



## The implementation of the Environmental Liability Directive

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 aims to prevent and remedy environmental damage. It seeks to achieve this by applying the 'polluter pays principle' and making businesses that damage the environment legally and financially accountable for that damage (Article 1).

### The importance of the Directive for wildlife conservation

The ELD has implications for wildlife conservation. It substantially extends the scope of regulatory protection for Community protected habitats and species by:

- applying to Natura 2000 habitat types and species (and their habitats) irrespective of whether they are on or outside Natura 2000 sites
- making undertakings liable even if the damage was not caused intentionally or;
- applying to businesses and undertakings in general (including non-profit making businesses), not just owners/occupies, although in relation to water and land damage (but not in relation to biodiversity damage) this is restricted to a specified list of dangerous activities;
- obliging businesses and undertakings to restore biodiversity and water damage they have caused;
- obliging operators to take preventive measures where there is an imminent threat of damage;
- applying Water Framework Directive principles to water damage, thereby potentially including morphological damage, not just pollution damage;
- potentially introducing a system to deal with GM liability

### The transposition process

The ELD also has a number of serious flaws from an environmental point of view and the transposition process will decide how effective the ELD will be in practice, and whether existing conservation and environmental laws will be strengthened or possibly even weakened by the ELD's implementation.

Areas of particular importance in this context are:

- a number of provisions give Member States a discretion as to whether or not to implement them.: The way each one of these discretions is exercised could have a significant impact on the environmental effectiveness of the ELD;
- the many references to and overlaps with existing EU and national legislation could result in intentional or inadvertent weakening of existing laws;
- the many complex and unclear definitions in the ELD require clarification but also provide an opportunity to look for practical solutions to strengthen the existing nature conservation laws

Under the ELD, the implementing legislation can be more stringent than the ELD itself. BirdLife and the RSPB believe that the national Governments should work to transpose the legislation to ensure that our ability to meet our conservation objectives are enhanced rather than compromised.

## Key issues for implementation

**1: The inclusion of nationally “designated” biodiversity (Article 2(3)(c):** The Directive allows for inclusion of certain nationally designated biodiversity under national implementing legislation. Every Member State should identify all relevant biodiversity under this provision and include it in the implementing regime. This would generally also help to meet Government commitments and targets in relation to national protected habitats and species.

**2: What constitutes biodiversity damage? (Article 2(1)(a):** The ELD definition of biodiversity damage poses a number of serious practical application issues. The RSPB and BirdLife recommend that biodiversity damage should be defined as any effects that undermine the maintenance and long-term viability of the relevant protected biodiversity.

**3: Definition of water damage (Article 2(1)(b):** Under the current ELD’s definition of water damage many small water bodies, such as ponds, which may be of high environmental significance, would not be covered. In addition, certain difficulties arise out of the ELD’s reliance on provisions of the WFD, many of which will not be operational for some time after the ELD’s transposition deadline. An interim approach could be based on existing concepts in national legislation. However, it is crucial that any interim and long-term approaches include small but environmentally significant water bodies, do not weaken the ELD or existing national legislation in other respects and cover ecological and morphological water damage.

**4: Exemptions from clean-up obligations under the “permit” and “state of the art” exceptions (Article 8(4):** The RSPB and BirdLife recommend the exclusion of these exceptions especially in relation to GMOs. Not only do these two exceptions derogate from the ‘polluter pays principle’ and the principle of strict liability, but they also reduce the incentive to operate safely and prevent environmental damage. Moreover, once occurred, damage is less likely to be remedied and they introduce added legal uncertainty, making it harder for businesses to assess the relevant risks. In addition, many of the activities listed in the ELD (in Annex III), which are subject to the two exceptions, are by their nature unsuitable for giving rise to the exceptions, as they involve very general permits or mere compliance procedures. This is especially relevant to GMOs.

**5: The definition of damage in relation to GMOs:** An EU law on GM liability has long been planned by Community institutions. The preamble 16 to Directive 2001/18 on the Deliberate Release of GMOs into the environment promises that the ELD will “also cover damage from GMOs”. Therefore, it should be expected that the ELD introduces an effective system in this context. However, if implemented as is, the ELD will not be able to adequately cover GM damage. This is mainly because of the “permit” and “state of the art” exceptions (see above), but also for a number of other reasons, e.g. the ELD contains no separate category of “GM damage”. There are certain limitations to this approach. The ELD covers lists of protected habitats and species, but not biodiversity in general. This is fine from a general point of view, but it is not ideal in relation to GMOs because of the type of damage involved. Moreover, existing EU and national GMO laws in this area take a much wider approach. In addition, the ELD only covers risks to human health in relation to land damage, but GM organisms could also cause environmental damage to land. Therefore, the “permit” and “state of the art exceptions” should not apply to GMOs, biodiversity in relation to GM damage needs to be defined in line with existing EU and national GMO legislation, which would make it wider (in relation to GMOs only) than the general biodiversity definition in the ELD. Finally, land damage unrelated to human health needs to be covered.

For more information please contact Dr. Claire Papazoglou, BirdLife International, Head of EU Policy ([claire.papazoglou@birdlifecco.net](mailto:claire.papazoglou@birdlifecco.net)) (tel. +32 2 2800830) or Sandy Luk, RSPB, EU Policy Assistant ([sandy.luk@rspb.org.uk](mailto:sandy.luk@rspb.org.uk)) (tel. 44 1767 680551)