



# **EFFACE Workshop on Environmental Liability and Environmental Crime**

**6<sup>th</sup> November 2014, IBIS Hotel St, Catherine, Brussels**

# **Environmental Liability and Way Forward**



## Overview on the ELD (1)

*The Environmental Liability Directive (ELD) follows an **administrative liability** approach*

**Not:** *Civil liability*

**Environmental** *damage (nature, water, soil)*

**Not:** *Traditional damage (personal injury, damage to property, economic loss)*



## Overview on the ELD (2)

**EU framework** based on the polluter-pays principle (Art. 191(2) TFEU) on the prevention and remediation of certain types of environmental damage (nature, water, soil)

Leaving **wide margin of discretion** to EU Member States on certain important issues (scope, derogations etc.)

**Minimum requirements** since EU Member States are allowed to maintain/adopt more stringent measures



## Overview on the ELD (3)

*Focus on **restoration in kind**: restore, rehabilitate or replace damaged natural resources (species, habitats, water, land) and/or impaired services, or to provide an equivalent alternative to those resources or services*

***Breaking new ground in Europe** on certain difficult technical issues as to how to ensure restoration in kind of damaged natural resources - implementation of complementary remediation and compensatory remediation*

***Financial security is not mandatory in EU**: financial security providers (such as insurers), encouraged to develop products covering environmental liability risks*



## Overview on the ELD (4)

**Strict liability:** *environmental damage and imminent threat when caused by specified occupations ("dangerous") activities*

**Fault based liability:** *damage to protected species and natural habitats and imminent threat when caused by non-specified occupational activities*

**Causal link** *always required*

## Overview on the ELD (5)

### **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



## Overview on the ELD (6)

*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*

## Overview on the ELD (7)

*Act of armed conflict, hostilities, civil war, insurrection  
Natural phenomenon of exceptional, inevitable and  
irresistible character*

***International Conventions (oil pollution,  
carriage of hazardous substances at sea and  
on land, nuclear risks/damage) – Annexes  
IV and V***

*National defence, international security, civil protection  
Diffuse pollution (i.e. no causal link)*



## Overview on the ELD (8)

Two main objectives:

- **Prevention:** *in case of 'imminent threat' of damage; includes: information of the competent authority if threat persists, etc.*
- **Remediation:** *Operator has to*
  - **take containment/ mitigation measures**
  - **develop and propose remediation plan**
  - **take remediation measures**

*Powers of the CA: "getting the work done"*



# Overview on the ELD (9)

*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



## Overview on the ELD (10)

**Operator has to bear the costs for preventive and remedial action, except:**

***Absolute defences:***

- **Third party intervention**
- **Compliance with compulsory order**

***Optional defences:*** when Member State decides to accept:

- **Permit defence**

or

- **State-of-the-art defence**



## Overview on the ELD (11)

*Affected or interested natural or legal persons are entitled to **request the competent authority to take action**, accompanied by relevant data or information on observations*

*The **competent authority shall investigate** and decide to accept or refuse the request*

*Affected or interested natural or legal persons are entitled to have **access to a court/other independent and impartial body** to review the decision of the competent authority*

## Overview on the ELD (12)

*ELD has **no retrospective effect**, i.e. it does not apply to:*

- **damage caused by an emission, event or incident that took place before **30 April 2007****
- **damage caused by an emission, event or incident which takes place after the **30 April 2007** when it derives from a specific activity that took place and was finished before that date**
- **damage, if more than **30 years** have passed since the emission, event or incident**



# Background, Objective, Process (1)

## *Background (1): Data basis*

1. **Member States reports:** see below
2. **Commission report 2010:** Conclusions
3. **Review points** pursuant to Art. 18(3) ELD
4. **Supplementary information** from experts and stakeholder meetings and **Commission Studies 2012 and 2013:** see below



# Background, Objective, Process (2)

## **Background (2): ELD Report 2010 - Conclusions:**

Scope of Directive: Gap as regards **damage to marine water** beyond territorial waters (cf. *Deepwater Horizon* incident)

Lack of experience and of data impede in particular the **development of financial security products** and does not allow to draw reliable conclusions on **mandatory financial security – postponed to 2014**

