



Impacts of the 2004 Environmental Liability Directive on Liabilities in the Area of Polluted Soils and Sites

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Key dates

- **1993** Publication of the “*Livre Vert*” concerning the Remedying of Environmental Damage
- **2000** Publication of the “*Livre Blanc*” on Environmental Liability
- **2004** Directive 2004/35/CE concerning the Environmental Liability with regard to the Prevention and the Remedying of Environmental Damage (the “**ELD**”)
- **Nov. 2006** In France, Preliminary Proposed Decree implementing the ELD (*Avant-projet de décret portant transposition de la directive 2004/35/CE*)
- **Apr. 2007** Proposed Law regarding the adoption of the ELD in France (*Projet de loi français relatif à l’adoption de la directive 2004/35/CE*)
- **Expected in June 2008:** “*Loi de Grenelle*” which should replace the Proposed Law and serve as the implementation measures for the ELD

Introduction

- **Adoption of the ELD:** April 21, 2004
- **Entry into force:** April 30, 2004
- **Context**
 - Significant health risks presented by many contaminated sites in the European Community
 - Increase of the loss of biodiversity
- **Objectives**
 - Implementation of the « polluter pays » principle
 - Implementation of a legal framework of liability with regard to the prevention and remedying of environmental damage
- **Implementation**
 - Deadline : April 30, 2007
 - As of today, less than half of the Member States (“**MS**”) have enacted the necessary implementation measures
 - In France, the Proposed Law regarding the adoption of the ELD was presented to the Council of Minister on April 4, 2007, and should be replaced by the “*Loi de Grenelle*” (expected on June 2008) which will implement the ELD

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Scope and Actors



Obligations and Liabilities under the ELD



Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites

I Scope and Actors (1/3)

1. Scope

1.1 Types of damage covered by the ELD

- *“Damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species*
- *Water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential*
- *Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms” (article 2 of the ELD)*

1.2 Exceptions provided by the ELD

- The ELD does not cover certain environmental damage (or an imminent threat of such damage), such as damage caused by natural phenomenon of exceptional, inevitable and irresistible character; pollution of a diffuse character, etc. (article 4 of the ELD)

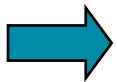
I Scope and Actors (2/3)

2. Actors (1)

2.1 The operator

- **Definition**

*“Any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity”
(article 2 of the ELD)*



Uncertainties with respect to:

- Owners of polluted sites (if contribution to the damage and if the operator fails to comply with his obligations)
- Purchasers of former industrial sites / Real estate developers
- The mother company of the operator
- Banks / Funds

I Scope and Actors (3/3)

2. Actors (2)

2.2 The national competent authority

- *“Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive” (article 11 of the ELD)*
- These authorities are empowered to execute certain administrative requirements and administer procedures under the ELD, such as supervising the operator's actions concerning the preventive and remedying measures
- In France, according to the Preliminary Proposed French Decree implementing the ELD, the competent authorities should be:
 - The Prefect (*Préfet*) who is the competent authority with regard to the legislation on classified installation
 - The Ministry in charge of the Environment (*MEDAD*), in every instance
 - The Regional Direction of the Industry, Research, and Environment (*DRIRE*)?

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Scope and Actors



Obligations and Liabilities under the ELD



Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites

II Obligations and Liabilities under the ELD (1/6)

1. Obligations under the ELD (1)

1.1 Operators' obligations

- **Prevention**
“Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures” (article 5 of the ELD)
- **Information, control, removal, and remediation in case of contamination**
*“Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:
(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services and (b) the necessary remedial measures” (article 6 of the ELD)*
- **Financial liability**
“The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive” (article 8 of the ELD)

II Obligations and Liabilities under the ELD (2/6)

1. Obligations under the ELD (2)

1.2 The competent authorities' obligations

- **Cooperation with operators on the definition of remedial measures**
“The competent authority shall decide which remedial measures shall be implemented in accordance with the cooperation of the relevant operator, as required” (article 7 of the ELD)
- **Request of remedial actions**
“The competent authority shall require that the remedial measures are taken by the operator” (article 6 of the ELD)
- **Substitution in case of failure of the operator**
“If the operator fails to comply with the obligations or [...] cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself, as a means of last resort” (article 6 of the ELD)

II Obligations and Liabilities under the ELD (3/6)

2. A dual Liability Framework under the ELD

- **Two different liability frameworks**, depending on the nature of the carried out activities causing the environmental damage:
 - **Strict liability:** “*environmental damage caused by any of the occupational activities listed in Annex III [i.e., : activities which present a risk for human health or the environment], and to any imminent threat of such damage occurring by reason of any of those activities*” (article 3-1 (a) of the ELD)
 - **Liability for fault or negligence:** “*damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent*” (article 3-1 (b) of the ELD)
- **Three conditions** are required:
 - One or more identifiable polluters
 - A concrete and quantifiable environmental damage
 - A causal link between the damage and the identifiable polluter(s)

II Obligations and Liabilities under the ELD (4/6)

3. Exemptions of liability

- *“The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive 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 authorized by, and fully in accordance with the conditions of, an authorization conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;*
 - 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” (article 8 - 4° of the ELD)*
- In France, these exemptions are mentioned in the Proposed Law implementing the ELD

II Obligations and Liabilities under the ELD (5/6)

4. Compensation under the ELD (1)

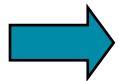
- Remedial Measures

- **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”
- **Interim compensation:** “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”

II Obligations and Liabilities under the ELD (6/6)

