

Liability for ecological damage: the added value of the Environmental Liability Directive for nature conservation

Valerie Fogleman

Consultant, Stevens & Bolton LLP

Professor of Law, Cardiff University

Topics

- Overview of Directive (2004/35/CE) on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive or ELD)
- ELD and nature conservation
- Applying the ELD to biodiversity damage
- Conclusion

Overview of ELD

■ Introduced liability for

- preventing and remediating an imminent threat of, or actual, environmental damage (ED) to natural resources
 - species and natural habitats protected by Natural Habitats and Birds Directives (biodiversity)
 - nationally protected biodiversity at the option of Member States
 - waters subject to the Water Framework Directive
 - land

Overview of ELD

- **Strict liability for an imminent threat of, or actual, ED to all natural resources caused by Annex III activities**
 - Annex III includes IPPC / IED, extractive minerals, waste management, transport of dangerous substances, genetically modified organisms
- **Fault based liability for an imminent threat of, or actual, ED to biodiversity by non-Annex III activities**
- **Does not impose liability for failure to maintain favourable conservation status**
 - must be environmental damage to trigger liability

Overview of ELD

- Prospective only from 30 April 2007
- Various exceptions including
 - act of war or terrorism
 - natural phenomenon of exceptional, inevitable and irresistible character
 - nuclear conventions
 - marine conventions
 - diffuse pollution when not possible to establish a causal link between ED and activities of individual operators

Overview of ELD

■ Mandatory defences

- Operator not at fault or negligent and imminent threat of, or actual, ED caused by
 - third party's act that occurred despite operator's appropriate safety measures
 - action mandated by governmental authority not connected to emission or incident due to operator's own activities

Overview of ELD

- **Optional defences to remedial actions**
 - Operator not at fault or negligent and imminent threat of, or actual, ED
 - caused by an emission or event expressly authorised by and fully in accordance with a specified permit
 - emission or event not considered likely to cause ED according to state of scientific and technical knowledge at that time

Overview of ELD

- **Threshold for biodiversity damage**
 - significant adverse effect on reaching or maintaining the favourable conservation status of protected species and natural habitats
 - significance of effects is assessed with reference to the species' or habitat's baseline condition
 - Annex I sets out criteria to be considered

Overview of ELD

- ED does not include previously identified adverse effects resulting from acts expressly authorised pursuant to articles 6(3), 6(4) and 16 of Habitats Directive; article 9 of Birds Directive; or equivalent provisions of national law

Overview of ELD

Remediation – biodiversity and water damage

- *Primary remediation*: remediation and restoration to “baseline” condition
- *Complementary remediation*: if damaged site cannot be fully restored, restoration of nearby site in addition to partial remediation of damaged site
- *Compensatory remediation*: losses between time ED occurred and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

Overview of ELD

- No liability for bodily injury, property damage or economic loss
- 30-year limitation period
- Member States may impose more stringent measures
- Non-governmental organisations and other qualified persons can provide comments on, and seek review of, competent authority's action / inaction
- No mandatory financial security but Member States should encourage the development of financial security instruments and markets

ELD and nature conservation

- Key reason for adoption of ELD was nature conservation
 - most Member States already had legislation imposing liability to remediate water and land pollution but national legislation to remediate and restore biodiversity damage was rare

ELD and nature conservation

■ 2001: European Commission

- referred to what would become the ELD as a liability instrument to “cover damage to biodiversity”, considering it “an important additional step forward”
- proposed limiting scope of the liability system “in a first instance to natural resources that are already protected by ... the Birds and Habitats directives ...” because liability for preventing and remedying damage to natural resources was basically new to the EU

ELD and nature conservation

- 14 Member States have extended liability to nationally protected biodiversity (Austria, Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden and UK (not Scotland))
- Large variation between Member States in extent of land area covered by Natura 2000 sites

35.52% Slovenia

27.24% Spain

15.43% Germany

13.82% Netherlands

12.74% Belgium

8.55% UK

Applying the ELD to biodiversity damage

- Very few ELD cases in Member States involving biodiversity damage
- Key reasons for lack of cases
 - assessing the applicable threshold
 - what is the natural range?
 - EU? Regional? Local?
 - favourable conservation status may differ according to the range
 - transposing legislation in many Member States is unclear

Applying the ELD to biodiversity damage

- Key reasons for lack of cases (continued)
 - high thresholds for liability to be triggered
 - competent authorities in many Member States continue to apply pre-existing national legislation that does not include complementary and compensatory liability for biodiversity (or water) damage instead of legislation transposing the ELD
 - general lack of awareness of ELD among industry and the public

Applying the ELD to biodiversity damage

- Actual and potential difficulties in application
 - identifying the baseline condition
 - more difficult for areas outside Natura 2000 sites
 - many protected habitats and species do not have favourable conservation status

Conclusion

- ELD and nature conservation
 - ELD probably achieved all that was feasible when it was adopted due to controversial nature of many provisions
 - good start for nature conservation
 - BUT only the beginning
 - more effective implementation by Member States is needed if loss of biodiversity in the EU is to be halted
 - any revisions to the ELD are likely to be controversial