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The Environmental Liability Directive (ELD)

Establishing damage and damages

Edward Brans

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Objective ELD:

To **prevent** and **remedy** environmental damage by establishing a framework on environmental liability based on the polluter pays principle.

- Preventive action (art. 5 and 8)
- Remedial action (art. 6, 7, 8 and Annex II)
 - ELD linked to other Directives (scope, definitions)



Only public natural resources covered:

- Natural habitats and wild flora and fauna covered by **Wild birds and Habitats Directives**
- Waters covers by the **Water framework Directive**
- Natural resources not covered by EC law, but protected by MS law (where a MS so determines)
- Land ??
- **Owned as well as unowned natural resources covered**



Damage threshold I

Damage to protected habitats and species:

Only covered by the ELD if the damage is such that it has “significant adverse effects on reaching or maintaining the favourable conservation status” of the habitats and species concerned (Habitats Directive)

Water damage:

Only if the damage is of such a significance that it “adversely affects the ecological [...] status and/or ecological potential” of the waters covered (WFD)



Damage threshold II

Land damage:

Only if the land contamination creates a “significant risk of human health being adversely affected”.

- No reference to risks for natural resources.

Scope ELD:

Under the ELD, damage to public natural resources only recoverable if it has been proved that the damage is beyond these thresholds (art. 2(1) and 3).



Baseline condition

Significance is to be assessed with reference to the baseline condition:

“the condition at the time of the damage of the natural resources and services that would have existed had the damage not occurred, estimated on the basis of the best information available”.

Natural fluctuations and or other (natural) causes to be taken into account? Yes, it is not a penal law regime.



How to determine the baseline condition?

Wild birds and Habitats Directives and WFD:

- Ms are required under these Directives to collect data on the conservation and biological status of certain natural habitats and species and on the quality of surface- and groundwaters.

Framework Directive for Protection of Soil (COM(2006) 232):

- MS have to identify risk areas of organic matter decline and contaminated sites + soil status reports.

- focus on risks to human health but concentration levels of dangerous substances present are to be identified.

→ data will become available on a natural resources level.



Objective remediation I

Objective ELD: restoration of the environment to its baseline condition (Annex II).

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

Services: functions performed by a natural resource for the benefit of another natural resource or the public



Objective remediation II

Under Wild Birds and Habitats Directives and WFD no requirement to collect data on human use services.

No or very limited data available on the services the natural resources covered under the ELD provide to humans

Relevance: unlimited liability. Remediation measures to be taken determine extent liability.



Effect of the ELD on other Directives. Art. 6(4) of the Habitats Directive

If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must [...] be carried out [...], the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

- The term "compensatory measures" not defined in the Directive.



Habitats Directive (Art. 6(4))

Various EC documents provide some guidance:

The compensatory measures proposed should:

- address in comparable proportions, the habitats and species negatively affected;
- concern the same biogeographical region in the same MS

The measures can consist of:

- recreating a habitat on a new or enlarged site
- improving a habitat part of another Natura 2000 site, proportional to the loss due to the project

Extra compensation should be considered in case of interim losses



Amended EIA Directive 97/11/EC (Art. 5(3)):

The information to be provided by the developer [..] shall include at least:

- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

SEA Directive 2001/40/EC: measures to fully as possible offset any significant adverse effects on the environment of implementing a plan or programme.



Annex II ELD. Guidance for other EC nature conservation Directives

- Case law Wild Birds and Habitats Directive relevant to ELD and visa versa (see e.g. ECJ 7 Sept. 2004, C-127/02)
 - REMEDE relevant to other EC Directives
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- How to determine baseline condition?
 - How to determine whether the damage is beyond the threshold
 - How to determine the scale of the remediation or compensatory measures to be taken and the reasonableness of such measures
 - How to compensate for interim losses?