**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 biodiversity scope** to cover species and natural habitats protected under domestic law



## Background, Objective, Process (3)

### ***Background (3): Review points Art. 18(3) ELD:***

1. Application of the **International Conventions** listed in Annexes IV and V ELD (IMO, nuclear)
2. Application of the Directive to environmental damage caused by **GMOs**
3. Application of the Directive in relation to **protected species and natural habitats**
4. Instruments that may be eligible for inclusion in **Annexes III** (list of dangerous activities), **IV or V**



# Background, Objective, Process (4)

## **Objective:**

Evaluate the effectiveness of prevention and remediation of damage to the environment on the basis of gathered experience (information, data, insights) – strengths and weaknesses – and Draw conclusions, suggest practical measures and/or legislative adaptations at EU level to increase effectiveness:

- **Evidence-based conclusions**
- **Presentation of options, not yet detailed assessed**

## Background, Objective, Process (5)

### *Process:*

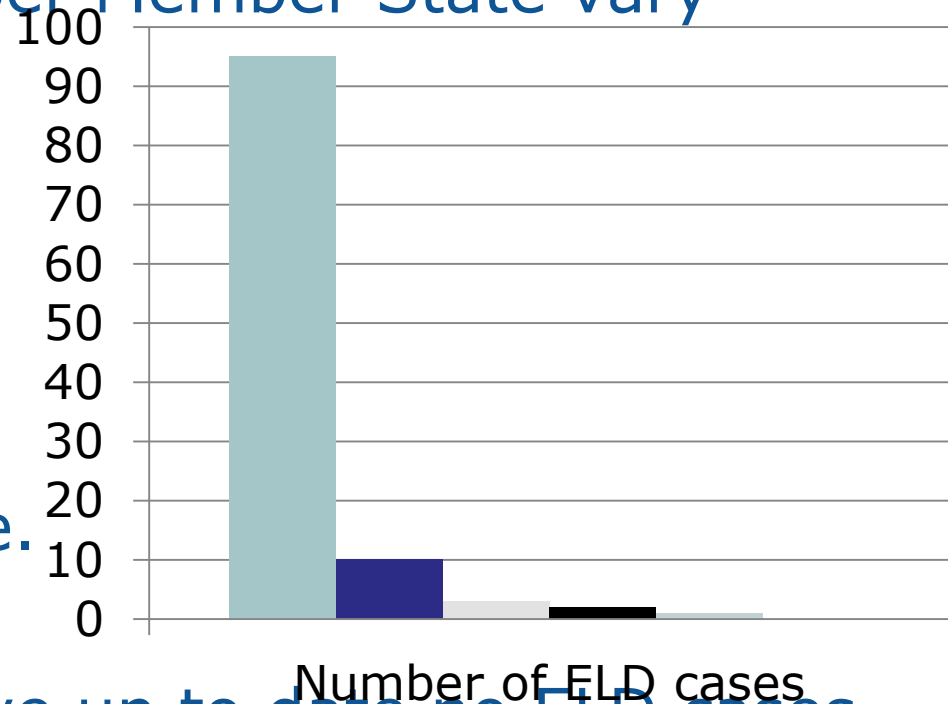
- **December 2013/January 2014:** Receipt of last studies and of last translations into English
- **3rd February 2014:** 14th ELD government experts meeting
- **End of February 2014:** Approval of 3 ELD studies
- **March - ongoing:** Draft report
- **Adoption of the Report:** 1<sup>st</sup> half of 2015

# MS Reports

## Reported ELD cases (1)

**Number of ELD cases** per Member State vary considerably from:

- 95 annual cases
- 10 annual cases,
- 3 annual cases to
- less than 1 annual case.



