



The Environmental Liability Directive – The ELD and water

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

The ELD makes “operators” of activities responsible for environmental damage they cause and obliges them to take measures to prevent environmental damage if there is an imminent threat of it occurring (Article 3(1), 5 and 6).

“Operators” are persons who operate or control (or who have the decisive economic power over the technical functioning) of a business, economic activity or undertaking (both profit and non-profit making) (Article 2(6) and (7)).

Operators are liable for water damage only if they carry out a dangerous activity subject to the Community instruments listed in Annex III of the ELD (e.g. IPPC, waste management, water discharge and abstraction, activities connected with dangerous goods and substances subject to Community rules, activities subject to Directives on GMs and more). Liability is strict, i.e. operators are liable irrespective of whether they are at fault (Article 3(1)(a)).

However, operators who carry out non-Annex III activities and who cause water damage that also involves biodiversity damage will be liable for the biodiversity damage caused, if they

were at fault (Article 3(1)(b)).

Water damage is defined as *“any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the Water Framework Directive 2000], of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies”* (Article 2(1)(b)). Diffuse pollution is not covered, unless a causal link can be proved (Article 4(5)).

A variety of defences/exceptions, such as *“force majeure”*, *“terrorism”* etc, which are usually used in civil liability, rather than administrative law regimes, are available to operators. In addition, Member States:

“may allow the operator not to bear the cost of remedial actions taken ... where he demonstrates that he was not at fault or negligent and the environmental damage was caused by (Article 8(4):

- (a) *an emission or event which was authorised under certain EU Directives”* (listed in Annex III) (the so-called *“compliance with permit”* or *“permit”* exception) (Article 8(4)(a);
- (b) *an emission or activity ... which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time ...”* (the so-called *“state-of-the-art”* exception)(Article 8(4)(b)).

The Directive only applies to damage caused after the date by which Member States have to implement the Directive (30 April 2007)(Article 17) 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. Remedial measures are identified by operators and approved by the competent authority (Article 7). There are additional guidelines on the identification and choice of remedial measures in Annex II.

Environmental NGOs (as well as individuals with a sufficient interest) have the right to *“submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive”* (Article 12(1), although Member States may decide not to give NGOs this right in cases of imminent threat of damage (Article 12(5)).

III. The main issues

Issue 1: The implementation timetable of the Water Framework Directive 2000 (the “WFD”) and Annex III activities under the ELD

The ELD deadline for implementation into national law is 30 April 2007 in relation to the entirety of its provisions. However, both the definition of water and of water damage and some of the activities listed in Annex III of the ELD, make reference to parts of the WFD, which will not become operational by the time the ELD implementing legislation enters into force.

If this problem is not addressed, then the implementing legislation will not be of any practical value in relation to water damage, as it will depend on concepts and activities, which do not yet exist.

In addition, only a very few activities directly linked to water damage are actually listed in Annex III of the ELD. However, companies can only be liable for water damage under the ELD, if they carry out an Annex III activity. The activities that are listed include activities subject to water discharge permits under the Dangerous Substances and the Groundwater Directives. They also include activities subject to water discharge permits and abstraction and impoundment licenses under the WFD. Moreover, it is not clear whether certain crucial Directives, such as the Sewage Sludge Treatment Directive and the Urban Waste Water Treatment Directive, are covered by Annex III.

As a result of the general timetabling issues and the problems with the content of Annex III, a number of crucial activities relating to water damage may not be caught by the ELD, both in the long-term and until the relevant WFD provisions become operational.

In addition, the ELD contains an additional discretion for Member States to exclude the spreading of sewage sludge on agricultural land from the scope of Annex III activities. It is difficult to see any environmental justification for this in that there is no obvious difference in environmental impact terms between the spreading of sewage sludge and other “dangerous” activities listed in Annex III.

Recommendation 1:

- (1) It is crucial that the ELD implementing legislation in any Member State provides a fair regime that is consistent with existing laws and that does not leave significant gaps in relation to water damage, either in time or in scope, particularly in relation to the implementation timetable of the WFD. This means that the activities caught must cover at the very least all discharges, abstraction and impoundment controlled under national legislation until the relevant replacing provisions of the WFD come into force; and to the extent that the relevant replacing regulations of the WFD do not cover all such discharges abstractions and impoundments these activities should continue to be caught;
- (2) Clarification, either in the relevant legislation or guidance documents, is required to make clear whether the activities carried out under the UWWTD and the Sewage Treatment Directive are covered by the implementing legislation
- (3) The discretion in the ELD to exempt the spreading of sewage sludge should not be exercised - the spreading of sewage sludge for agricultural purposes should not be an exempt activity.

