An European vision of environmental liability (as impacted by the new directive)

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FEDERATION OF EUROPEAN RISK MANAGEMENT ASSOCIATIONS

What is FERMA ?

- Federation of European Risk management Associations
- Established in 1974
- Head office in Brussels
- Today represents
  - 13 countries
  - 14 associations
  - 4800 members
- Expanding its membership in eastern countries

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FEDERATION OF EUROPEAN RISK MANAGEMENT ASSOCIATIONS

Objectives:

- Widen and raise the culture of Risk Management throughout Europe, by information sharing, educational and research projects
- Represent the interests of European industry with respect to Risk management issues and be part of the decision making process at the European level.
- Develop and maintain contacts with other European Business Associations such as :
  - **CEA (European insurers association)**
  - **BIPAR (European brokers association)**
  - **UNICE (European industry representatives)**

The CEA Working group

- The group's aim is progressing in insurability :
  - More comprehensive
  - Widely available
  - Sustainable
  - At adequate price(fair and competitive terms)
- Development of common tools (techniques, guidelines) for
  - Risk assessment
  - Evaluation of damages
  - Remediation solutions
  - Tools should be accepted by all stakeholders

- Environment protection raises 3 types of issues for corporations :
  - The past (site rehabilitations)
  - The future (potential pollution accidents)
  - The present (change in legislation)
- Risk management has become a major part of corporation strategies
- Risk management best practices rely on :
  - Adequate risk assessment
  - Proper risk financing

How will the new ELD impact our businesses?

- A new legal entity: the environment
- A new concept “Environmental damage”
- A new strict liability scheme
- New actors
- Duty to prevent damages
- New types of compensation

ELD : 3 types of remediation

Compensatory :
same or any kind
same or any location

Base Line

Complementary :
different kind or
different location

Primary:
same kind and
same location

'location' refers to the 'damaged site' or 'an appropriate alternative site'

'kind' refers to the type of damaged natural resources/services.

ELD and risk assessment

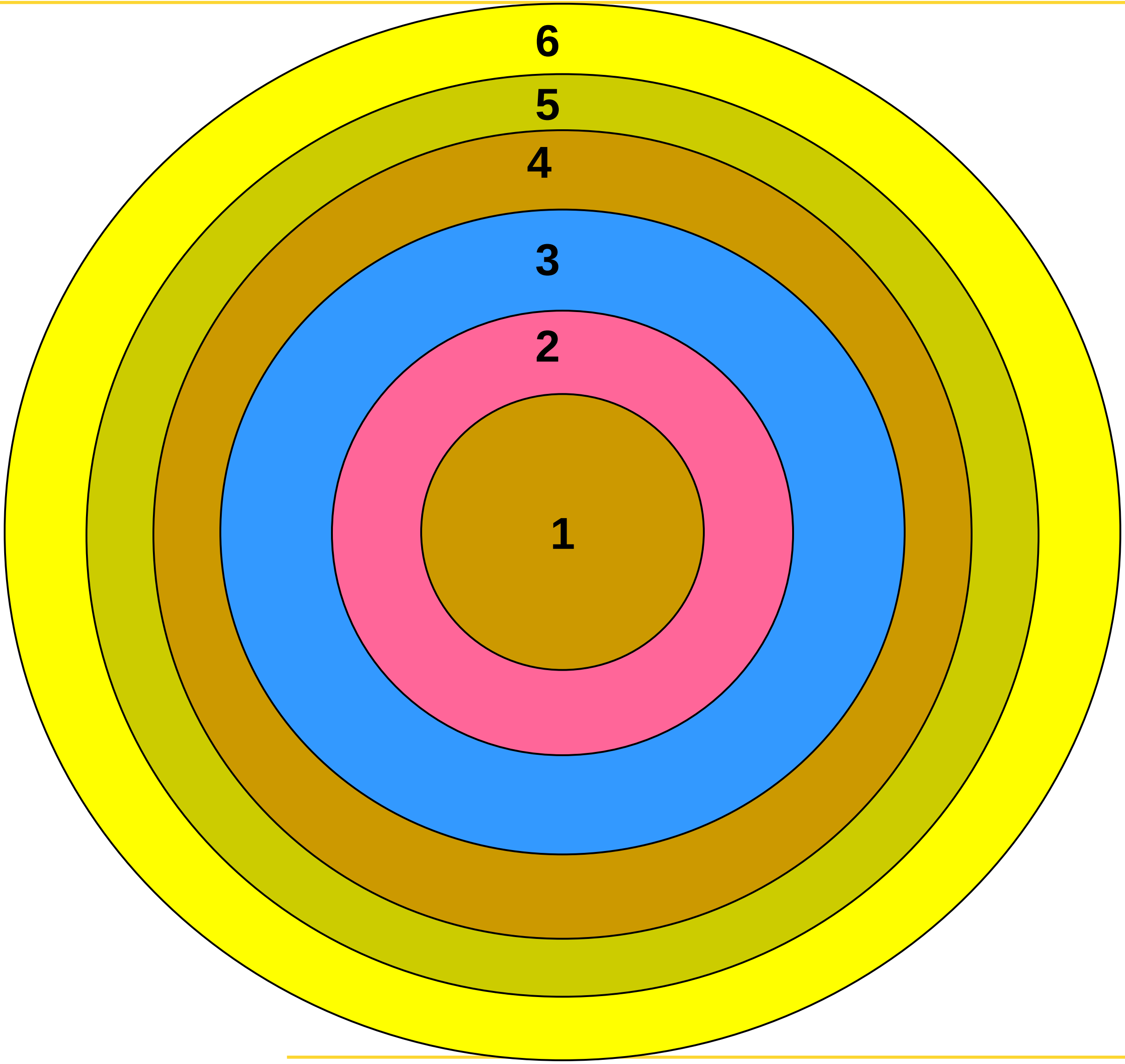
- No clear rules
- No real past experience
- Need for legal clarity and consistency

