



European Union Action to
Fight Environmental Crime

Contribution to conclusions and recommendations on environmental crime: Environmental Liability



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Table of Contents

- 1 Introduction 1
- 2 Opportunities..... 1
- 3 Options..... 3
- 4 Critical analysis of options 6
- 5 Alternative policy options 6
- 6 Harmonisation and coordination..... 10
- 7 Effectiveness 10
- 8 Conclusions..... 11
- References..... 13

List of Tables

<i>Table 1: Overview of Opportunities, Weaknesses and Strengths</i>	2
<i>Table 2: Overview of Policy Options</i>	12

LIST OF ABBREVIATIONS

ECD	Environmental Crime Directive
ELD	Environmental Liability Directive
EU	European Union
FERMA	Federation of European Risk Management Associations
IED	Industrial Emission Directive
IPPC	Integrated Pollution Prevention and Control
MS	Member States
SWOT	Strengths, Weaknesses, Opportunities, Threats
TFEU	Treaty on the Functioning of the European Union

1 Introduction

This contribution addresses the potential of the environmental liability regime under Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive, ELD), in relation to the fight against environmental crime.

The ELD establishes a framework to prevent and remedy environmental damage. The ELD establishes the powers of the “competent authority” and the duties of the “operator” whose occupational activity has caused environmental damage (or imminent threat of); the latter is defined as damage to protected species and natural habitats, damage to waters and damage to soil. ELD states that operators operating or controlling a dangerous activity (listed in Annex III) are subject to a strict liability rule, with exceptions and defences; in other cases (not listed in Annex III), when causing damage to biodiversity a fault based liability applies. Operators must take preventive action, if there is an imminent threat of environmental damage, and bear the costs of the remedial measures, if such damage has occurred.¹ It should be recalled that MS can add liability requirements beyond those of the directive.

A SWOT analysis was conducted on whether the ELD and the Member States (MS) ELD transposing provisions can play a role in relation to the fight against environmental crime at the European Union (EU) and MS level.²

This contribution focuses on the policy options resulting from the SWOT analysis. Through a critical scrutiny of these options, this contribution analyses whether it is possible to search for smart interdependencies between the environmental liability regime as per the ELD and environmental criminal enforcement, and to formulate recommendations. This contribution only concerns the role of the use of liability (as per the ELD) as it affects environmental crime; it does not address tort law.

2 Opportunities

Several opportunities were identified in the above mentioned SWOT analysis. These opportunities logically follow from a particular weakness or strength identified earlier. Here the following opportunities will be briefly presented: 1) raising awareness and increasing expertise; 2) review and eventual revision of the ELD; 3) review and eventual revision of EU secondary legislation relevant under the ELD; 4) the Baseline Report under the Industrial Emission Directive.

The options arising from these opportunities will be addressed in the next sections.

¹ Salanitro, U., “Directive 2004/35/EC on Environmental Liability.” Study in the framework of the EFFACE research project, Catania: University of Catania, 2015, 6.

² Vagliasindi, G.M., “Environmental Liability”, in EFFACE SWOT Analysis, 2015.

Table 1: Overview of Opportunities, Weaknesses and Strengths

Opportunities	Weaknesses addressed	Strengths to build on
Raising awareness and increasing expertise	Low awareness of operators and authorities and a lack of expertise as it concerns the ELD	The ELD brought benefits in terms of economic valuation of damage, complementary and compensatory remediation and public participation including access to justice
Review and eventual revision of the ELD	Deficits in the content of the ELD, such as e.g. its imprecise language or the lack of inclusion of relevant rules, affecting environmental protection achievements Lack of coordination between the ELD and the ECD	
Review and eventual revision of EU secondary legislation relevant under the ELD	Problems in the EU secondary legislation relevant under the ELD might negatively affect the ELD itself and its potential to contribute to deter environmental crime	
The Baseline Report under the Industrial Emission Directive	It could indirectly contribute to address environmental crimes connected to the omitted or delayed remediation of contaminated areas	

2.1. Raising awareness and increasing expertise

The SWOT analysis showed a low awareness of operators and authorities and a lack of expertise as it concerns the ELD. Together with other weaknesses (see below), this resulted to hamper the enforcement of the ELD.

Indeed, raising awareness of operators and authorities and increasing expertise is an opportunity to improve the enforcement of the ELD and its potential to contribute to fight environmental crime.

2.2. Review of the ELD

The SWOT analysis identified several weaknesses related to the ELD itself as well as to its potential to contribute to deter environmental crime; the latter also refers to the lack of links between the ELD and the Environmental Crime Directive, and their respective implementing provisions.

For this reasons, the fact that the comprehensive review of the ELD that is now underway could lead to a revision of this instrument, is seen as an opportunity.

2.3. Review and eventual revision of EU secondary legislation relevant under the ELD

Several EU directives are relevant under the ELD, such as the Birds and Habitats directives and the Water Framework directive, with the same directives being relevant also under the ECD. Problems in the EU secondary legislation relevant under the ELD might negatively affect the ELD itself and therefore its potential to contribute to deter environmental crime. This EU secondary legislation could represent a link between the ELD and ECD.

For this reason, the review and eventual revision of EU secondary legislation relevant under the ELD and a better enforcement of such legislation represent an opportunity of improvement of the role of the environmental liability regime, also in relation to contributing to deter environmental crime.

2.4. The Baseline Report under the Industrial Emission Directive

The Baseline Report obligation, introduced by the Industrial Emissions Directive (2010/75/EU, IED) made the establishment of a common and comprehensive European framework on environmental liability for contaminated areas a new and essential goal for Europe.

The diffusion at European level of the Baseline Report could indirectly help the process of introducing instruments aiming at deterring and punishing the omitted or delayed remediation of contaminated areas, and it is therefore considered an indirect opportunity to enhance the potential of environmental liability regime to deter environmental crime.

3 Options

We will now illustrate the options for action at the policy level, identified in the light of earlier findings in EFFACE, literature and documentation. The options will then be critically analysed in section 5.

3.1. Raising awareness and increasing expertise

The European Commission has carried out an evaluation of the effectiveness of prevention and remediation of damage to the environment on the basis of gathered experience; the purpose is to suggest practical measures and/or legislative adaptations at EU level to increase effectiveness. Among other results, this evaluation showed a low awareness of operators and authorities and a lack of expertise and resources in financial, economic and liability matters.³

Indeed an option is:

a) to take actions in order to raise awareness of operator and authorities and to increase expertise, and particularly to:

- draft technical guidance to support competent authorities in determining significant environmental damage;⁴

³ Vagliasindi, G.M., Bianco, F., and Lucifora, A., “Summary of the EFFACE Workshop on “Environmental Liability and Environmental Crime””, held in Brussels on 6 November 2014 (hereinafter: the EFFACE Workshop), 8; Lopatta, H., Presentation at the EFFACE Workshop.

⁴ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, Final report prepared for European Commission – DG Environment, in collaboration with Stevens & Bolton LLP, 2013, 142.

- focus on similarities in ELD practices in the EU Member States, to develop unified ELD practice regimes, and provide education and training to all stakeholders;⁵
- create a comprehensive and accessible register at EU level to provide information to competent authorities, operators and other stakeholders;⁶
- promote information exchange and communication between the key stakeholders.⁷

This could also lead to another option, i.e.:

- b) enhancing the possibility for operators and enforcing authorities to interpret, to the extent possible, the ELD and the ECD implementing provisions in a consistent manner.⁸

3.2. Review of the ELD

According to the 2010 Commission report on the ELD, there are diverging national transposing rules which could potentially create difficulties; for example, there is an uneven implementation of the permit and state of the art defences and an uneven extension of the biodiversity scope to cover species and natural habitats protected under domestic law.⁹ This is due, among other reasons, to some deficits in the content of the ELD, such as e.g. its imprecise language¹⁰ or the lack of inclusion of relevant rules, such as those on causation,¹¹ or instruments, such as mandatory financial security.¹²

The purpose of the Environmental Liability Directive is to prevent and remedy environmental damage.¹³ The purpose of the Environmental Crime Directive is to assure the respect of EU environmental legislation (including EU secondary legislation also relevant under the ELD) by imposing MS to criminalise conduct endangering or damaging the environment. The two directives are referred to as complementary.¹⁴ However, differences are deemed to currently exist concerning the scope and application of the ELD and ECD.¹⁵

Amending the ELD¹⁶ and taking into account the mutual elements between the environmental liability regime and environmental criminal law¹⁷ might therefore foster environmental protection achievements.

An option is therefore:

⁵ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 143.

⁶ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 144.

⁷ Report from the Commission to the Council, the European parliament, the European Economic and Social Committee and the Committee of the Regions Under Article 14(2) of Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage, COM(2010) 581 final, Brussels, 12.10.2010 (hereinafter COM(2010) 581 final), 10.

⁸ Salanitro (2015) 30.

⁹ Vagliasindi et al., “Summary”, 8; Lopatta, H., Presentation at the EFFACE Workshop.

¹⁰ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 10.

¹¹ ECJ, 9 March 2010, Case C-378/08, *Raffinerie Mediterranee*, (2010) *Reports of Cases* I-01919, paras. 56-58. For a comment on the case, see Fogleman, V., “The European Court of Justice rules on the Environmental Liability Directive”, *Env. Liability* (2/2010): 39-44.

¹² Faure M.G., “Regulatory Strategies in Environmental Liability”, in Cafaggi, F. and Muir Watt, H. (eds.), *The Regulatory Function of European Private Law*, Cheltenham-Northampton: Edward Elgar, 2009, 147.

¹³ Salanitro (2015) 7.

¹⁴ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 71-72; Stevens & Bolton LLP, “The Study on Analysis of integrating the ELD into 11 national legal frameworks”, Final Report prepared for the European Commission – DG Environment, 2013, 95.

¹⁵ See Vagliasindi et al., “Summary”, 2; Fogleman, V., Presentation at the EFFACE Workshop.

¹⁶ Milieu Ltd., IUCN, “Experience gained in the application of ELD biodiversity damage”, Final report for the European Commission - DG Environment, Brussels, February 2014, 90.

¹⁷ See Vagliasindi et al., “Summary”, 6; Rosi, E., Presentation at the EFFACE Workshop.

a) to revise the ELD, as a consequence of the ongoing review of the directive, in order to overcome the weaknesses showed in its implementation; this should include addressing at least the following issues:

- use of undefined legal terms;¹⁸
- difficulties in establishing causality and identifying liable operator;¹⁹
- compliance with permit defence;²⁰
- underdeterrence in case of insolvency and mechanisms (insurance etc.) in place to remedy large scale damage;²¹

b) in doing so, to assure coordination between the ELD and the ECD; to assure that the omitted or delayed remediation of contaminated areas is sanctioned by MS by criminal or administrative fines imposed to individuals and corporations, and that the fines are used to restore the environment.

3.3. Review and eventual revision of EU secondary legislation relevant under the ELD

As mentioned above, several EU directives are relevant under the ELD, such as the Birds and Habitats directives and the Water Framework directive, with the same directives being relevant also under the ECD. Problems in the EU secondary legislation relevant under the ELD might negatively affect the implementation of the ELD itself²² and therefore its potential to contribute to deter environmental crime. This secondary legislation could also represent a link between the ELD and ECD.

For this reasons, an option is:

- a) to take advantage of the review and eventual revision of EU secondary legislation relevant under the ELD (and the ECD) to address issues which might negatively affect the implementation of the ELD and ECD;
- b) to assure a better coordination and enforcement of EU legislation;²³
- c) as long as possible, to interpret this secondary legislation in a consistent manner when enforcing the ELD and the ECD implementing provisions.

3.4. The Baseline Report under the Industrial Emission Directive

After the Baseline Report obligation, introduced by the Industrial Emissions Directive (2010/75/EU, IED), the establishment of a common and comprehensive European framework on environmental liability for contaminated areas has now become a new and essential goal for Europe. The first step towards such a goal should be focused on the introduction of common technical standards for considering a site as contaminated under the law and for the identification of the remediation targets. The aim of the baseline report is to allow a quantifiable comparison

¹⁸ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 10.

¹⁹ Milieu Ltd., IUCN, “Experience gained in the application of ELD biodiversity damage”, 90.

²⁰ De Smedt, K., and Faure, M.G., “The implementation of the Environmental Liability Directive. A law and economics analysis of the transposition of the ELD in Belgium, the Netherlands and Germany”, *ZEuP* (4/2010): 783-808, 784.

²¹ Faure, “Regulatory Strategies in Environmental Liability”, 147.

²² Fajardo, T., and Fuentes, J., “The Aznalcollar and the Kolontar Mining Accidents: A Case Study on Mining Accidents and the Criminal Responsibility of Operators and Administrations.” Study in the Framework of the EFFACE Research Project. Granada: University of Granada, University of Jaen, 2014. 8.

²³ Fajardo and Fuentes (2014) 8.

between the state of soil and groundwater at the site of an industrial installation before starting operations and its condition upon definitive cessation of activities.²⁴

As to environmental crimes connected to the omitted or delayed remediation of contaminated areas, although different approaches exist in MS criminal law, the diffusion at European level of the Baseline Report could indirectly help this difficult process.²⁵

The diffusion at European level of the Baseline Report could therefore be considered an option to indirectly enhance the potential of the environmental liability regime to deter environmental crime.

Being of an indirect impact, it will be not addressed in the remaining of this contribution.

4 Critical analysis of options

The options described in the previous section will be now critically analysed and a normative position will be taken. The suggested policy options can mostly fall outside the criminal justice system and will therefore be critically analysed in section 5.

5 Alternative policy options

As mentioned above, the suggested policy options mostly fall outside the criminal justice system.

5.1. Raising awareness and increasing expertise

De iure condito, we are in favour of an awareness and expertise raising policy action.

Awareness about the ELD is needed in different ways. There is a need for properly understanding the Directive by those in charge of its application (the competent authorities and the operators).²⁶ It has been stressed that certain technical aspects of the Directive such as the assessment of biodiversity damage require support and awareness measures; in addition, stakeholders' awareness is needed to ensure their involvement in identifying damages or providing input for risk assessments; finally, operators do not always notify the imminent threat of damage or the damage itself.²⁷

In this respect, suggested policy actions include: draft technical guidance to support competent authorities in determining significant environmental damage;²⁸ focus on similarities in ELD practices in the EU Member States, to develop unified ELD practice regimes, and provide education and training to all stakeholders;²⁹ create a

²⁴ On the Baseline report, see Butti, L., "The National contaminated land regimes in the EU and the baseline report provided for by the IED directive: European or National rules for the remediation of soil and groundwater", 5 *IUCN Academy of Environmental Law Journal* (6/2015): 101-105.

²⁵ See Vagliasindi et al., "Summary", 5; Butti, L., Presentation at the EFFACE Workshop.

²⁶ Salanitro (2015) 7 ff.

²⁷ Milieu Ltd., IUCN, "Experience gained in the application of ELD biodiversity damage", 93.

²⁸ BIO Intelligence Service, "Implementation challenges and obstacles of the Environmental Liability Directive", 142.

²⁹ BIO Intelligence Service, "Implementation challenges and obstacles of the Environmental Liability Directive", 143.

comprehensive and accessible register at EU level to provide information to competent authorities, operators and other stakeholders;³⁰ promote information exchange and communication between the key stakeholders.³¹

As it has been suggested, the Commission “may want to consider promoting a more systematic sharing by Member States representatives of best practices and information dissemination initiatives reaching local authorities, operators and stakeholders. The Commission could facilitate it maybe through the coordination meetings (allocating time for presentations on this issue) but also through allocating funding for raising awareness projects. Specific attention should be made to the development of a register of ELD cases with information on the notification of damages and the preventive and remedial measures (to be) undertaken”.³²

Training is needed at national and local level; however, it has been stressed that training and awareness raising measures would only work within the appropriate legal framework and the structures designed to implement it (see also below). Guidance documents explaining the interpretation of the legal framework, procedures and competent authorities help the implementation.³³

This option based on raising awareness and increasing expertise could also contribute to enhancing the possibility for operators and enforcing authorities to interpret and enforce, to the extent possible, the ELD and the ELD implementing provisions in a consistent manner;³⁴ the same is true for the EU secondary legislation relevant under the ELD and the ECD. This should contribute to assure a better coordination of EU environmental legislation and national implementing provisions at the enforcement level.

5.2. Review of the ELD

The previous option is highly desirable in order to improve the enforcement of the current regime of environmental liability. However, although it could be a lengthy and not easy procedure a review of the ELD is highly recommendable.

As noted above, some deficits in the content of the ELD, such as e.g. its imprecise language³⁵ or the lack of inclusion of relevant rules, such as those on causation,³⁶ or instruments, such as mandatory financial security,³⁷ caused diverging national transposing rules which could potentially create difficulties (e.g. uneven implementation of the permit and state of the art defences and an uneven extension of the biodiversity scope to cover species and natural habitats protected under domestic law).³⁸

Commentators note that as it concerns transposition, difficulties can be explained by the fact that the final decision on crucial elements of the liability regime, as the scope of the regime, the insertion of a permit or a state of the art defence or the decision on obligatory insurance, has been passed on to the Member States. Member States may also adopt or maintain more stringent provisions in relation to the prevention and remedying of environmental damage.³⁹

³⁰ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 144.

³¹ COM(2010) 581 final, 10.

³² Milieu Ltd., IUCN, “Experience gained in the application of ELD biodiversity damage”, 94.

³³ Milieu Ltd., IUCN, “Experience gained in the application of ELD biodiversity damage”, 93-94.

³⁴ Salanitro (2015) 30.

³⁵ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 10.

³⁶ See ECJ, 9 March 2010, Case C-378/08, *Raffinerie Mediterranee*, paras. 56-58; Fogleman, “The European Court of Justice”, 39 ff.

³⁷ Faure, “Regulatory Strategies in Environmental Liability”, 147.

³⁸ Vagliasindi et al., “Summary”, 8; Lopatta, H., Presentation at the EFFACE Workshop.

³⁹ De Smedt and Faure, “The implementation of the Environmental Liability Directive”, 784.

An option is therefore to revise the ELD, as a consequence of the ongoing review of the directive, in order to overcome the weaknesses showed in its implementation; this should include addressing at least the following issues:

a) Use of undefined legal terms.⁴⁰ The imprecise language in the ELD has had a major effect on its implementation and enforcement.⁴¹ Indeed, the lack of precision has resulted in differences in the national laws of Member States.⁴² Key definitions and concepts, such as “environmental damage”, “significant damage”, “baseline condition”, where there is divergence in national implementation, should be clarified.⁴³

b) Difficulties in establishing causality and identifying the liable operator.⁴⁴ In *Raffinerie Mediterranee*, the European Court of Justice⁴⁵ found that the ELD does not specify how a causal link between the activities of the operator(s) and the environmental damage is to be established. Whilst the Court recognises the possibility that a Member State may impose remedial measures for environmental damage on the presumption that there is a causal link between the pollution found and the activities of the operator(s), if the latter are located close to that pollution, it requires the competent authority to have “plausible evidence” capable of justifying that presumption. According to *Milieu Ltd.* the wording of the ELD should be amended to reflect the Case law and ensure a harmonised implementation by clearly stating that the causal link should be assumed, if the operator is located close to the pollution and that a “plausible evidence” should be provided by the competent authorities to justify the rebuttable presumption of a causal link under the ELD. This would facilitate easier implementation of the ELD. A more simple system would reduce costs for implementation and limit the duration of the process for determining liability.⁴⁶

c) Compliance with permit defence.⁴⁷

d) Underdeterrence in case of insolvency and mechanisms (insurance etc.) in place to remedy large scale damage.⁴⁸ Art. 14 ELD merely states in respect of financial security: “Member states shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this directive”. It has been stressed, that “This is a dangerous approach since the directive introduces strict liability for many activities. If this strict liability is not accompanied by a mandatory financial guarantee or insurance, underdeterrence may arise. Moreover, it seems clear that environmental liability, given the serious insolvency risk, cannot exercise its compensatory function unless a regulatory intervention has taken place to impose a duty to seek financial coverage”.⁴⁹ In addition,

⁴⁰ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 10.

⁴¹ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 10.

⁴² For concrete examples of imprecise terms, see BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 59 ff.; see also Vagliasindi, G.M., Presentation at the EFFACE Workshop.

⁴³ COM(2010) 581 final, 10.

⁴⁴ *Milieu Ltd.*, IUCN, “Experience gained in the application of ELD biodiversity damage”, 90.

⁴⁵ ECJ, 9 March 2010, Case C-378/08, *Raffinerie Mediterranee*; Fogleman, “The European Court of Justice”, 39 ff.

⁴⁶ *Milieu Ltd.*, IUCN, “Experience gained in the application of ELD biodiversity damage”, 90.

⁴⁷ De Smedt and Faure, “The implementation of the Environmental Liability Directive”, 784.

⁴⁸ Faure, “Regulatory Strategies in Environmental Liability”, 147. With regard to Spain, see Fajardo, T., Fuentes, J., Ramos, I. and Verdú, J., “Environmental Crime in Spain: A Country Report.” Study in the Framework of the EFFACE Research Project, Granada: University of Granada, 2015. 76. For an analysis on the opportunity to introduce a mandatory financial security, see Bergkamp, L., Herbatschek, N., and Jayanti, S., “Financial security and insurance”, in Bergkamp, L., and Goldsmith, B. (eds.), *The EU Environmental Liability Directive: A Commentary*, Oxford: Oxford University Press, 2013, 118 ff; Pedraza, J., De Smedt, K., and Faure, M.G., “Compulsory financial guarantees for environmental damage. What can we learn from Spain?”, 20 *Env. Liability* (6/2012): 227-237.

⁴⁹ Faure, “Regulatory Strategies in Environmental Liability”, 147.

environmental liability is a difficult to insure risk.⁵⁰ This situation can hamper the possibility that the ELD contributes to remedy the damage caused by environmental crime and should therefore be addressed when revising the ELD. However, it should be noted that stakeholders question whether mandatory financial security or an insurance scheme at EU level would help mitigate the consequences of an environmental damage in MS; they also ask what would be the consequences for organisations of a mandatory financial security scheme regarding the coverage of environmental damage.⁵¹

In undertaking the revision of the ELD, a coordination between the ELD and the ECD and other EU instruments should be pursued. In fact, as noted above, the ECD and the ELD are referred to as complementary;⁵² however, differences are deemed to currently exist concerning the scope and application of the ELD and ECD.⁵³

Under this perspective, a relevant point should be addressing the notion of damage. Commentators stress that the scope of environmental damage under the ELD, namely its categorisation into land, water and biodiversity damage, is in contrast to the environmental liability regimes of Member States and other EU environmental legislation, which are mainly based on harm to human health and the environment.⁵⁴ As stressed by BIO Intelligence Service, revising the ELD to impose liability for preventing and remediating damage to human health and the environment would promote the polluter pays principle because it would extend liability to parts of the environment, such as land that is not subject to human presence and air that are not currently covered by the ELD. Such a revision would also harmonise and streamline the ELD with other EU legislation, particularly the legislation listed in Annex III, which is mostly based on protecting human health and the environment. Further, such a revision would harmonise and streamline the ELD with Member State legislation and would enable the ELD better to add value to that legislation.⁵⁵ Finally, the ECD and implementing provisions could better play a complementing role of the environmental liability regime. In addition, the ELD coverage of the marine environment should be improved; remediation of damage to the marine environment should be addressed in light of a coordinated approach with Directive 2009/123/EC.

Amending the ELD⁵⁶ and taking into account the mutual elements between the environmental liability regime and environmental criminal law⁵⁷ might therefore foster environmental protection achievements.

5.3. Revision and review of EU secondary legislation relevant under the ELD and the ECD

The enforcement of the ELD, and its potential to contribute to remedy the damage caused by environmental crime, can be hampered by enforcement problems related to other directives. For instance, an EFFACE case study on mining concludes that “The Kolontar case shows that even though Hungary complied with the Environmental Liability Directive (ELD), the incorrect enforcement of the waste management directive undermined the enforcement of the former and other directives”,⁵⁸ the authors add that in the Aznacollar and Kolontar cases the

⁵⁰ See, with regard to tort law, Faure, “Regulatory Strategies in Environmental Liability”, 147 ff.

⁵¹ FERMA, 29 September 2014. On this point, FERMA argues that introducing a mandatory financial security in all EU member states would: set another budget constraint on companies, affecting their development; divert investments with a negative impact on investment related to prevention and risk management; not solve local issues of governance regarding the implementation of the ELD and other environmental rules caused by lack of administrative resources, conflicts of rules etc.

⁵² BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 71-72; Stevens & Bolton LLP, “The Study on Analysis of integrating the ELD into 11 national legal frameworks”, 95.

⁵³ See Vagliasindi et al., “Summary”, 2; Fogleman, V., Presentation at the EFFACE Workshop.

⁵⁴ BIO Intelligence Service, “ELD Effectiveness: Scope and Exceptions”, Final Report prepared for the European Commission – DG Environment, 2014, 258.

⁵⁵ BIO Intelligence Service, “ELD Effectiveness: Scope and Exceptions”, 258.

⁵⁶ Milieu Ltd., IUCN, “Experience gained in the application of ELD biodiversity damage”, 90.

⁵⁷ See Vagliasindi et al., “Summary”, 6; Rosi, E., Presentation at the EFFACE Workshop.

⁵⁸ Fajardo and Fuentes (2014) 8.

companies “did not pay for the total damage caused, raising many questions about the gaps of EU environmental liability legislation as well as its enforcement and the need to have a better and coordinated implementation of the EU directives”.⁵⁹

Indeed, BIO Intelligence Service suggests that the whole legislative framework could be optimised through a better coordination of the ELD with other related directives such as IPPC – IED, SEVESO, Water Framework Directive, etc.⁶⁰

The review and eventual revision of EU secondary legislation relevant under the ELD (Birds and Habitats directives and Water Framework directive) represent an option for indirect improvement of the enforcement of environmental liability regime.

As to the Birds and Habitats Directives, following the publication in February 2014 of the mandate for the Fitness Check on the directives, the publication of Commission report on the results of the Fitness Check is expected for Early 2016.

As to the water framework Directive, the Commission shall publish a report on the implementation of Directive 2000/60/EC at the latest 12 years after the date of entry into force of this Directive and every six years thereafter, and shall submit it to the European Parliament and to the Council. The Commission will review this Directive at the latest 19 years after the date of its entry into force and will propose any necessary amendments to it. Directive 2006/118/EC on the protection of groundwater against pollution and deterioration requires the Commission to review Annex I and II of the Directive every six years and come forward with legislative proposals, if appropriate; the Commission carried out the first review of those Annexes in 2013; the proposal is currently under scrutiny of the Council and European Parliament.

6 Harmonisation and coordination

Raising awareness and increasing expertise should be realised at the MS level through coordination and networking; the EU could facilitate this through coordination and networking with MS and through allocation of resources and eventually through a soft law instrument.

The revision (ongoing) and review of the ELD should be realised at the EU level, eventually resulting in an amended directive. This option seems politically feasible; however, the experience with the drafting and transposition of the ELD makes it likely that a revision would be not easy nor fast; moreover, the opposition of involved stakeholders (e.g. as it concerns the introduction of mandatory financial security) appears as a threat to the revision of the ELD.

The revision and review of EU secondary legislation relevant under the ELD and the ECD should be realised at the EU level, eventually resulting in amended directives.

7 Effectiveness

The ELD provides for higher remediation standards that did not always exist previously (in particular, complementary and compensatory remediation) and it implements the polluter pays principle.⁶¹ The ELD also brought benefits in terms of economic valuation of damage, complementary and compensatory remediation and

⁵⁹ Fajardo and Fuentes (2014) 8.

⁶⁰ BIO Intelligence Service, “Implementation challenges and obstacles of the Environmental Liability Directive”, 133.

⁶¹ Vagliasindi et al., “Summary”, 8; Lopatta, H., Presentation at the EFFACE Workshop.

public participation including access to justice;⁶² as to the latter, access to justice and enhancing the role of victims is a key element of a modern approach towards the fight against environmental crime.

However, the SWOT analysis showed several relevant weaknesses in the drafting and implementation of the ELD such as low awareness of operators and authorities; lack of expertise and resources in financial, economic and liability matters; difficulties in establishing causality and identifying the liable operator; compliance with permit defence; no mechanisms (insurance etc.) in place to remedy large scale damage; use of undefined legal terms. According to the ELD Implementation Study 2012, the 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.⁶³

The proposed policy options address these weaknesses in that they aim to:

Facilitate a better enforcement of the current environmental liability regime by raising awareness of operators and authorities and increasing expertise; in doing so, a coordinated interpretation and enforcement of the implementing provisions of the ELD, ECD and other relevant EU directives could be also indirectly facilitated.

A review and revision of the ELD addresses the weaknesses related to the wording and content of the ELD as well as to the lack of coordination with the ECD.

A review and revision of the EU secondary legislation relevant under the ELD (and to a certain extent) under the ECD addresses the weaknesses related to the negative impact on the ELD enforcement arising from problems with content and enforcement of the above mentioned EU secondary legislation.

8 Conclusions

While the ELD brought some benefits in term of enhancing environmental protection, its implementation and enforcement showed several weaknesses which hamper the effectiveness of the environmental liability regime as well as its potential to contribute to deter and to restore the harm caused by environmental crime.

We therefore recommend to:

- Raise awareness of operators and authorities and increase expertise; this relates to MS and coordination and networking among MS and could be facilitated by the Commission through coordination and networking (and allocation of resources to e.g. training) and is a core proposal.
- Revise the ELD and, in doing so, take into account coordination with the ECD; this relates to harmonisation by the EU and is a core proposal.

⁶² Vagliasindi et al., "Summary", 2. Within the EFFACE Country Reports, see e.g. Mitsilegas V., Fitzmaurice, M., Fasoli, E., "Fighting Environmental Crime in the UK: A Country Report." Study in the Framework of the EFFACE Research Project, London: Queen Mary University of London, 2015, 74 f.: "A difference between the ELD, as implemented, and the existing national rules on pollution prevention and clean-up is that the former gives affected individuals or NGOs the right to press the regulatory authorities to take action. The regulator must then give its reasons for either choosing (or declining) to act and the NGO has the right to question on the basis of the regulator's decision (either in a court or another competent body)".

⁶³ Vagliasindi et al., "Summary", 8; Lopatta, H., Presentation at the EFFACE Workshop. Within the EFFACE country reports, see for instance Philipsen, N.J., and Faure, M.G., "Fighting Environmental Crime in Sweden: A Country Report." Study in the Framework of the EFFACE Research Project, Maastricht: Maastricht University, METRO, 2015, 44: "The ELD was added as an extra layer into the existing liability regime in Chapter 10 of the Environmental Code, which creates serious delineation problems. According to Prof. Jan Darpö, there were only very few ELD incidents mentioned in the recent report from the SEPA to the Commission about the existence of ELD incidents in Sweden".

- When reviewing the EU secondary legislation, take into account those problems which might indirectly affect the enforcement of the ELD; this relates to harmonisation by the EU and is a supplementary proposal.

All these recommendations focus on alternatives (or better: are supposed to be coordinated) to the criminal justice system.

Table 2: Overview of Policy Options

Level	Option	Recom- mended	Political feasibility	Priority
EU/MS	<ul style="list-style-type: none"> • Raise awareness of operators and authorities and increase expertise 	Yes	+	Yes
EU	<ul style="list-style-type: none"> • Revise the ELD and, in doing so, take into account coordination with the ECD 	Yes	+/-	Yes
EU	<ul style="list-style-type: none"> • When reviewing the EU secondary legislation, take into account those problems which might indirectly affect the enforcement of the ELD 	Yes	+	No

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