



The Environmental Liability Directive – General issues relating to the ELD

I. Introduction

The European Union's Environmental Liability Directive (ELD) entered into force on 30 April 2004. Member States are obliged to transpose this into domestic law by 30 April 2007.

The ELD forms a base for national laws and the fundamental principle of the Directive is to ensure that operators whose activities have caused environmental damage are held legally and financially liable. There are many areas where the Directive is unclear. It is important that the national implementing laws should clarify such areas, in particular in relation to a number of key issues (discussed below). It should be noted in this context, that implementing regulations can be more stringent and that the Environmental Liability Directive expressly states that its implementation and enforcement should be effective. Therefore, implementing laws, which add certainty and clarity, would comply with the Directive, even if they were more stringent. However, if this is not achieved, there is a danger that any new laws could weaken existing laws intentionally or inadvertently.

This briefing describes the main features of the ELD in relation to water issues, identifies the areas where the Directive may prove to be unclear or ineffective and suggests ways in which national laws could improve the situation. It is intended to help people in influencing Governments as they build the Liability Directive into national law to get the strongest environmental protection possible.

II. **Main features of the ELD**

In principle, the Directive obliges "operators" - usually persons who operate or control a business or commercial activity (an "occupational activity") (Article 2(6) and (7)) - to prevent or to remedy environmental damage they cause or are likely to cause. Non-profit making businesses are also covered by the ELD. Environmental damage could be to water, land or biodiversity (Article 2(1) and 2(3)). The rules on when operators are liable for the specific types of damage are complex (Article 3(1)):

- Water and land damage are only covered by the ELD if they are caused by one of a specified list of dangerous activities, which is set out in Annex III of the ELD. Liability in these cases is strict (subject to the defences and exceptions described below), which means operators are liable irrespective of whether or not they are at fault.
- Biodiversity damage, which is caused by an Annex III activity, is also subject to strict liability (subject to the defences and exceptions described below).
- In addition, biodiversity damage which is caused by any other occupational activity not listed in Annex III is also covered by the ELD, but only if the relevant operator was at fault or negligent.

Consequently, if an operator of an un-listed activity causes biodiversity damage without being at fault, or if he causes soil or water damage, whether at fault or not, he will not be caught by the Directive.

A variety of standard civil liability defences/exceptions from liability are available to operators. In addition, a potentially dangerous new hybrid article – commonly referred to as the “permit” and “state of the art” exception – was introduced (Article 8(4)). This article gives Member States the right to allow operators who have caused environmental damage to escape from the duty to pay for the costs of remedial measures even though they are liable for the damage under the ELD, if:

- they acted in accordance with the conditions of an authorisation given under national laws in relation to one of the Annex III activities (the “permit exception”);
- they operated according to the state of scientific and technical knowledge at the time (the “state of the art” exception).

The Directive only applies to damage caused after 30 April 2007 and there is a “long-stop” period of 30 years after which operators are no longer liable for damage they have caused (Article 17). There is no cap on liability.

There is no provision for mandatory financial security (in the form of insurance, funds, bonds or similar), but Member States are to encourage the development of financial security instruments and markets, and there is provision for the possibility of the Commission proposing a “system of harmonised *mandatory* financial security” within 6 years of entry into force of the Directive, but only if “appropriate” and after an “extended” impact assessment, including a cost benefit analysis. A Commission review mechanism is provided for.

The Directive will be enforced by the “competent authority” - which will probably differ according to the medium concerned and could be the Environment Agency/English Nature/Natural England, local authorities, the future Marine Management Organisation or others.

III. General issues

Issue 1: Exemptions from clean-up obligations under the “permit” and “state of the art” exceptions (Article 8(4))

Member States have a discretion as to whether they implement the “permit” and “state of the art” exceptions into national law. There is a host of reasons why it is crucial from an environmental point of view that they should not exercise this discretion, including:

- The existence of these exceptions derogates from the “polluter pays principle” and the principle of strict liability.
- Without these exceptions, operators have a stronger incentive to operate safely and prevent environmental damage.
- Once occurred, damage is more likely to be remedied if the exceptions do not exist.
- Because of the enforcement structure of the ELD, introducing the exceptions would make it more likely that both operators and the competent authority would ignore environmental damage, in order to avoid responsibility for restoration costs.