ELD Applicability uncertainties

- Is the ELD applicable in the specific situation (origin, location, operator, scope of damages…)?
- Is there a casual link between release and observed effects ?
- How to deal with multi-parties considerations (joint and several vs proportional liability)?
- Does the permit compliance or state of science exclusion apply?
- How are the pre and post ELD damages established ?
- How is the baseline established (pre and post ELD releases)
- What preventive actions should be decided?
- How are the 3 types of remediation determined?
- Who are the controlling authorities?
- How do you take into account natural recovery?
- How to deal with cross border damages

ELD and Risk financing

- Financial consequences resulting from new risks should be mutualized
- Present insurance products not adequate
- Appropriate coverage with adequate capacity, should be made available at reasonable price (taxes?)
- Programs should be consistent in all European countries
- Proper balance between self insurance and insurance should be considered



1. **Insurable risks**
2. **Uninsurable risks**
3. **Uninsurable sites or activities**
4. **Risks where hazards does not exist**
5. **Non pollution damages**
6. **Uncertainties in the Directive**

Items to consider in policy coverage :

- Occurrence or Claims made ?
- Third party or first party coverage?
- What is the policy trigger?
- Description of coverages (3 types of remediation..)
- "Sudden & accidental" only or including "unintended and unexpected"?
- Who takes control of the remediation (insurer or authority)
- What are the exclusions ?
- What if Transposition in local law goes beyond ELD?
- Capacity available
- Niche product available to happy few (site underwriting)

But insurers are risk averse for environmental risks

- Not an homogenous portfolio and little history
- Shareholder capital will not be given to cover EIL (bad reputation)
- ROI will not be sufficient unless premiums are high
- Solvency 2 requirements prevent insurers from allocating capital to environmental risks
- If made compulsory, insurance requires a stable , established, sustainable market (get claims paid, long tail)
- To make insurance compulsory, legislator has to set specifics (limits, coverage…) Specifics will be set up for the biggest risks. This will imply coverages they don’t need at expensive costs for SMEs

Conclusions

- The ELD transposed in each country will have a significant impact on the environment issues for businesses
- Rules are yet to be clarified
- Adequate insurance projects should be developed
- Risk management associations should take an active part in the process !