



## The Environmental Liability Directive – The ELD and biodiversity

### 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 biodiversity 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 as regards biodiversity

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)). This may also encompass persons subject to management agreements under the Wildlife & Countryside Act 1981.

Environmental damage covers water, land and biodiversity damage (Article 2(1)) and operators can be liable for biodiversity damage:

- 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). In this case, liability is strict, i.e. subject to the "permit" and "state of the art" exceptions below

- operators are liable irrespective of whether they are at fault (Article 3(1)(a)); or
- if they carry out any other activity not covered in Annex III. In this case liability is only established if the operator was at fault or negligent (Article 3(1)(b)).

Biodiversity damage is defined in terms of “*significant adverse effects on reaching or maintaining the favourable conservation status*” (Article 2(1)(a)) (see Main Issues below). The significance of effects is to be assessed with reference to the “*baseline condition*” taking account of the criteria set out in Annex I.

The definition of biodiversity is fundamentally a list of certain protected habitats and species:

- all natural habitat types of Community interest whose conservation requires the designation of SACs listed in Annex I, i.e. SACs and habitats which ought to be SACs;
- all species of Community interest whose conservation requires the designation of SACs under Annex II of the Habitats Directive and their habitats, i.e. the relevant species on and outside SACs and the habitat they live in;
- all species of Community interest in need of strict protection listed under Annex IV of the Habitats Directive and their breeding sites or resting places;
- migratory birds and their habitats;
- the bird species listed in Annex I of the Wild Birds Directive (which are to be the subject of special conservation measures) and their habitats (i.e. the relevant species on and outside SPAs and the habitats they live in).

In addition, Member States can also include nationally protected habitats or species, which are designated for equivalent purposes. In the UK, for example, these could include SSSIs and BAP priority species and habitats and also Ramsar sites.

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):

- 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);
- 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

Please note: For ease of reference, this document refers to “biodiversity damage” instead of damage to “protected species and natural habitats”, even though “biodiversity damage” is not a defined term under the ELD. In addition, it should always be borne in mind that when this document or the ELD refer to “protected” biodiversity, it refers to the specific and restricted definition of “protected” biodiversity under the ELD (see above), not to what may otherwise be considered protected biodiversity. Thus, under the Wild Birds Directive and national legislation such as the the Wildlife & Countryside Act 1981 in the UK all wild birds are protected. Under the ELD this is not the case, so “protected” biodiversity in relation to the ELD will not encompass wild birds, for example.

The crucial definitions in relation to biodiversity damage are set out in the box below for ease of reference.

The crucial definitions

**Biodiversity damage:** “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 significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I.

*Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation<sup>1</sup>.”*

**Damage:** “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly<sup>2</sup>”

**Natural resource:** “protected species and natural habitats, water and land<sup>3</sup>”

**Natural resource service:** “the functions performed by a natural resource for the benefit of another natural resource or the public<sup>4</sup>”

**Protected species and natural habitats:**

<sup>1</sup> Article 2(1)(a)

<sup>2</sup> Article 2(2)

<sup>3</sup> Article 2(12)

<sup>4</sup> Article 2(13)

- *the species mentioned in Article 4(2) of the Wild Birds Directive;*
- *the species listed in Annex I of the Wild Birds Directive;*
- *the species listed in Annexes II and IV of the Habitats Directive;*
- *the habitats of the species mentioned in Article 4(2) of the Wild Birds Directive;*
- *the habitats of the species listed in Annex I of the Wild Birds Directive;*
- *the habitats of the species listed in Annex II of the Habitats Directive;*
- *the natural habitats listed in Annex I of the Habitats Directive;*
- *breeding sites or resting places of the species listed in Annex IV of the Habitats Directive;*
- *where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives*<sup>5</sup>.

Baseline condition: *“the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available”*<sup>6</sup>.

Annex I criteria: Annex I explains that the *“significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration”*. Further examples listed in Annex I (see also *Guide to Central Provision*).

#### Issue 1: The inclusion of nationally designated biodiversity (Article 2(3)(c))

The ELD provides that equivalent nationally protected biodiversity can also be brought within the application of the ELD provisions. In the UK, there are two obvious potential candidates for inclusion: SSSIs and BAP priority habitats and species. In other EU Member States it will be necessary to examine all nationally designated biodiversity (both species and habitats) to identify the potential candidates. In general, there should be very strong arguments why nationally designated biodiversity should be included in the ELD implementing legislation, including potential benefits to wildlife conservation and arguments of consistency and certainty. Potential difficulties with this approach could arise in relation to the different conservation parameters and standards that exist in relation to nationally protected biodiversity and the European protected habitats and species covered by the ELD. However, approaching damage by looking at underlying characteristics, such as effects on maintenance and long-term viability and, in relation to designated sites, at conservation objectives, may remove these difficulties. Certainly in the UK, this approach appears worth pursuing.

