

Environmental Liability Directive: A Short Overview

Subject matter

The purpose of the Environmental Liability Directive (“ELD”) is to establish a framework of environmental liability, based on the "polluter-pays" principle, to prevent and remedy environmental damage.

What is environmental liability?

The ELD aims at ensuring that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. Insofar as the ELD provides for the financial responsibility of an operator, it lays down a framework, based on the “polluter-pays” principle, which can be qualified as one of “environmental liability”, even though liability under the ELD has few in common with standard civil liability rules. For instance, the ELD does not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage occurring.

The ELD’s own specific approach is shown by the role given to competent authorities to be designated by Member States. These competent authorities will ensure the effective implementation and enforcement of the ELD; they will also safeguard the legitimate interests of the relevant operators and other interested parties. Competent authorities will, for instance, be in charge of specific tasks such as assessing the significance of the damage and determining which remedial measures should be taken (in co-operation with the liable operator).

Against that background, it is important to know how the ELD defines “operator” and “environmental damage”.

Definition of operator

Operator means any natural or legal, private or public person who operates or controls the damaging occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.

Definition of environmental damage

There are three categories of environmental damage under the ELD:

(a) “damage to protected species and natural habitats”, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43;

(b) “water damage”, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60, of the waters concerned;

(c) “land damage”, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

Liability regimes under the ELD

The ELD provides for two liability regimes:

Under the first liability regime, operators of certain activities deemed to be of actual or potential concern, listed in Annex III to the ELD, can be held liable in the event of damage to protected species and natural habitats, water damage and land damage. Among the activities concerned, one shall find large industrial installations; waste management operations; certain installations releasing polluting substances into air; installations discharging polluting substances into water; manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances and preparations; contained use of genetically modified micro-organisms and deliberate release into the environment, transport and placing on the market of genetically modified organisms.

The ELD does not require, as a prerequisite, that fault or negligence be established on the part of the operator for him to be held liable. There are, however, circumstances in which the operator may be relieved of his financial responsibility. For instance, the ELD does not apply to cases where environmental damage or an imminent threat of such damage is caused by an act of armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character. The same holds true, *inter alia*, in respect of damage caused by nuclear risks, national defence activities and incidents, such as oil pollution by sea-going ships, in respect of which liability or compensation falls within the scope of certain international conventions (listed in Annexes IV and V to the ELD).

In addition, Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;

(b) an emission or activity or any manner of using a product in the course of an 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 when the emission was released or the activity took place.

The second liability regime provided for by the ELD applies to damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

This Directive does not apply to nuclear risks; similarly, it does not apply to activities the main purpose of which is to serve national defence or international security nor to activities, the sole purpose of which is to protect from natural disasters.

Prevention and remedying of environmental damage

Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures and, in certain cases, inform the competent authority of all relevant aspects of the situation, as soon as possible.

Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services, and

(b) the necessary remedial measures, in accordance with the relevant provisions of the ELD (its Annex II in particular).

Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition. The ELD aims at ensuring that the environment be physically reinstated. This is achieved through the replacement of the damaged natural resources by identical or, where appropriate, equivalent or similar natural components, or, as appropriate, by the acquisition/creation of new natural components. If measures taken on the affected site do not allow achieving the return to the baseline condition, complementary measures may be taken elsewhere (for instance, an adjacent site). In any case, the scale of the remedial measures should be determined in such a manner as to compensate interim losses, that is, losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the environment is restored. Any significant risk of human health being adversely affected must also be removed.

As far as remedying of land damage is concerned, the necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health.

How is the financial responsibility of the operator enforced?

The operator liable under the ELD must bear the cost of the necessary preventive or remedial measures. He will do so either directly or indirectly:

- In the first case, the operator pays for the measures he takes himself or he entrusts a specialised undertaking to take them on his behalf.
- In the second situation, where a competent authority has acted, itself or through a specialised undertaking, in the place of the liable operator, that authority shall recover the costs it has incurred from the operator.

The competent authority may initiate cost recovery proceedings against the operator within five years from the date on which the measures have been completed or the liable operator has been identified, whichever is the later.

In case of multiple party causation, the ELD leaves to the Member States to decide how the costs will be allocated - on a proportional basis or jointly and severally - among the various operators concerned.

Request for actions by interested third parties, including NGOs, and judicial review

Natural or legal persons affected or likely to be affected by environmental damage, or having a sufficient interest, or whose rights have been impaired, may request the competent authority to take action under the ELD.

Those persons shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.

Financial security

The ELD requires Member States to take measures to encourage the development of financial security instruments and markets with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

The Commission reported on 12 October 2010 on the effectiveness of the Directive in terms of remediation of environmental damage and on the availability and affordability of financial security products. The report found due to the limited experience with the Directive it was premature to draw reliable conclusions as to whether a system of harmonised mandatory financial security should be established at European level. Among other issues (harmonisation of some options such as the extension of the scope for biodiversity damage or the issue of the optional defences), the report concluded that the Commission will look into this again in the next Commission report due by 2014.

Transboundary damage

Where environmental damage affects or is likely to affect several Member States, those Member States shall cooperate, including through the appropriate exchange of information, with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage.

Temporal application

The ELD only applies to damage occurring after 30 April 2007; it has no retrospective effect.

Relations with national law

Member States may maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage.

Relations with international law

The ELD does not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in its Annex IV, including any future amendments thereof, which is in force in the Member State concerned.

Among IV lists among others the following conventions:

(a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;

(b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

(c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;

(d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

This ELD applies without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976.

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