



# *The Environmental Liability Directive (ELD) 2004/35/EC*

**12 May 2016, Vienna**

# ELD – Content of presentation

- Historical Background and Basic Features
- Main Provisions and Requirements





## ELD – A long story

- European Commission Proposal of 1989 for a Directive on civil liability for damage caused by waste
- Green Paper 1993
- White Paper 2000
- Working Document 2001
- Legislative Proposal 2002
- Directive adopted by European Parliament and Council in April 2004
- Directive to be transposed until 30 April 2007
- Transposition completed by mid 2010

# ELD – The basic features (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)



## ELD – The basic features (2)

**EU framework** based on the **polluter-pays** principle on the prevention and remedying of certain types of environmental damage (nature, water, soil) – **restoration in kind**

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/far-reaching rules

## ELD – The basic features (3)

Focus on **restoration in kind**: restore, rehabilitate or replace damaged natural resources and/or impaired services

**Breaking new ground in Europe** on difficult technical issues as e.g. on complementary and compensatory remediation and remediation of biodiversity damage

Financial security providers encouraged to develop products covering environmental liability, but **financial security is not made mandatory at EU-level**

# Exceptions

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

# The double scope of ELD liability

## *Strict liability:*

Dangerous occupational activity – Annex III ELD



Damage to biodiversity, water, land

## *Fault based liability:*

Any other occupational activity



Damage to biodiversity

Causal link is always necessary element – cf. C-378/08



# Key definitions - 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)  
environmental status of the marine waters concerned (with reference to the Marine Strategy Framework Directive 2008/56/EC)
- **“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

## Key definitions - Operator

*“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”*

# Competent authority

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

# Key requirements – Preventive measures

Any “measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage”

*Operator must*

- take preventive action
- inform competent authority
- follow instructions from competent authority



# Key requirements – Remedial action

Any action (including immediate control, containment, mitigation and further prevention of damage) “to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative”

Operator must

- inform the competent authority of all relevant aspects
- provide supplementary information
- follow instructions by CA to immediately control, limit damage
- identify potential remedial measures and submit them to CA
- follow instructions by CA to take the necessary remedial action