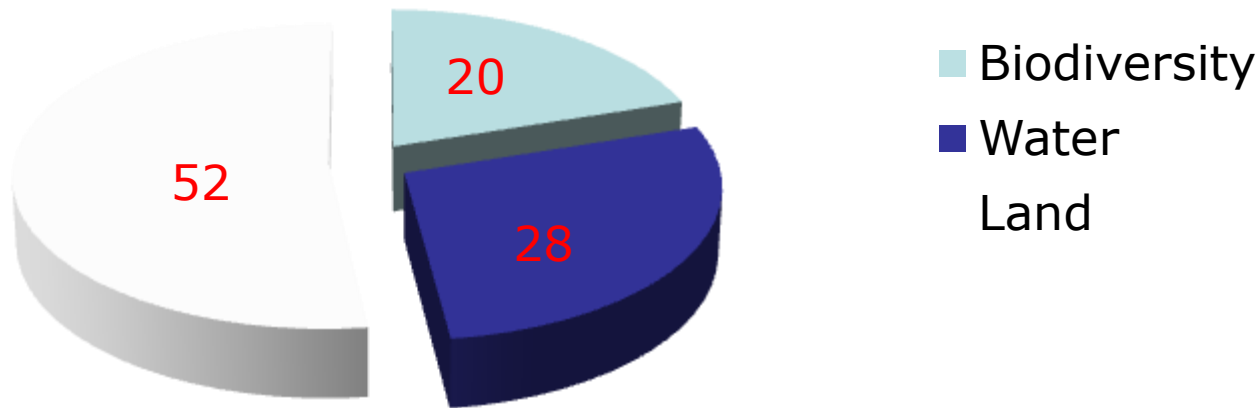
Some Member States have up to date no ELD cases

# MS Reports

## Reported ELD cases (2)

### Biodiversity, Water, Land Damage Cases

Category of environmental damage, based on 1388 attributable cases:



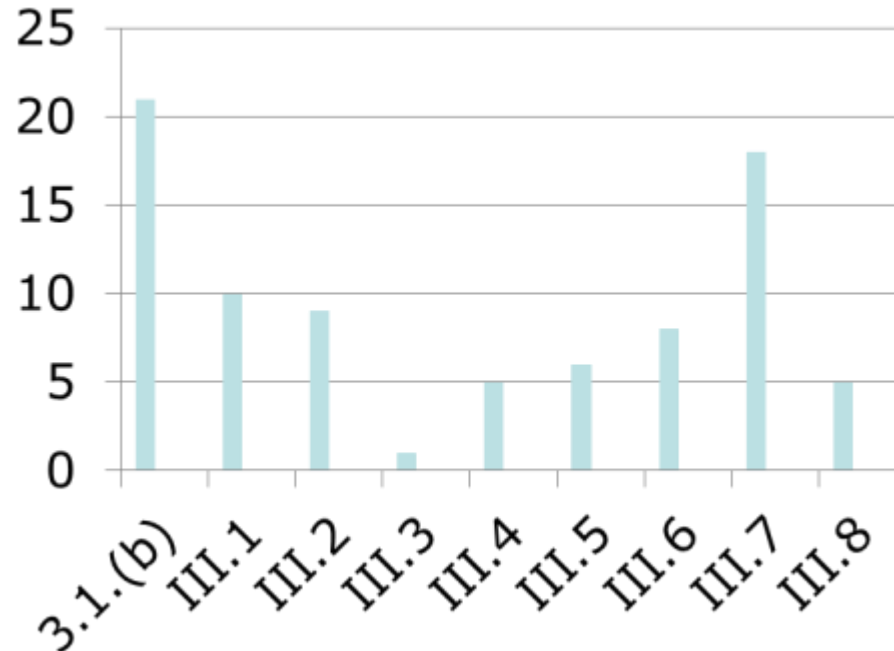
## MS Reports

### Reported ELD cases (3)

#### Type and Annex III-Category of Activity

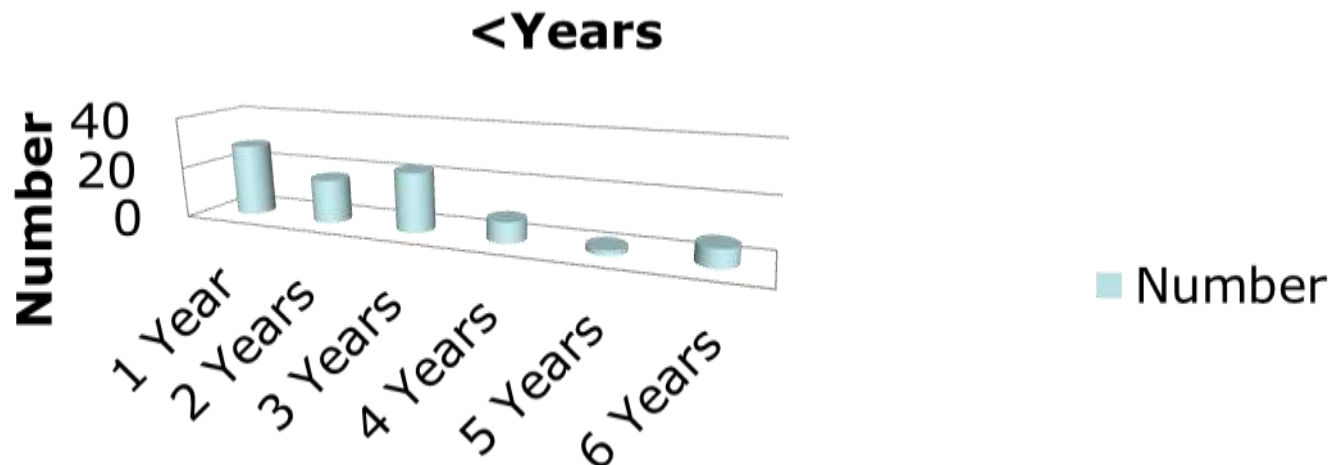
**Most notified cases have not been classified pursuant Article 3(1)(b) and Annex III ELD, hence are not attributable! Otherwise:**

**Most cases concern Art. 3.1.(b) and Ann. III.7**



## MS Reports Reported ELD cases (4) Duration of Remediation

**Length of remediation procedure without evaluation of Hungarian, Polish and British cases:** between 1 day and more than 6 years, average duration approximately around 2 years.



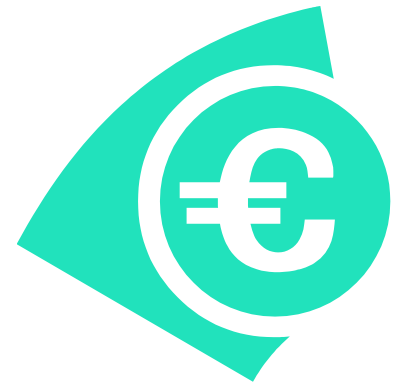


## **MS Reports Reported ELD cases (5) Costs of Remediation**

**Costs of prevention and remediation, based on a sub-set:**

Range between €2,950 and €2.5 million (€65.4 million?)

Average: €300,000 (€2.5 million?),  
depending on large scale damage cases





# MS Reports Financial Security

## Very varied picture:

from "*market too small for insurance*" and "*currently no liability insurance due to insufficient practice*", to ... "*gradual establishment of elaborated mandatory financial security system*", or "*financial security instruments are developing on a voluntary basis*", and even ... "*emerging EIL market offering wide range of products*", etc.





# MS Reports Promotion Activities

## **Many MS report about wide ranging activities:**

Stakeholder meetings, training sessions, workshops, awareness raising, regular authority meetings, information days, guides, tools, publications on website, reporting portals, consultative bodies/committees, seminars, operators handbook, information sheets, practitioner groups, participation in industry forums, web-based advice etc.



# MS Reports Significance Threshold

**Several responses of which most regard it as difficult, some opinions:**

*"Preference for case-by-case assessment poses problems for interpretation/application"*

*"Threshold good because ELD-remediation relatively onerous"*

*"Due to high severity threshold no cases so far"  
or "Factor, limiting the application so far"*



# MS Reports Strengths

*ELD is used to improve environmental prevention and remediation significantly*

*Risk assessments by operators progressively update their process to avoid incidents (awareness and risk identification and reduction)*

*ELD provides for higher remediation standard that did not always exist previously, in particular complementary and compensatory remediation*

*Regarded as effective – prevention works*

*Two strengths: implementation of the polluter pays principle and ecosystem services approach to remediation*