- Introducing the exceptions would introduce legal uncertainty and would make it harder for operators to assess the relevant risks.
- Many of the laws listed in Annex III are unsuitable for the permit and state of the art exceptions, as they involve very general permits or mere compliance procedures (see for example GMOs below).

The best environmental outcome would undoubtedly be for Article 8(4) not to be implemented in national legislation.

Another way of dealing with this issue would be to allow a very restricted list of consents that can give rise to the “permit exception”. Relevant permits would have to be very precise, detailed and strict in their application. They would need to be based on the type, extent and likelihood of environmental damage to a specified target environmental medium. They would also have to be specific to a particular location. Such permits might include water discharge consents, some waste disposal licences and possibly IPPC consents. General consents in relation to pesticides, GMOs, transport and labelling should not be subject to the “permit exception”.

It would also be possible to treat “permit” and “state of the art” as mitigating factors to be considered in relation to the extent of remediation to be paid for by the operator. If this is going to be the way forward, it will be necessary to think about suggesting some wording.

In relation to the issue of the burden of proof, it is important, should there be a “permit” and state of the art exception in the ELD implementing legislation, that there should be a uniform standard of proof and that the word “prove” should be used instead of “demonstrate”.

Recommendations:

1. The permit and state of the art exceptions should not be implemented into national law – this would result in greater business certainty, a greater incentive to prevent environmental damage and operate in an environmentally friendly fashion, thereby promoting the development of green technologies and a greater incentive to use financial security cover.
2. If they are implemented into national law, this should only take place in a very specific and restricted way:
 - Only permits, not operating conditions or similar, under Annex III regimes should come within the exception.
 - Only very specific permits which aim at preventing specific types of environmental damage and take into account the type of damage at issue and the **local** environmental conditions, which are apply the precautionary principle and are set at a high level of environmental protection (i.e. tough permits).
 - No notifications or permits under GMO regimes should be included either under the permit or the state of the art exceptions, as they are too wide in their application (they do not satisfy condition a)) and they would effectively take GMO damage outside the operation of the ELD, leaving it completely without a liability system (and the ELD is meant to be the GMO liability regime).
 - The state of the art exception should not apply in relation to biodiversity damage, as that would be in conflict with the existing regime under the Habitats Directive.

3. Another way to deal with permit and state of the art considerations would be to make them part of a range of mitigating factors which may influence the amount of damage an operator has to remedy, although, of course, this does mean that the competent authority will have to bear the rest of the costs.

Remediation

Remediation (together with prevention) is one of the twin aims of the ELD. The provisions on restoration are central to the effectiveness of the ELD in practice. However, they have been criticised by industry and insurers as being impracticable and too vague.

At the same time, from an environmental point of view, this is an area of the ELD that goes further than other wildlife legislation, e.g. the compensatory requirements under the Habitats Directive (ensuring overall coherence of Natura 2000 network). This is therefore one area where the ELD is groundbreaking and it is of crucial importance that the provisions work in practice.

The fundamental problems in relation to remediation are of a practical nature in that at the moment, industry does not believe that the ELD provisions are practicable. Additional guidance from the Commission/national governments will be necessary to help with applying Annex II of the Directive. It would make sense to build on the experience gained with restoration and compensatory measures taken under existing national legislation.

However, it will be important that a flexible and practical approach is taken to restoration to take into account the variability of the natural environment. This is particularly important in the context of the marine environment where natural recovery is often the only way to restore environmental damage. The ELD implementing regime should be flexible enough to allow experience gained in this context to be used and to allow for the different nature of, say, water damage under the ELD (i.e. pollution and morphological damage), which may necessitate different approaches than those used in relation to soil clean-up and biodiversity damage.

Recommendation:

The success of the ELD rules on restoration of environmental damage will depend on a flexible and practical approach being taken. Practical results are important, not theoretical values for the environment. Guidance will be necessary in this context.