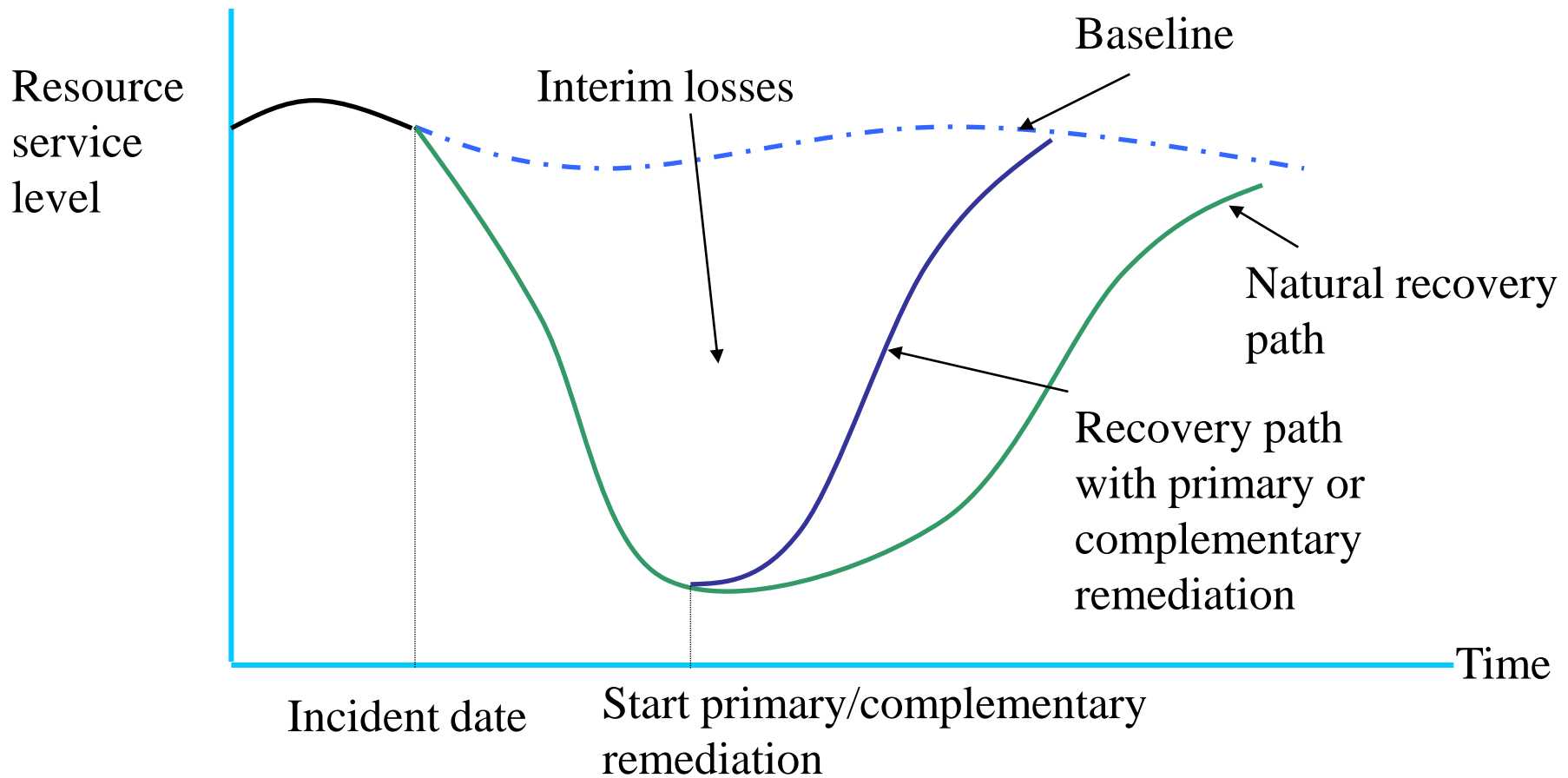
## Remediation types (Annex II)

**Primary remediation:** “any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition”

**Complementary remediation:** “any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services”

**Compensatory remediation:** “any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect”

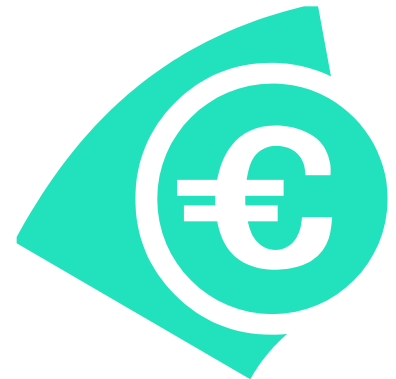
# Remediation to baseline condition



## Costs and defences

Operator has to bear the costs for preventive and remedial action, including assessment, enforcement, monitoring etc. costs, except:

- **Third party** caused the damage
- **Compliance with compulsory order or instruction** from public authority
- When Member State decided to accept  
**Permit defence** (17 did so)  
or  
**State-of-the-art defence** (15 did so)







## Optional defences - Permit defence

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



## Optional defences - State of the art defence

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



## Multi 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

# Civil society/Public participation

## **Request for action:**

Natural or legal persons affected or likely to be affected by environmental damage or having a sufficient interest in environmental decision making, including NGOs, are entitled to request action by the competent authority in case of environmental damage.

## **Right to appeal:**

These entitled persons have the right of legal review of the decision taken by the competent authority before a court or another independent and impartial public body.



## Financial security - 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), considering: Romania, Hungary, Lithuania

**Most MS (2/3) rely upon a voluntary financial security scheme**



<http://ec.europa.eu/environment/liability/index.htm>

**Thank you for your attention !**