

# NGO's assessment and recommendations as to Directive 2004/35/EC



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## Introduction

- J&E and EEB
- Polluter Pays Principle
- ELD making and in operation
- Limited scope of the directive
- First transposition assessment
- Conclusion and recommendations

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## Justice and Environment



- An 2004 established association of Environmental legal organisations
- Aims for better legislation and implementation of environmental law
  - to protect environment, people and nature



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## EEB - EUROPEAN ENVIRONMENTAL BUREAU



- EEB was created in 1974 to represent ENGOS' interests vis-à-vis the EU Institutions
- It is a federation of over 145 European environmental citizens organisations
- Based in Brussels
- Covers most EC env. policy areas including horizontal issues and enforcement

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## Polluter Pays Principle (PPP)

- Prevention, precaution, preservation
- Polluter shall pay for damages
- Liability is a complementary tool to command and control approaches
- Art 174 par 2 EC Treaty

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## Liability Directive: 25 years of discussion

- 1980's discussions in U.S. and EC
- 1989 to 2000: various proposals of European Commission
  - from ambition to frustration
- 2002 to 2004 European legislation procedure
  - a fragment is left

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Directive 2004/35 in operation

- three years transposition period
  - three countries on time (April 2007)
- some more countries by end of 2007
- EC actions against 9 member states in June 2008

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Directive 2004/35 in operation

Awareness of liability cases until Sept 2008

- according to NGO lawyers research
- no cases reported in
  - Austria, Belgium, Czech Rep.,
  - Estonia, Hungary, Ireland,
  - Poland, Romania, Spain
- Germany one case
- no information about other countries

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## Directive 2004/35 contradicts PPP

... in major aspects

- strict vs fault based liability
- limited scope, damage and liability definition

... but MS have discretion to be more stringent  
(Art 175 EC-Treaty, Art 16 directive)

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## Limited scope of the directive

Limited damage definition

- „environmental damage“, Art 2 par 1
  - water, but only when it „significantly adversely affects“ water quality
  - land, but only when „significant risk to human health“
  - damage to protected species and natural habitats
    - most ambitious objective of the Directive
- limited scope
  - land and water damages only covered when operation falls under Annex III activities (Art 3 par 1)

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## Limited scope of the directive

(Basically) only fault based liability

- Habitats and species (Article 3 par 1)
  
- Water and land damages
  - operators are „liable“ (Art 3 par 1) and have to remediate damages (Art 6 and 7)
  - but do not need to bear costs (Art 8 par 4)
    - „Permit defence“
    - „State of the art defence“
    - discretion of MS to grant defences

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## First transposition assessment

- Justice and Environment legal analyses 2007
  - EST, HUN, CZE, AUT, SLO;
  - limited public participation and access to justice rights
  - due to vague + discretionary terms of directive broad variation in transposition approaches
  - transposition not much more precise than directive
  - positive examples for certain issues in any country
  - financial security and defences: no clear picture
  - confirmed by EEB report

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## Conclusion

- Directive is limited in scope and too vague
- Fault based liability contradicts PPP
- MS tend to not go beyond the directive
- Application shows few if any cases
- Guidance needed for MS transposition and authorities

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## Recommendations

- EC should assess impact of the directive asap
- MS should strengthen transposition
- MS and EC should share best practice experience
- EC should provide guidance and guidance documents to decision makers and authorities
- Authorities and judges should interpret laws according to PPP

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