4. Compensation under the ELD (2)

- **Third-party Claims: Natural or legal persons (such as NGOs), as defined by article 12 of the ELD, may:**
 - Submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage in order to request necessary actions (article 12 of the ELD)
 - Access to a court or any other independent and impartial public body competent to review the procedural and substance legality of the decisions, acts or failure to act of the competent authority under the ELD (article 13 of the ELD)



The ELD does not expressly allow third parties to claim compensatory / monetary damages

- **Future Preventive Action**
In order to avoid future similar environmental damage:
 - Technical obligations
 - Financial responsibility of operators
 - Implementation of a proper risk management policy (E.g., appropriate insurance system)

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Obligations and Liabilities under the ELD



Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites

III

Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites (1/4)

1. The French Legal and Technical Framework on the Management of Polluted Sites (1)

■ Legal Framework

- **Articles L .511-1 et seq. and R. 511-1 et seq. of the Environmental Code** (codifying the Law of July 19, 1976 concerning the classified installations for the protection of the environment and the Decree n °77-133, dated Sept. 21, 1977)
- The article L. 512-17 of the Environmental Code provides: *“When a facility is stopped definitively, its operator must place its site in such a condition that it cannot harm the interests mentioned in Article L. 511-1 [i.e. : public health and safety; the protection of nature and the environment...] and that it enables a future use of the site determined jointly with the Mayor or the President of the inter-commune public cooperation body competent in town planning matters and, if it is not the operator, the owner of the land on which the facility is located”*



III

Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites (2/4)

1. The French Legal and Technical Framework on the Management of Polluted Sites (2)

- **Technical Framework**
 - Circulars dated February 8, 2007
- **Potential liability of operators regarding soil pollution:**
 - **Administrative**
 - **Criminal**
 - **Civil** (liability to third parties E.g., nuisance, etc.)
 - **Contractual liability** (following M&A transactions; sale of sites)



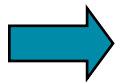
French Policy based on risks and the use of concerned sites

III

Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites (3/4)

2. Polluted Sites are Directly Covered by the ELD

- “*Environmental damage means: (...) **land damage**, which is any **land contamination** that creates a **significant risk of human health** being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms*” (article 2 of the ELD)
- Annex II 2. provides: “*the necessary measures shall be taken to ensure (...) that the relevant contaminants are removed, controlled (...), taking account of its **current use or approved future use** at the time of the damage, no longer poses any significant risk of adversely affecting human health (...). Use shall be ascertained on the basis of the land use regulations (...) in force (...) when the damage occurred. If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.*”



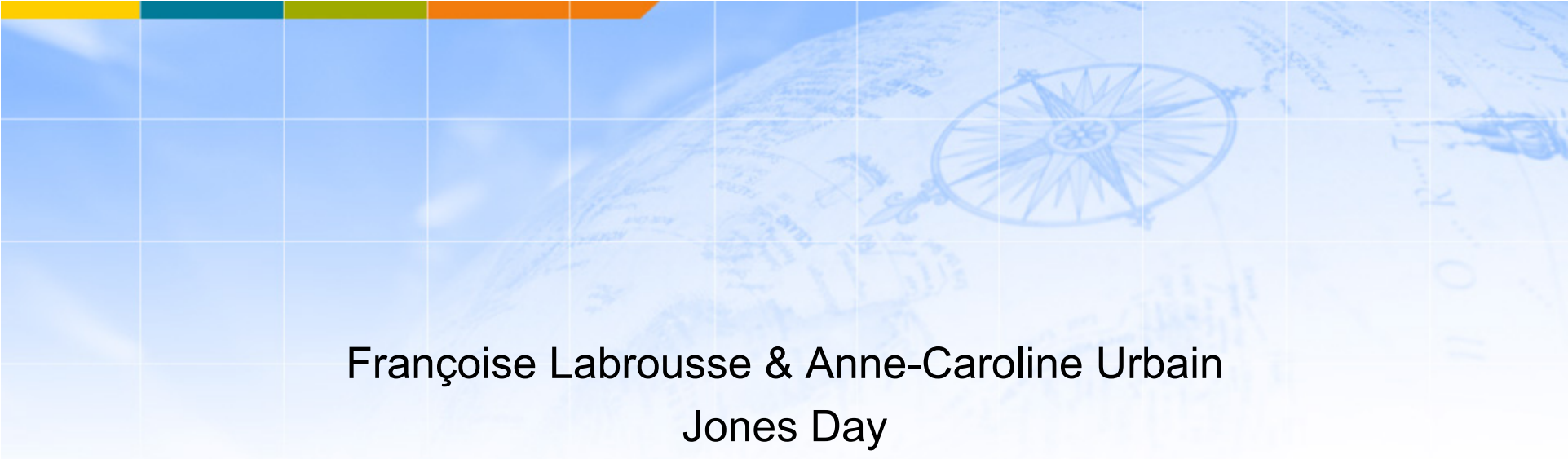
The ELD approach is risk and use based

III

Potential Impacts of the ELD on the French Policy on Polluted Soils and Sites (4/4)

3. Impacts of the ELD on the French Policy on Polluted Sites

- The ELD covers the “ecological damage”
- Right of actions for moral persons in connection with ecological damage (articles 12 and 13 of the ELD)
- The ELD does not apply to “*damage caused by an emission, event or incident that took place before the date referred to in Article 19(1) [i.e. : April 30, 2004]*”
- The ELD does not apply to environmental damage caused by pollution of a diffuse character
- The ELD does not provide for third-party compensation
- The ELD does not provide for specific sanctions
- ➔ The Proposed Law does provide for criminal sanctions (fines and imprisonment)
- No specific provisions for financial security instruments (i.e., insurance, financial guarantees...) / Competence of MS
- ➔ System of harmonized mandatory financial security might be adopted on 2010 after the issuance of a report of the effectiveness of the ELD by the Commission



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