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## Dealing with Liability under EU Law

**Ingvild Ombudstvedt**

CO<sub>2</sub>Geonet and Gassnova's workshop "Dealing with Liability"

11 May 2016



# OVERVIEW

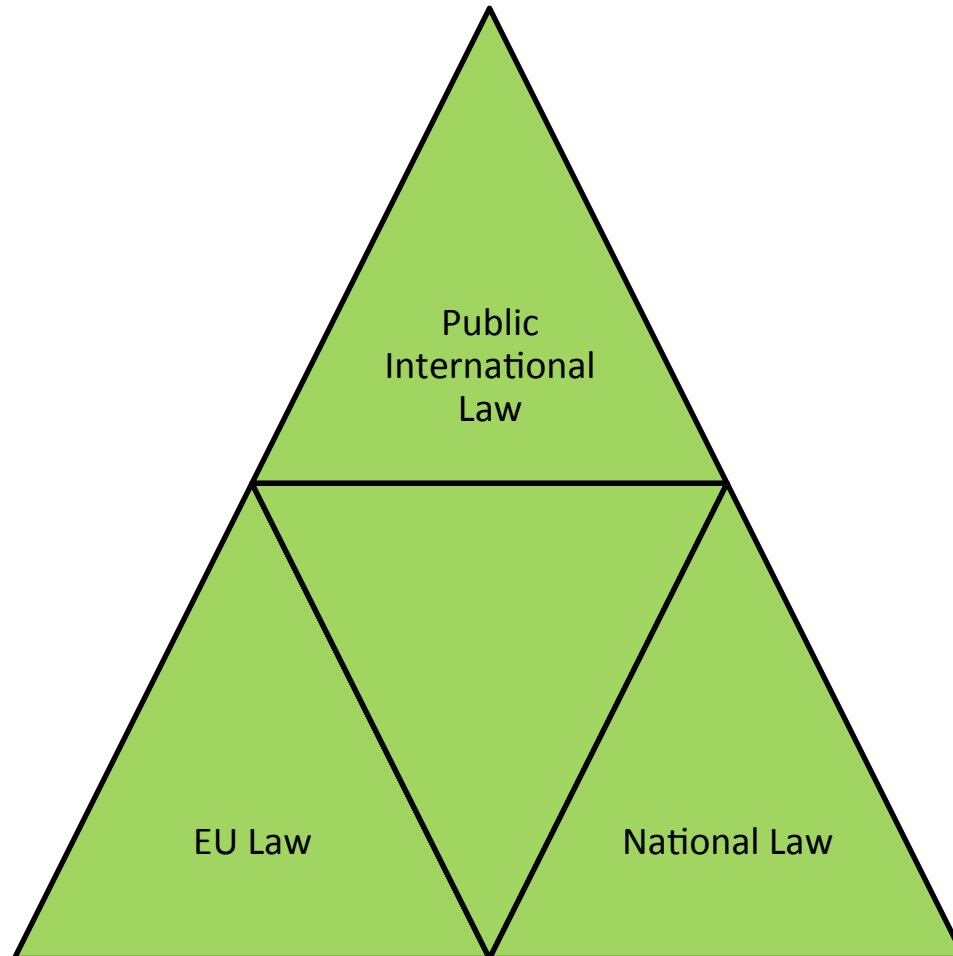
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- **CCS Regulatory Framework**
- **Liability**
- **The timeframe for liability**
- **Closure and post-closure liability**
- **Transfer of liability**
- **Financial security**
- **State aid rules and cap on liability**
- **Public procurement**
- **Conclusions**



# CCS REGULATORY FRAMEWORK

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# LIABILITY AND CCS OPERATIONS

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- 'Liability' is consistently highlighted as a topic to be addressed:
  - Projects and industry continue to express concern;
  - Issue which has yet to be addressed/fully addressed in some legal and regulatory frameworks.
  
- It is important to clarify the nature of liability, beyond a collective term:
  - Civil liability;
  - Administrative liability; and
  - ETS liability