Issue 2: Water damage

Water damage in the ELD is identified by means of adverse effects on different types of water “status” as defined in the WFD. Status in the WFD is measured with reference to “water bodies” in relation to which certain size restrictions apply. This means that many small water bodies, such as ponds, which may be of high environmental significance, would seem not to be covered by the definition of water damage in the ELD. This is a severe limitation to a law that aims to deal with liability for all environmental damage. It would be possible to deal with this problem by introducing a wider definition of “environmental damage” in the ELD implementing legislation.

In the UK, DEFRA has suggested using the concept of '*significant pollution of controlled waters*' (if this were defined so as to include effects on ecological systems)". However, this approach, if taken, would not comply adequately with the ELD, as certain types of non-pollution damage, such as morphological damage, would not be covered. This would mean that the ELD would not have been properly implemented.

Other possible approaches can be focused on other relevant national water legislation. For example, in the UK, the Water Act 2003 (the "Water Act") requires the protection of waters from "*serious damage*" in certain circumstances. This approach focuses on damage in general, and would deal with the problems encountered by simply measuring water damage in terms of "significant pollution of controlled waters" or in terms of effects on water bodies and the connected size restrictions imposed through the link to WFD status. Of course, it would be necessary to ensure that all status related damage was also covered. However, neither "*serious*" nor "*damage*" are defined yet.

Recommendation 2:

Linking the definition of water damage to WFD status is too restrictive, as smaller, but environmentally significant water bodies would be excluded from the application of the ELD. Similarly, linking the definition of water damage to the concept of "*significant pollution*" is too restrictive, as morphological damage would be excluded from the application of the ELD.

Possible solutions:

- define "*water damage*" as "*serious damage*" or similar concept (see for example s.27 of the Water Act 2003 in the UK), as long as this does not weaken ELD requirements in other ways;
- use the concept of "*significant pollution of controlled waters*" or other equivalent concept, but make sure that it applies not only to ecological, but also to morphological and physical damage.

In both cases, this may only be an interim solution, as a definition strictly linked to WFD status may be applied once the relevant water bodies have been established. However, it would still need to be ensured that smaller, but environmentally significant bodies of water were not excluded.

Issue 3: Territory covered

The territorial limit of the WFD is generally 1 nm. However, other countries (e.g. Scotland) may have different territorial limits (except as regards transitional waters going beyond that limit and/or chemical status, where the limit would be the width of the territorial waters – 12 nautical miles – see Article 2(1) WFD). In Scotland the implementing legislation (the Water Environment and Water Services Act 2003) extends coastal water bodies out to 3nm.

In relation to biodiversity damage, the ELD extends to the edge of the Continental Shelf, but extending the application of the WFD to encompass the Continental Shelf is not feasible or sensible. In any case, a future Marine Framework Directive is planned in this context. However, the law in relation to the territorial boundaries of biodiversity damage should remain (i.e. application across the Continental Shelf), subject to the ELD's rules on international maritime conventions.

Recommendation 3:

In the interest of consistency with the existing legislation that the concepts relating to water and biodiversity are based on, different territorial boundaries should apply to water and biodiversity damage under the ELD. Therefore it is acceptable that the ELD will extend to the edge of the continental shelf in relation to biodiversity damage and that water damage will cover coastal water bodies defined by the WFD and transposition legislation (except in relation to chemical status in relation to which the boundary is 12 nautical miles).

Issue 4: Remediation

As already discussed above there is a difference in when and how the ELD and national legislation apply to water damage. In the Member States, experience in relation to remedying water pollution already exists. Given the problems a strict link to the WFD provisions creates, and in the interests of consistency, it would make sense, where this is appropriate, to base the assessment of environmental damage and its restoration on existing experience under the national (in the UK for example, the Water Resources Act 1991 and, if applicable, the Contaminated Land Regime under the Environmental Protection Act 1990). Since the ELD's regulation of water damage goes wider than just pollution, e.g. in relation to morphological aspects, and national laws may simply address the issue of pollution of controlled waters, a wider approach will be necessary for water damage that is not covered by the existing pollution based legislation

Recommendation 4:

In the interests of consistency and fairness it would make sense to base the approach to remediation of water damage, as far as is possible, on the relevant national practical experience under pollution control provisions, whilst recognising that additional measures will need to be introduced to deal with non pollution based water damage which may not be covered by existing national legislation.

Issue 5: Baseline condition

Establishing baseline condition is a potentially complex question of fact. As the WFD introduces a monitoring system in relation to surface water status, groundwater status and protected areas, the relevant data to establish baseline condition should be relatively easy to access once the WFD has become fully operational and the monitoring requirements are being complied with. However, other available information, especially during the period before WFD data is accumulated, should also be used, e.g. in the UK, data relating to the "General Quality Assessment" ("GQA") of rivers carried out by the Environment Agency, SSSI monitoring data, drinking water intake monitoring etc.

Recommendation 5:

Any available data, including, but not restricted to WFD monitoring data, should be used to establish "baseline conditions".

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