

Environmental Liability as a back-up tool for managing natural resources:

how to fill the gap?

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Article 14 Environmental Liability Directive: Financial security

First paragraph:

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.**

Second gap of the ELD:

If an industry is not capable of cleaning up environmental damage, it is not the case that the government has to “fill this gap” ->

the ELD does not impose a duty on the government to clean up environmental damage..... -> “orphan damages” may occur

Quote from the Refit report (2016):

“Operators responding to a recent industry survey generally did not support the implementation of mandatory financial security”

COMMISSION STAFF WORKING DOCUMENT REFIT Evaluation of the Environmental Liability Directive Accompanying the document Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, April 2016.

National measures for imposing financial security ?

Thus far, only a minority of member states has introduced obligatory financial security measures ...

(such as Czech Republic, Greece, Portugal, Slovakia, Spain)

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National measures: experiences with financial security in **The Netherlands**

- **2003** (May): entry into force of financial security imposition on polluters - so in advance of the ELD directive from April 2004
- Meaning that permitting authorities **may impose** a financial security obligation (discretion, no obligation for authorities)
- Legal basis in Environmental Management Act, implemented by a governmental decree



Structurele Evaluatie Milieuwetgeving

EVALUATIE VAN HET BESLUIT FINANCIËLE
ZEKERHEID

KWALITATIEVE ERVARINGEN 2003-2006

STRUCTURELE EVALUATIE MILIEUWETGEVING (STEM)



Structurele Evaluatie Milieuwetgeving

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STEM is het samenwerkingsverband tussen het Centrum voor Milieurecht (CvM, Universiteit van Amsterdam), Maastrichts Europees instituut voor Transnationaal Rechtswetenschappelijk Onderzoek (METRO, Universiteit Maastricht), het Instituut voor Milieuvraagstukken (IVM, Vrije Universiteit Amsterdam) en ARCADIS.

2 oktober 2006
110643/CE6/1J9/000360

1) Slow start -> start up phase for getting familiar with the financial dimension

- Permitting authorities need time to develop policies and practices for using the new competence; the financial dimension is not well-known territory for the civil servants (particularly problematic in case of municipalities, having limited human resources)

2) Diverging policies

The imposition of financial security is a discretionary competence: how has that been applied?

- Some authorities had no clear view on whether to use the competence or not
- Some authorities expect that no severe damages will happen in view of their ambitious and solid permit, inspection and enforcement approach
- However, at least one authority intends to actively impose financial security (reason: experiences with environmental damage in the past)

3) Limits of financial security

- Illegal activities (particularly illegal waste dumping) are not covered by insurances, while they are perceived as the main problem
- Practical problems with arranging the financial security (will the polluter find and maintain sufficient security? Insurer may end the contract, other problems may occur -> market analysis is needed)

Final conclusions evaluation research

- No clear real added value of financial security in addition to the (strong?) permit and enforcement policies could yet be identified
- Nonetheless, it seems too early to remove the competence -> further experimentation is recommendable
- Moreover: principled and theoretical reasoning justifies to keeping the provision (at least a while, and particularly for activities with risk liability) together with introducing a governmental duty to clean up damage but for which the polluter has no financial capacity

Removal of financial security option in 2009

- Political decision (parliament – government) to withdraw the governmental decree for financial security
- In order to relieve the burden for industry, together with the observation that environmental damages do not occur

Latest developments (2016-2017)

- Lobby by some provinces for re-introducing the financial security, particularly for waste activities
- Competence should be without discretion (no 'province shopping' by industries)
- Reason: too many damages in practice (waste -> polluted soil and water) while polluters have no financial capacity, so the governmental budgets need to be used... if clean up is indeed decided
- Political will is very uncertain at the moment (new government has yet to be installed)

Conclusions

- **Principled approach:**
 - > starting point is that polluters should have a financial security obligation, and that governments should take responsibility for orphan damages.
 - > Member states should fill the gap in their national legislation
- **Practice -> more insight needed:**
 - *data*: are there indeed only a few serious cases? Have orphan damages occurred?
 - *capacity*: how to make permitting authorities fit to deal with imposing financial securities? what legal disputes will emerge regarding the imposition and enforcement of financial security provisions?
 - *costs & the market* -> need of developing a competitive insurance market

Thank you !



Further reading:

Financial security obligations to prevent orphan damage: some preliminary experiences from the Netherlands (Marjan Peeters, Frans van der Woerd), *Environmental liability* [2006] 6 *Env. Liability*

