which the ELD applies only if damage reaches or exceeds a specified level.

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
Difficulties in establishing whether an environmental damage occurrence meets the significance criteria for land, water and/or biodiversity damage?					X	
Perception of the significance criteria as being high compared to national liability legislation.					X	

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
Difficulties in deciding whether national ELD legislation, national non-ELD liability legislation, or both apply to an environmental damage occurrence.					X	
Limitation of liability for remediating damage to land to a significant adverse effect on human health.					X	
Insufficient access for interested persons to request action / submit comments on an imminent threat of environmental damage under the public participation mechanism of the ELD in some Member States.					X	
Lack of awareness about the ELD.					X	
Complexity of the ELD.					X	
Insufficient reporting / lack of publicly accessible records of ELD occurrences / cases.					X	
Absence of EU legislation on environmental inspections (to detect company misconduct).					X	
Impossibility to identify liable operators in some cases.					X	
Insolvency of liable operators in some cases.					X	
Application by competent authorities of environmental permitting legislation, including the Industrial Emissions Directive , instead of the ELD.					X	
The 'permit defence' in the ELD that allows operators not to bear the costs of remediating environmental damage if the damage is caused by activities carried out in compliance with a relevant permit.					X	
The 'state-of-the-art defence' in the ELD that allows operators not to bear the costs of remediating environmental damage if the damage is caused by activities carried out in compliance with scientific and technical knowledge at the time of the occurrence.					X	

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
Exempting liabilities subject to marine conventions listed in annex IV to the ELD, nuclear conventions listed in annex V to the ELD, and environmental damage caused by armed conflicts, natural disasters, activities serving national defence, international security and preventing natural disasters, as well as diffuse pollution.					X	

10. Experience has shown that many occurrences of environmental damage (or an imminent threat of such damage) have been handled under national legislation that implement the ELD in some Member States whilst very few or no environmental damage occurrences have been handled under such legislation in other Member States. In such cases the environmental damage has been prevented or remediated under non-ELD legislation. Do you consider that handling environmental damage occurrences under non-ELD legislation has provided the same, a lower, or a higher level of protection for the environment?’

- The same level of protection.
- A lower level of protection.
- A higher level of protection.
- I do not know / No opinion.**

11. Are you aware of any environmental damage occurrences dealt with in a Member State under non-ELD legislation that should have been dealt with under the ELD?

- Yes.
- No.
- I do not know/ No opinion.**

12. Is the following scope (coverage) of the ELD still appropriate?

The questions concerning annex III of the ELD refer to the list of EU legislation pursuant to which operators carry out so-called ‘dangerous activities’. Operators that carry out annex III activities (annex III operators) are subject to strict liability if their activities cause damage to land, water and biodiversity. Operators that carry out non-annex III activities (non-annex III operators) are subject to fault-based liability if their activities cause damage to biodiversity.

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
No imposition of liability on non-annex III operators whose activities cause water damage .	X					

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I do not know/ No opinion
No imposition of liability on non- annex III operators whose activities cause land damage .	X					
Imposition of fault-based rather than strict liability on non-annex III operators whose activities cause biodiversity damage .	X					
Limiting strict liability to annex III operators.	X					
Limiting liability to operators rather than any person that causes environmental damage.	X					
Including a defence in some Member States for annex III operators whose activities carried out non-negligently and in full compliance with a permit cause environmental damage.	X					
Including a defence in some Member States for annex III operators whose activities are carried out non-negligently when the state of scientific and technical knowledge at the time of the occurrence could not have discovered that damage would be caused (state-of-the-art defence).	X					
Exempting liabilities subject to marine conventions listed in annex IV to the ELD.	X					
Exempting liabilities subject to nuclear conventions listed in annex V to the ELD.	X					
Scope of activities listed in annex III is adequate.	X					

13. *Please provide details if you have any further observations concerning the current scope of the ELD or you are aware of any environmental damage occurrences where you believe the ELD would have offered a suitable response in terms of prevention and/or remediation but could not be applied due to limitations in its current scope.*

Insurers believe that widening the scope of the Environmental Liability Directive could diminish the effectiveness of the Directive as well as impair the related insurance market. Therefore, Insurance Europe strongly recommends that the Commission should consider and carefully assess the impact of widening the scope of the ELD. In particular, the impact on the basic principles of insurance should be seriously taken into account. Currently, the insurance industry provides dedicated products covering all ELD liabilities for operators of all kinds. Should the ELD's scope be expanded significantly, this may not be the case anymore and the market capacity may be reduced.

14. *In their recent recommendations the European Parliament and the European Court of Auditors pointed to a number of issues related to the ELD (such as considerable variability between Member States with regard to ELD enforcement, lack of a secondary civil liability regime including parent company and chain liability, corporate board liability, and a financial compensation scheme). In your view have these issues hindered the effectiveness of the ELD?*

- Yes.
- No.**
- I do not know/ No opinion.