# MS Reports Weaknesses (1)

*Low awareness of operators and authorities*

*Staffing of competent authorities*

*Lack of expertise in financial, economic and liability matters*

*Establishing causality, identifying liable operator*

*Time duration of the assessment*

*No mechanisms (insurance etc.) in place to remedy large scale damage*



## MS Reports Weaknesses (2)

*Undefined legal terms pose problems ('baseline situation', 'natural recovery')*

*Limitations and constraints from concepts 'baseline condition', 'imminent threat', 'environmental damage'*

*Significance threshold:*

- **Uncertainty for operators as to when reached**
- **Uncertainty for competent authorities who have to wait before determining the applicable regime**
- **Criteria for determining significance would help**



# ELD Implementation Study 2012

## Key results from legal part: procedural and substantive variations:

Transposition of the ELD into national law did "not result in a level playing field but a patchwork of liability systems" due to procedural and substantive variations:

Legal framework character including reference to national law

Transposition as stand-alone legislation or incorporating into existing legislation



# ELD Implementation Study 2012

## Key results from legal part: "Severity threshold":

*"... misperception that the ELD applies only to the most severe instances of damage"*

Annex I ELD sets the determination criteria for the **significance threshold** of biodiversity damage:

natural recovery

smaller than natural fluctuations

specie's/habitat's capacity to recover within a short time, etc.,



# ELD Implementation Study 2012

## Recommendations to strengthen practical implementation of the ELD:

Organisation of workshops and conferences to increase awareness of stakeholders; establishing networks of stakeholders

Development of supporting tools: elaboration of guidance documents, national or EU registers of ELD cases, tools to promote purchase of insurance policies (GIS, leaflets etc.)

Developing actions to improve expertise and knowledge of all stakeholders

Promoting the development of databases for the collection of data on the quality of environmental sectors





# Commission studies 2013

## Following the ELD Implementation Study 2012, and to inform the ELD report and review through supplementary information:

**Legal analysis:** Completion of the legal part in the 2012 study covering 16 MS, the remaining 11 MS pursuant to the same template

**Biodiversity damage:** following from Article 18(3) ELD, ELD Report 2010 and ELD Implementation Study 2012

**ELD effectiveness:** following from Article 18(3) ELD, ELD Report 2010 and ELD Implementation Study 2012



# Commission studies 2013

## Legal Analysis, Insights and suggestions:

*Strict enforcement of operator notification duty by competent authorities  
Encouraging/obliging all Member States to establish publicly accessible (statutory) ELD registers covering geo-referenced information and developing an EU register including related guidance as appropriate*

*Broad access for interested parties, and the latter reacting by submitting observations, and good collaboration between stakeholders (in particular between competent authorities and enabled persons)*

*Continuation/intensification of operator awareness programmes/measures by the Commission, MS and the industrial community (e.g. information and training measures)*

*Secondary obligation for competent authorities (and possibly other liable parties) to carry out preventive or remedial measures if the operator fails to do so (so far existing in a few MS only)*



# Commission studies 2013

## Biodiversity Damage (1):

**Assess the experience in practical implementation of the ELD in relation to damage to protect:**

- What are the main challenges and obstacles drawn from practical experience?
- Does the different definition of biodiversity damage (EU scope vs. national extension) call for further harmonisation?
- How are concepts and definitions applied? What are the main approaches to tackling biodiversity damage?
- What are the potential differences and how is the relationship between ELD and Habitats and Birds Directives re species and habitats protection?
- Drawing up a register of information sources and methodological approaches for the determination of "baseline condition"



# Commission studies 2013

## Biodiversity Damage (2), Suggestions:

**Ensuring coherence and coordinated implementation between the Habitats Directive and the ELD** regarding in particular the relationship between Article 6(2) Habitats Directive and Article 2 ELD concerning the concepts of "significant damage" and "deterioration of habitats/disturbance of species"

**Extension of strict liability for biodiversity damage** from Annex III-operators to cover all occupational activities in order to harmonise liability

**Clarifying/correcting the geographical reference for the determination of the "favourable conservation status"**

**Clarifying/correcting the definition of "preventive measures"** (to be not only taken to prevent any damage from happening but also to be taken before an incident is judged to become significant damage)