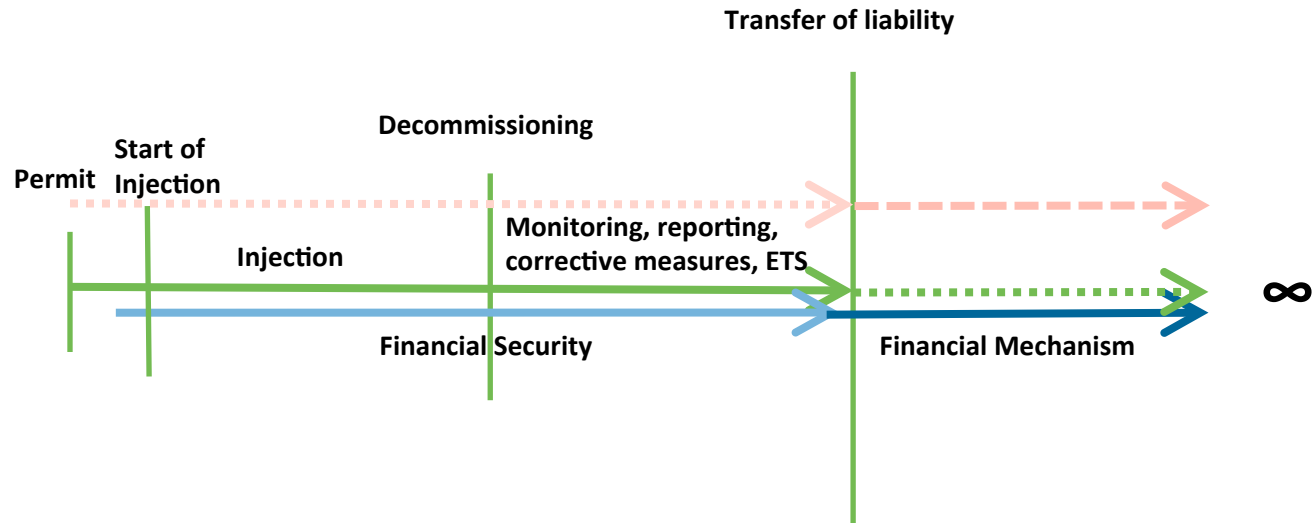
# LIABILITY

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- Civil liability largely applying to pollution incidents and land contamination etc., as well as e.g. damage to third party
  - Particular issues to be highlighted include the jurisdictions' approaches to:
    - Potential importance of limitation periods when bringing a claim
    - Regulatory compliance and potential civil liability
  - Common law has established principles sit alongside statutory systems of assessment and licencing, for e.g. 'torts' of negligence, public nuisance, trespass
  
- Administrative liability focusing on requirements an operator faces to undertake remedial action in light of actual/perceived environmental damage.
  - The CCS Directive includes provisions which enable an authority to issue 'directions' or order specific activities.
  - Substantial powers also found within broader environmental regulatory regimes
  
- The approach under the EU ETS is to focus responsibility upon the storage operator (prior to the post-closure transfer of liability):
  - To purchase allowances to meet any subsequent leakage;
  - Maintain adequate financial security to cover potential liabilities.



# LIABILITY TIMELINE





# CLOSURE AND POST-CLOSURE LIABILITY

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Article 17:

A storage site shall be closed:

- (a) if the relevant conditions stated in the permit have been met;
- (b) at the substantiated request of the operator, after authorisation of the competent authority; or
- (c) if the competent authority so decides after the withdrawal of a storage permit pursuant to Article 11(3).

Post-closure liability

- Monitoring
- Reporting
- Corrective measures
- Surrender allowances
- Remedial actions
- Sealing storage site and remove injection facilities
- Civil liability



# TRANSFER OF LIABILITIES –CRITICAL ISSUES

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- When can transfer take place?
  - A minimum of 20 years, but may be less if certain conditions are satisfied.
- What conditions must be satisfied?
  - “*all available evidence*’ indicates that the stored CO<sub>2</sub> will be completely and permanently contained”:
    - Also required: a financial contribution, sealing and removal (P&A) and reporting.
- What is transferred?
  - Administrative responsibilities for monitoring, ‘corrective measures’, remediation, and the surrender of GHG allowances (nothing on civil (tort) liabilities).
- Can a State re-open the operators’ liability (inclusion of ‘claw-back’ provisions)?
  - State may recover costs where these are due to any fault on the part of the operator:
    - “Fault’ wide definition including cases of deficient data.





# FINANCIAL SECURITY

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- Requirements of financial security under the CCS Directive:
  - Financial Security, c.f. Article 19
  - Financial Mechanism, c.f. Article 20
  - Ultimately limits the potential exposure of both the Operator and the State.
  
- While the approach has varied between the jurisdictions, several have drawn upon established domestic models (e.g. oil and gas sector):
  - Beneficial to both regulators and operators, who are familiar with many of the pre-existing concepts;



# SOME THOUGHTS ON STATE AID

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- EU State aid rules limit the authorities' flexibility to deviate from the CCS Directive's liability requirements, however
  - EEA Agreement preamble, cf. Articles 1(2)f and 73-75, 61(3)c
  - EU Treaty Article 107(3)c
  
- Further, the Commission's Guidelines for state aid provide for some leeway:
  - (161) In order to promote the long term decarbonisation objectives, the Commission considers that the aid for CCS contributes to the common objective of environmental protection.
  - (162) [...] aid for CCS addresses a residual market failure, unless it has evidence that such remaining market failure no longer exists.
  - (165) The aid is limited to the additional costs for capture, transport and storage of the CO<sub>2</sub> emitted.
  
- Implications, and potential cap on liabilities for
  - Decommissioning and post-closure liability
  - Transfer of liability
  - Carbon price
  - Financial liabilities



# SOME THOUGHTS ON PROCUREMENT

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## **Some basic principles**

- Public procurement ≠ state aid
- Public procurement shall be based on:
  - free movement of goods, freedom of establishment and the freedom to provide services; and
  - equal treatment, non-discrimination, mutual recognition, proportionality and transparency
- Public procurement does not exclude the use of state aid
  - May be used as a tool to distribute state aid for CCS projects



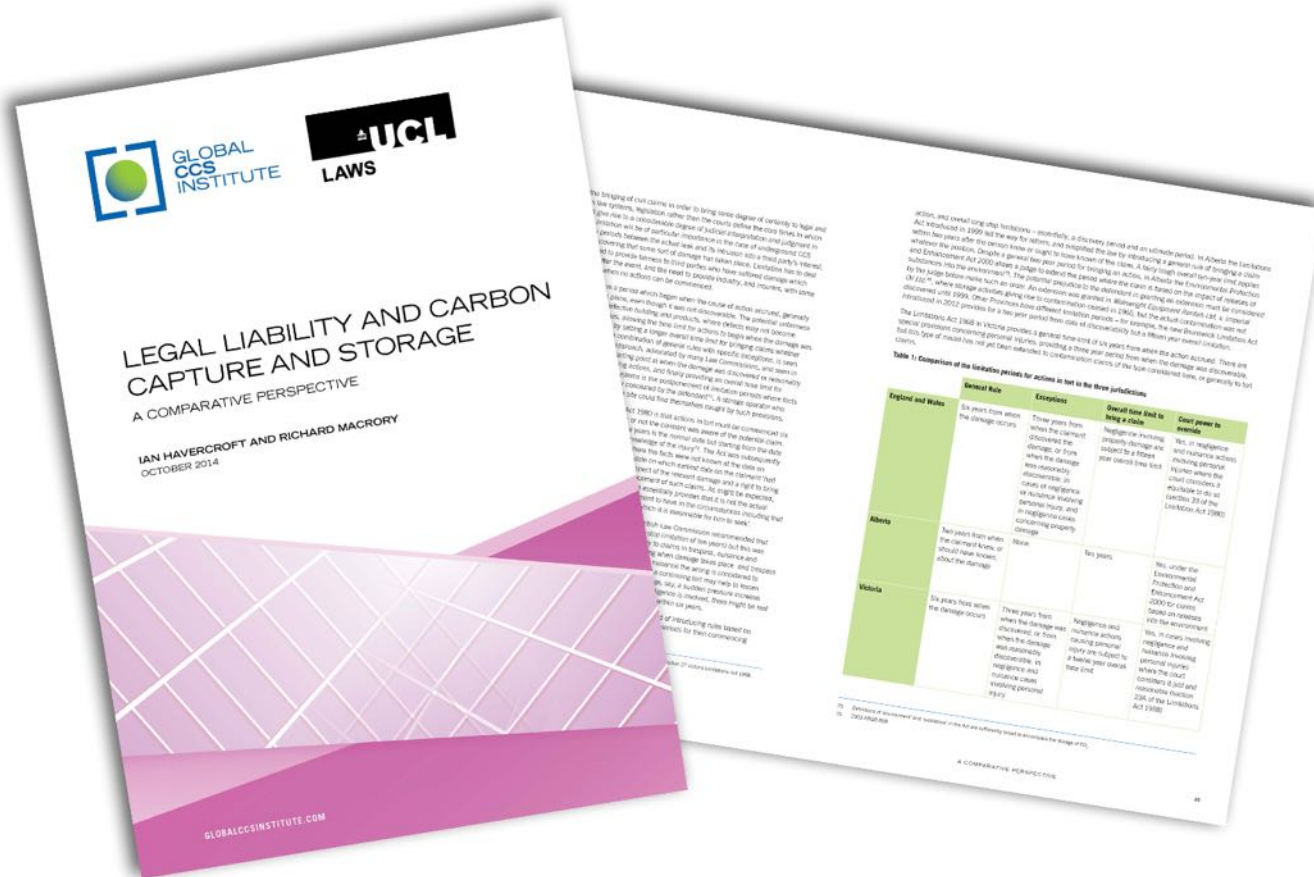
## CONCLUSIONS

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- Legal liability issues remain critically important for the deployment of CCS.
- Wording of EU CCS Directive not an exhaustive legal framework for CCS.
- EU law has capped the liability for the CCS industry, and opens up for additional capping, both through state aid and otherwise.
- Further refinement of regulatory models, together with flexibility in their implementation, will likely prove important.



# FOR FURTHER INFORMATION



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