15. *Has the ELD improved the availability of insurance for ELD liabilities for large and/or multinational companies?*

- Yes.**
- No.
- In part.
- I do not know/ No opinion.

16. *Has the ELD improved the availability of insurance for ELD liabilities for small to medium sized enterprises?*

- Yes.**
- No.
- In part.
- I do not know/ No opinion.

17. *There are significant differences between Member States in the implementation and enforcement of the ELD. In your view, has the efficiency of the ELD framework been improved by the introduction in some Member States of the following? You may select more than one.*

- Mandatory financial security.
- Fund to provide money to remediate and prevent further environmental damage when the liable operator has insufficient funds to do so.
- National guidance on the ELD.**
- Awareness-raising programmes about the ELD.**
- Consultation procedures between ELD and non-ELD competent authorities to determine if an environmental damage occurrence is an ELD occurrence.**
- Registers of ELD occurrences.**
- Other.

18. To what extent have the following actions undertaken by the Commission since 2016 improved the efficiency of the ELD?

	To a substantial extent	To a limited extent	Not at all	I do not know/ No opinion
Issuing guidelines on a common understanding of the term 'environmental damage'.	X			
Continuing to develop and encourage training programmes on the ELD.	X			
Encouraging compilation and publication of national registers of an imminent threat of, and actual, environmental damage occurrences.	X			
Promoting the availability and demand for insurance for ELD liabilities.	X			

19. Have the guidelines on a common understanding of the term 'environmental damage' provided sufficient clarity as regards the concept in the ELD?

- Yes.
- No.
- In part.**
- I do not know/ No opinion.

20. Are the main costs of the ELD justified, overall and for different stakeholder groups, given the benefits achieved by the ELD?

	Costs justified	Costs partially justified	Costs not justified	I do not know/ No opinion
Overall costs for operators and competent authorities	X			
Costs for preventing environmental damage by liable operators	X			
Costs for remediating environmental damage by liable operators	X			
Costs for preventing environmental damage by competent authorities	X			
Costs for remediating environmental damage by competent authorities	X			
Costs of insurance for ELD liabilities for operators	X			
Administrative costs of competent authorities	X			
Costs for environmental NGOs and others in case of presenting comments, requests for action and participating in court cases	X			

21. To what extent is the ELD internally consistent and coherent?

- **Fully.**
 - To a substantial extent.
 - To a limited extent.
 - The ELD is not internally consistent and coherent.
 - I do not know/ No opinion.

22. The ELD interlinks with numerous EU legal instruments and policies, in particular: Industrial Emissions Directive, Birds Directive, Habitats Directive, [Environmental Crimes Directive](#), [Offshore Safety Directive](#), [Seveso III Directive](#), [Environment Impact Assessment Directive](#), [Waste Framework Directive](#), [Water Framework Directive](#), [Marine Strategy Framework](#), [Non-Financial Reporting](#), [Sustainable Corporate Due Diligence Directive](#) (proposal), [Taxonomy Regulation](#), [European Green Deal](#), [Zero pollution action plan](#), [EU Biodiversity Strategy for 2030](#), [EU farm to fork strategy](#), [EU soil strategy for 2030](#), etc. To what extent is the ELD coherent with these other EU legislation and policies, or relevant international conventions?

- **Fully.**
 - To a substantial extent. To a limited extent.
 - The ELD is not coherent with them.
 - I do not know/ No opinion.

23. What is the added value of the ELD compared to what is likely to have been achieved by Member States in its absence?

	Major added value	Some added value	Little added value	No added value	I don't know/ No opinion
Creation of a level playing field for all Member States to prevent and remediate environmental damage.	X				
Introduction of a minimum standard for preventing and remediating environmental damage.	X				
Reinforcing the polluter pays principle.	X				
Allowing public participation for interested persons, i.e., to request action in case of an imminent threat of, or actual, environmental damage, provide observations and have access to justice.	X				
Growth of an environmental insurance market.	X				
Introduction of complementary and compensatory remediation for water and biodiversity damage.	X				

24. *To what extent have stakeholders been engaged in the process of improving the implementation of the ELD at a Member State level?*

	Substantial extent	Limited extent	No extent	I do not know/ No opinion
Governmental authorities	X			
Operators	X			
Re/insurers and re/insurancebrokers	X			
Environmental NGOs	X			
Trade organisations	X			
Others				X

FINAL (ADDITIONAL) FEEDBACK

In case you would like to share anything else in addition to the above questions related to the evaluation of the ELD, please provide details here (optional).

See [key messages](#).

Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe’s economic growth and development. European insurers pay out over €1 000bn annually — or €2.8bn a day — in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy.