



Environmental Liability Directive: FERMA's views on the Multi-Annual Work Programme for 2017-2020

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Executive Summary

Risk and insurance managers are at the forefront of managing environmental risks within their organisations, including the assessment, mitigation and treatment of identified risks. The Federation of European Risk Management Associations (FERMA) represents the interests of more than 4800 risk managers through its 22 national risk management association members in 21 European countries.

FERMA welcomes the European Commission's Multi-Annual Work Programme (MAWP) 2017-2020 published on 28 March 2017. We share the Commission's conclusions from the 2016 review that no revision of the ELD is necessary. We welcome this outcome, in line with the EU Better Regulation approach, because it capitalises on the existing law without introducing costly new requirements for industrial operators.

We ask the Commission to:

- 1/ Foster a dialogue between Member States and operators in the most sensitive industries to improve implementation of the ELD using the MAWP as a framework.
- 2/ Include the promotion of risk management practices to reduce the risk of environmental impairment in the most sensitive sectors.
- 3/ Work with operators to clarify the content and use of any ELD register to ensure that it would meet its purpose without unnecessary administrative burdens on public authorities and operators.
- 4/ Do not consider imposing mandatory financial security. It would not serve the true purpose of the ELD, which is first and foremost to prevent environmental damage. Instead, investment capacities in risk management must be preserved, and prevention and protection measures promoted.
- 5/ Avoid further EU measures related to the ELD unless the need arises in future. The outstanding issues are now primarily a matter for Member States.



FERMA welcomes the ELD multi-annual work programme 2017-2020 to improve implementation of the Directive

The Commission's new multi-annual work programme (MAWP) 2017-2020¹ has the potential to help all stakeholders (i.e. public authorities and industrial operators) to make the best out of the ELD, while maintaining legal certainty. It will consolidate and improve the Directive allowing the Member States and industrial operators to develop an ELD expertise.

The MAWP is based on the evaluation of the ELD concluded in April 2016 to which FERMA contributed²: This review demonstrates the value of the EU Better Regulation approach, which aims to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives.

ELD positive contribution for environmental policies in the EU

FERMA shares the European Commission's conclusions that the ELD greatly contributed to the development of environmental policies in the EU with the introduction of concepts about biodiversity damages, remediation and compensation in every legal system of the EU Member States. It also shows the added value of having an EU action in this area with the establishment of a common set of principles: polluter pays, baseline conditions, biodiversity protection and implementation of international conventions.

Furthermore, the ELD had a positive impact on the development of the insurance market for environmental liabilities. The market for Environmental Impairment Liability (EIL) insurance is growing and is competitive in Europe, offering tailor-made solutions to operators.³

Recent examples are supporting this claim:

- In its latest study published on 3 April 2017, global insurer AIG finds that 13% of environmental claims in 2016 were for non-pollution events, which are mostly characterised by direct damage to biodiversity. AIG considered this proportion as a significant development since it did not exist seven years ago before the ELD.⁴
- According to Marsh, a global leading insurance broker, the average limits of indemnity being obtained by mid-sized companies have risen from an average of €6.9 million to €7.9 million and as a consequence the average premium paid for environmental insurance for operational risk policies has increased since 2011 from around €25 000 to more than €30 000.⁵

¹ See the ELD work programme on the European Commission website at http://ec.europa.eu/environment/legal/liability/pdf/MAWP_2017_2020.pdf

² FERMA contributed to the studies on the feasibility of a fund and on the effectiveness of the ELD; participated in the ELD stakeholder conferences and organised of an ELD training for risk managers supported by the European Commission.

³ See page 18 of the Multi-Annual ELD Work Programme: "sufficient insurance cover is available in most member states..." http://ec.europa.eu/environment/legal/liability/pdf/MAWP_2017_2020.pdf

⁴ AIG Claims Intelligence Series "Environmental regulators flex their muscles", April 2017, page 3, <https://www.aig.co.uk/content/dam/aig/emea/united-kingdom/documents/Insights/aig-claims-intelligence-eil-regulators-flex-their-muscles.pdf>

⁵ Marsh Environmental Market Update, September 2016 <https://www.marsh.com/content/dam/marsh/Documents/PDF/eu/en/2016%20Environmental%20Market%20Update.pdf>



- In September 2016, Allianz, one of the largest insurers, announced the expansion of their team in Madrid to meet increased demand for commercial environmental liability cover for the Mediterranean regions⁶.
- In June 2014, an Insurance Europe report indicated that the majority of ELD cover was between €1 million and €5 million, with available capacity in some markets up to €50 million, and even higher on request⁷.

Because environmental incidents are affecting the reputation, competitiveness, production, employees and communities nearby, ELD has also pushed operators and regulators to work together. In that respect, ELD acted as a trigger for the awareness of all the possible stakeholders involved in an ELD case.

Challenges remain on data collection and interpretation among member states

The first purpose of the ELD is to prevent and remediate the loss of biodiversity and damages to land and water, but a lack of meaningful data about ELD incidents is preventing a complete assessment of the true effectiveness of the ELD. Reporting on the number of ELD cases has been inconsistent among Member States⁸, and the interpretation of key concepts is different within Member States. For example, Member States use the concept of “significance” for the threshold triggering the application of the ELD in many different ways.

Improving data collection could lead to a more coordinated approach to prevent and reduce risk as well as help to enhance the effectiveness of the ELD. Building the right metrics and indicators will also prove useful for the next REFIT evaluation. As such, FERMA calls on the European Commission to foster the dialogue between Member States and the most sensitive operators using the MAWP as a framework to improve the implementation of the ELD.

⁶ Allianz Expands Global Environmental Impairment Liability Team, 7 September 2016, <http://www.businesswire.com/news/home/20160907005173/en/Allianz-Expands-Global-Environmental-Impairment-Liability-Team>

⁷ Insurance Europe, Survey of environmental liability insurance developments June 2014 <https://www.insuranceeurope.eu/sites/default/files/attachments/Survey%20of%20environmental%20liability%20insurance%20developments.pdf>

⁸ 86% of the ELD damage cases reported out of the 1,243 were in Poland and Hungary <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0121&from=EN>



Market-based environmental insurance solutions encourage prevention & protection measures as it promotes good risk management practices

Preventing ELD incidents is first of all a matter of risk management

The profession of risk and insurance manager is at the forefront of managing environmental risks within their organisations. Acting as a coordinator, they are responsible for the assessment and treatment of the identified risks, including those linked to the environment. Prevention and protection are at the core of the profession.

When he/she follows the ERM (Enterprise Risk Management) process⁹, the risk manager is able to take informed decisions on environmental risk management. After identification and analysis of the environmental risks, the risk manager can establish the maximum probable losses (i.e. the normal loss we can expect, taking into account risk mitigation measures).

Prevention and protection measures must be promoted to reduce environmental risks

On this basis, the risk manager assists the organization in taking the right investment decisions to reduce the risk through the use of prevention and protection measures and thus reduce the likelihood of an incident. The risk manager can for instance coordinate systematic checks for leaks in tanks containing dangerous products and monitor regularly the rivers nearby, or also organise the protection of local species by cultivating them on a separate location before reintroduction.

After mitigating the risks in this way, the organisation can look to transfer the remaining exposure to the insurance market. Because the cost of the premiums will reflect the level of risk. Risk managers within their companies have therefore an interest to see their environmental risk as low as reasonably possible by investing in prevention and protection measures.

Each company has specific risk transfer needs depending on its exposures after mitigation and its ability to finance these residual risks through its own resources. This is why the insurance market is working well on a voluntary basis. The risk-pricing mechanism promotes good risk management practices, and the market offers tailor-made insurance products to fit the diversity of operators in Europe.

Investment capacities in environmental risk management must be preserved

FERMA is concerned about imposing a mandatory financial security or an industry fund at EU level, which would not solve the problems of environmental incidents or reduce their frequency. Securing

⁹ The ERM methodology is defined as a process “designed to identify potential events that may affect the entity, manage risk to be within its risk appetite and provide reasonable assurance regarding the achievement of entity objectives.”

See Committee of Sponsoring Organizations of the Treadway Commission (COSO), (2004). *Enterprise Risk Management — Integrated Framework Executive Summary*. For similar definitions see also:

RIMS Strategic and Enterprise Risk Center. *RIMS the Risk Management Society*. Retrieved from <https://www.rims.org/resources/ERM/Pages/WhatIsERM.aspx> ;

The Institute of Internal Auditors (IIA), (2009). *IIA POSITION PAPER: THE ROLE OF INTERNAL AUDITING IN ENTERPRISE-WIDE RISK MANAGEMENT* (p. 2). Retrieved from [https://na.theiia.org/standards-](https://na.theiia.org/standards-guidance/Public%20Documents/PP%20The%20Role%20of%20Internal%20Auditing%20in%20Enterprise%20Risk%20Management.pdf)

[guidance/Public%20Documents/PP%20The%20Role%20of%20Internal%20Auditing%20in%20Enterprise%20Risk%20Management.pdf](https://na.theiia.org/standards-guidance/Public%20Documents/PP%20The%20Role%20of%20Internal%20Auditing%20in%20Enterprise%20Risk%20Management.pdf)



money through environmental insurance or other financial security would not reduce the frequency of environmental incidents.

Mandatory financial securities will on the contrary reduce investment capacities of businesses in prevention and risk management. As a consequence, such reduction has the potential to slow down the modernisation of the EU industry to the latest environmental standard.

From a technical standpoint, deciding on the right amount of money to serve as a guarantee for ELD damages is an almost impossible task. Because ELD-related risks are so diverse, with exposures that can be over a long time, amounts are likely to never be high enough to cover the potential costs of an environmental disaster.

Imposing a mandatory financial security based on the maximum possible losses seems unrealistic. The insurance market is unlikely to have the capacity to provide hundreds of millions euros to so many operators in Europe. Alternatively, securing such large amount of money under the form of bonds, credits, own funds or reserves could put some organisations and especially SMEs out of business if insurers or banks deny providing it.

FERMA believes that introducing mandatory financial security in all EU member states would have a negative impact on investment in prevention and risk management, and on the modernisation of European industry, because it would:

1. Divert investments: Industries are unlikely to invest in prevention and at the same time secure millions of euros of guarantees (in insurance policies or bank guarantees).
2. Set another budget constraint on companies affecting their development and competitiveness. The accumulation of various mandatory financial requirements could immobilise funds for investments in R&D, new markets and new products/services.

The focus should be on supporting companies to invest in risk management, prevention and protection. The ELD is first and foremost about preventing environmental incidents.

ELD register – need for precisions

An ELD register is an interesting concept to overcome the lack of reliable and comparable data about ELD incidents. From FERMA's perspective, the register would act as an official record of environmental incidents falling under the scope of the ELD. Elements – notably its content and use – need to be clarified to ensure it meets its purpose without imposing unnecessary administrative burdens on public authorities and operators. FERMA recommends that the Commission and the Member States work closely with the operators on the development of such a register.

Content: level of details

To be beneficial for the European businesses, an ELD register should contain the key elements of an incident, such as the nature and financial extent of the damages, the type and result of remediation measures, and the type of operators. Such information would certainly help risk and insurance managers to get a better understanding of environmental risk, especially from a likelihood and impact perspective, but also to share the most efficient remediation practices.



To avoid adding unnecessary reporting requirements, the ELD register should leverage as much as possible existing local environmental reporting requirements in line with the Once-Only principle¹⁰. Reporting would also need to be consistent with the latest mandatory disclosures for environmental risks imposed by the Non-Financial Reporting Directive adopted in 2014 and applicable from next year for the financial year 2017.¹¹

Availability of such registers: restricted, public, on demand?

ELD registers should be available at least for operators and public authorities to consult. Disclosure beyond this audience should be subject to careful consideration because the content could be harmful for the operators, especially when information can be misinterpreted or released prematurely. In this respect, timing is a key element, and ELD incidents should only appear in such a register when all legal proceedings are over.

Conclusion

The Commission's MAWP has the potential to consolidate and strengthen best practices for the existing ELD.

FERMA calls on the Commission to foster the dialogue between Member States and operators in the most sensitive industries using the MAWP as a framework to improve implementation of the ELD. FERMA recommends that this dialogue includes the promotion of risk management practices to reduce the environmental risk for sensitive sectors.

FERMA continues to advocate against the introduction of an EU-wide mandatory financial security scheme. We believe capital resources are scarce and that current insurance voluntary systems are working well.

A register of ELD incidents is an interesting idea to increase reliable and comparable data about ELD incidents, but it should be designed carefully, notably as regards its availability and level of detail.

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FERMA - The Federation of European Risk Management Associations brings together 22 national risk management associations in 21 European countries. FERMA represents the interests of more than 4800 risk and insurance managers in Europe active in a wide range of business sectors from major industrial and commercial companies to financial institutions and local government bodies. More information can be found at www.ferma.eu

¹⁰ The Once-Only principle is defined in the eGovernment Action Plan 2016-2020: "*public administrations should ensure that citizens and businesses supply the same information only once to a public administration. Public administration offices take action if permitted to internally re-use this data, in due respect of data protection rules, so that no additional burden falls on citizens and businesses.*" More information available at <https://ec.europa.eu/digital-single-market/en/news/communication-eu-egovernment-action-plan-2016-2020-accelerating-digital-transformation>

¹¹ See article 1 of the Non-Financial Reporting (NFR) Directive 2014/95/EU <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>