#### Recommendations:

It is crucial for wildlife conservation that all relevant nationally designated biodiversity should be included in the ambit of the implementing legislation.

Ramsar sites and future marine protected sites should also included under the ELD regime.

<sup>5</sup> Article 2(3)

<sup>6</sup> Article 2(14)

## Issue 2: What constitutes biodiversity damage? (Article 2(1)(a))

The definition of biodiversity damage in the ELD is based heavily on concepts used in the Habitats Directive, but differs in its exact wording and application. Thus the ELD's definition is dependent on impacts on favourable conservation status ("FCS"), but it is difficult to find a workable way of interpreting this definition, especially as it is not site-based, but depends on whether a habitat or species is listed in the relevant provisions and Annexes of the Habitats and Wild Birds Directives. Questions also arise in relation to the level at which FCS should be assessed, i.e. site, local, regional, national or EU. In addition, Member States have a right to introduce equivalent national protected interests into the implementing legislation. " In order to achieve a workable and effective law, all these strands need to be taken into account in the search for a viable interpretation of the ELD's definition of biodiversity damage. Therefore, it is crucially important that the biodiversity definition in the ELD is interpreted in a way that properly encompasses all biodiversity protected by the ELD (particularly relevant in relation to protected species under the Birds Directive where designated sites are just one of the special conservation measures required). It is also necessary to establish a practical way in which to be able to apply the ELD's test of having "significant adverse effects on reaching or maintaining favourable conservation status. Looking at effects that undermine the maintenance and long-term viability of the relevant protected biodiversity is an approach that can provide such a solution.

In addition, the ELD imposes a separate definition of "damage", based on "measurable adverse change". It is important that a flexible and practical approach be taken to this definition, as a rigid interpretation could make it very difficult to establish damage in practice.

### Recommendations:

1. Undermining the maintenance and long-term viability of the relevant protected biodiversity amounts to biodiversity damage under the ELD, irrespective of whether the protected biodiversity, be it habitats or species, is on or outside a designated site.
2. In relation to designated sites, this test will be determined by the site's conservation objectives. Therefore, any undermining of the site's conservation objectives amounts to biodiversity damage under the ELD.
3. This approach is probably applicable to nationally, as well as internationally, protected biodiversity, but this needs to be examined separately in each Member State individually.
4. The level at which impacts should be assessed in relation to site-based biodiversity should be at site level.
5. In relation to protected biodiversity outside designated sites, effects need to be measured at an appropriate level (site, local, regional, national or Community) for the maintenance and long-term viability of the affected biodiversity, taking account of its natural range.
6. The definition of "damage in the ELD needs to be applied in a practical context and on a case-by-case basis, using a number of key factors where appropriate.

### Issue 3: The meaning of “baseline condition” (Article 2(14))

In cases where biodiversity damage has taken place, the significance of damage is to be assessed by reference to the damaged biodiversity’s “baseline condition” and restoration to “baseline condition” must take place, if possible (Article 2(1)(a), Annex II).

Ascertaining the “baseline condition” of damaged biodiversity will pose a number of practical problems in relation to establishing the relevant data, especially in relation to protected biodiversity outside designated sites. Although existing legislation at EU and national level uses concepts similar to that of “baseline condition” in relation to remediation standards, many of the existing standards do not appear to be particularly helpful in relation to the issues raised by the ELD definition of “baseline condition”.

However, relevant data and information does exist, in the UK, for example in the form of JNCC Common Standards Monitoring Data, Countryside Surveys, UK BAP reports, Natura 2000 monitoring information, Breeding Bird Atlas and Wintering Bird Atlas. Similar data needs to be identified in all EU Member States. The crucial issue will be to introduce a practical and flexible system in relation to obtaining and using the relevant information.

#### Recommendations:

1. The approach to ascertaining baseline conditions should be pre-eminently practical and flexible and based on the use of the best available information and aimed at providing the best practical remedial solution.
2. All available sources of information should be open to use. Guidance will be necessary in this regard.

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