Further promoting **awareness raising and training measures**

In order to ensure that information and data about the "baseline condition" is better accessible and used, establishing a **centralized biodiversity baseline data register**



# Commission studies 2013

## **ELD Effectiveness (Scope and Exceptions - 1):**

- **Application of International Conventions listed in Annexes IV and V:** Are there substantial differences regarding environmental damage remediation deriving from incidents under International Conventions and from the ELD? Are other international instruments eligible for incorporation into ELD?
- **Scope of strict liability, Annex III:** Is the scope of strict liability about right? Is Annex III encompassing all dangerous activities?
- **Scope of environmental damage:** Are the environmental sectors included (nature, water, land) the most important and clearly defined? Is there need for further harmonisation/streamlining?
- **Appropriateness of significance thresholds:** Should land damage remediation standard be aligned? Should significance criteria for water damage be developed and provided?
- **Application of permit and state of the art defence:** Is there a need for harmonisation? How often were these defences invoked?



# Commission studies 2013

## ELD Effectiveness (Scope and Exceptions - 2):

### *Application of International Conventions listed in Annexes IV and V:*

*Considering the advantages of the effectively working international Conventions, **retaining fully the "international Conventions-exemptions"** in the marine sector **OR** considering the largely absent cover of liability for the pure ecological damage emanating from marine pollution through ship transport, **lifting fully the "international Conventions-exemptions"** in the marine sector **OR amending the Claims Manual to the IOPC Funds** by upgrading the requirements for remediation of environmental pollution (possibly together with deletion of the limitation of liability according to Article 4(3) ELD)*



# Commission studies 2013

## ELD Effectiveness (Scope and Exceptions - 3):

### *Scope of strict liability, Annex III:*

**Maintaining the present structure in strict and fault-based liability and just filling in the gaps discerned in the practical application of the Directive** as being necessary to ensure an effective level playing field for activities presenting a similar high level of environmental risk, i.a. through adding one or the other such activity, in particular **pipeline transport of dangerous substances**, or eventually also introduction of alien species and mining activities (considering however also the financial security costs) in order to close the gaps and ensure as harmonised scope, **OR, alternatively:**

**Extension of the scope of strict liability to cover all types of occupational activities**, in particular with respect to biodiversity damage by abandoning completely any fault-based liability (leaving the latter under subsidiarity to the MS level, could be considered



# Commission studies 2013

## ELD Effectiveness (Scope and Exceptions - 4):

### *Scope of environmental damage:*

*In order to complete the scope of environmental damage and to harmonise it with the other categories of environmental damage, **"damage to air"** could be considered as an additional damage category (in so far as it is possible to establish a causal link between activities covered under Annex III and damage to air).*

***Land damage:** In order to harmonise the ELD threshold with the commonly used threshold for land damage in national legislation and to streamline the possibly confusing parallelism between the national thresholds (including "significant risk to the environment") and the EU threshold (excluding "environment") for land damage, consideration could be given to an extension of the definition of land damage by adding "or the environment" after "significant risk of human health" in Article 2.1.(c) ELD*





# Commission studies 2013

## ELD Effectiveness (Scope and Exceptions - 5):

### *Appropriateness of significance thresholds:*

Lowering the threshold for "imminent threat" of damage, as an assessment of significant imminent threat is problematic due to the lengthy assessment – this is an outcome of two evaluation studies

In addition **OR** alternatively, there may be need for further interpretation and better communication on the "significance threshold" for "environmental remediation", in particular as regards all key stakeholders and ELD practitioners.



# Commission studies 2013

## ELD Effectiveness (Scope and Exceptions - 6):

### *Application of permit and state of the art defence:*

*There remain in principle some options in order **to harmonise the important question of optional defences under the ELD** and to ensure a better level playing field throughout the EU. Considering the main outcome of the study, it could be proposed to **delete the optional defences** in order to render the Directive more effective and to simplify its complexity and increase the level playing field. However, as with other options, this particularly contested point should be also made subject to a broad stakeholder consultation.*



**<http://ec.europa.eu/environment/liability/index.htm>  
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**Thank you for your attention !**