Preventing imminent damage

The ELD obliges operators to take “the necessary preventive measures” to prevent environmental damage where there is an “imminent threat of such damage occurring”. This is defined in terms of “a sufficient likelihood” of damage occurring. In practice, to determine what this means, it would make sense to take a risk assessment approach, similar, for example, to the one taken in the UK under the rules on contaminated land under Part IIA of the Environmental Protection Act 1990 in relation to contaminated land, i.e. an approach based on an assessment of the probability or frequency of the occurrence of a defined hazard and the magnitude of its consequences.

The word “imminent” (defined as “near future”) should be given its normal meaning and be judged on the facts of the case (see also the UK Contaminated Land Regime).

Recommendation:

- (1) The meaning of “sufficient likelihood” should be based on a risk-assessment approach.
- (2) The meaning of “near future” should be determined on the facts of the case.

NGO rights and review procedures

The ELD does not provide for a very strong enforcement regime. Especially if the “permit” and “state of the art” exceptions are introduced without an effective system of paying for the costs of restoring environmental damage, the rights of NGOs to request the competent authority to take action (under Article 12) will be crucial. In relation to cases where there is an imminent threat of damage, this is especially important, as it will be particularly in those cases, where the right to request the competent authority to take action will be most important. However, this is where Member States have the discretion not to introduce the right of NGOs to request action. The UK government, for example, has voiced concerns that even including a duty to provide evidence is going to greatly add to the administrative costs of the competent authority. However, other environmental regimes in the UK, for example, use and even, to an extent, rely on the help of members of the public or of environmental organisations in much less well defined circumstances than under the ELD.

The ELD approach is much more restricted than these regimes. Far from being an additional administrative burden, given a proper framework for their participation, environmental NGOs could ease the competent authorities’ costs by assisting them in identifying real or threatened environmental damage and requiring operators to take preventive or remedial measures. In fact, the ELD regime and under it competent authorities could benefit from a much greater involvement of the relevant NGOs and their staff on the ground, as the NGOs themselves would be carrying some of the costs the authorities would otherwise be bearing.

Industry concerns are that NGOs and/or affected parties, which have the same rights, will bring spurious actions. However, NGOs have no interest in doing this, as they wish to remain credible and, in any case, do not have the resources for this. After all, every request for action has to be based on evidence that needs to be provided to the competent authority.

In addition to their rights to request the competent authority to take action, affected individuals and environmental NGOs also have the right to bring an action “to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority” under the ELD.

The fact that the review rights extend to “procedural” and “substantive” issues would indicate that, in England at least, a mere right to judicial review would not be sufficient under the ELD, as judicial review proceedings do not involve a substantive review of an authority’s decisions. Especially given that substantial parts of any substantive review will be decided on evidence, it will be crucial that an additional process in the courts or before another competent body at a higher level than the competent authority itself be provided for in the implementing legislation.

Recommendation:

The discretion under Article 12(5) for Member States to remove affected persons' and environmental NGO's rights to request the competent authority to take action in cases of imminent threat of damage and to be informed of the competent authorities' reaction, should not be used and the right should remain.

In fact, it would be beneficial to the competent authorities to involve the relevant NGOs on a much wider basis to benefit from their expertise and knowledge on the ground and from the fact that they are in a better position to identify actual or threatened environmental damage. In this regard, NGOs could ease the administrative burden of competent authorities.

Both in relation to NGO rights under Article 12 and any further involvement of NGOs a proper framework would need to be established for their involvement.

Financial security

From an environmental point of view the crucial test as to the effectiveness of this Directive is twofold:

- Does the Directive create a strong incentive to prevent environmental damage in the first place?
- When environmental damage is caused, is it effectively remedied?

Strong rules on financial security are necessary to answer both questions in the affirmative. Therefore, an obligation to have some kind of financial security cover, be it through insurance, dedicated funds or another mechanism, would create a strong incentive to operate in an environmentally friendly fashion, thus preventing environmental damage.

Recommendation:

Financial security cover for operators who are affected by the ELD should either be mandatory or strongly encouraged and a framework for such financial security should be created.

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