

The Concept of Damage (Soil, Water, Biodiversity)

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Topics

- **Environmental Liability Directive (2004/35/EC) (ELD)**
 - Focus and objectives
 - Types of damage and liability
 - Land / water / biodiversity damage
- **Environmental Crimes Directive (2008/99/EC) (ECD)**
 - Focus and objectives
 - Criminal offences
 - Soil / water / biodiversity damage
- **ELD and ECD: comparison of scope of damage**
- **Conclusions**

ELD: focus and objectives

■ Focus

- Establishes liability for preventing and remedying “environmental damage” caused by an occupational activity carried out by an “operator”
 - Liability is subject to exceptions and defences
 - Does not include any sanctions for causing an imminent threat of, or actual, environmental damage other than a duty to prevent or remedy damage
 - Member States have imposed a wide range of sanctions from administrative / civil sanctions to criminal sanctions for breaches of legislation transposing the ELD

ELD: focus and objectives

■ Objective

- Induce operators to adopt measures and develop practices to minimise risk of environmental damage
- So as to lead to a reduction in
 - Operators' exposure to financial liabilities for environmental damage by minimising risk of such damage
 - Number of future contaminated sites
 - Rate of loss of biodiversity in European Union (EU)

ELD: types of environmental damage

- Three “natural resources”
 - Land
 - Water
 - Protected species and natural habitats
- Three types of “environmental damage”
 - Land damage
 - Water damage
 - Generally referred to as biodiversity damage
- NB: ELD uses term “protected species and natural habitats”, not “biodiversity’ damage” due to limited scope of biodiversity covered by it

ELD: liability

■ Trigger for liability

- Imminent threat of, or actual, environmental damage
- Damage must be “significant”
 - Word “significant” / “significantly” is in definition of each type of environmental damage
- Operator’s activity need not be conducted unlawfully
 - Damage caused by Annex III activity
 - **Strict liability for land, water and biodiversity damage**
 - Damage caused by non-Annex III activity
 - **Fault-based liability for biodiversity damage only**

ELD: land damage

- Land damage

- Defined as

- “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”

ELD: land damage

- Land damage (continued)
 - “Land” not defined
 - May include subsoil and bedrock as well as soil but unclear
 - Definition includes word “under” but need for human presence
 - Compare withdrawn Proposal for Soil Framework Directive
 - Application to “soil forming the top layer of the earth’s crust situated between the bedrock and the surface, excluding groundwater as defined in [Water Framework Directive 2006/60/EC (WFD), ie, “all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil”]”

ELD: land damage

- Land damage (continued)
 - Liability does not apply to land with no human presence
 - Potential severe limitations on application for
 - Damage to wetlands
 - Damage to sediment in surface and coastal waters
 - Genetically modified organisms and micro-organisms
 - Definition of land damage contains words “organisms” and “micro-organisms” and Annex III includes direct release Directive (2001/18/EC) and contained use Directive (2009/41/EC) but potential lack of human presence if damage to wild fauna and flora

ELD: water damage

■ Water damage

- Defined by reference to WFD and Directive 2008/56/EC (Marine Strategy Framework Directive (MSFD))
 - “any damage that significantly adversely affects:
 - (i) the ecological, chemical or quantitative status or the ecological potential, as defined in [WFD], of the waters concerned, with the exception of adverse effects where Article 4(7) of [WFD] applies; or
 - (ii) the environmental status of the marine waters concerned, as defined in [MSFD], in so far as particular aspects of the environmental status of the marine environment are not already addressed through [WFD]”
- (ii) will enter into effect on 19 July 2015

ELD: water damage

■ Water damage (continued)

- Does definition of “waters concerned” in (i) refer to
 - “Waters” under WFD?
 - OR
 - “Water bodies” under WFD?
- Waters under WFD are surface, ground, transitional and coastal waters plus territorial waters (for chemical status)
- But WFD establishes management plans to achieve good status in the EU by 2015 only for surface water bodies and groundwater bodies not for all waters

ELD: water damage

- Water damage (continued)
 - Interpretation by Member States as “water bodies” means transposing legislation is less likely to be triggered due to
 - Non-application to unclassified waters
 - Large size of some surface and groundwater bodies
 - Requirement in some Member State transposing legislation for status of water bodies to be lowered for damage to occur, which excludes damage to water bodies with worst category status

ELD: biodiversity damage

■ Biodiversity damage

- Defined by reference to Birds Directive (2009/147/EC) and Habitats Directive (consolidated version 1/1/2007)
 - “Damage to protected species and natural habitats” 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”
- Annex I sets out examples of data to measure significant adverse changes to baseline condition of natural resource

ELD: biodiversity damage

- Biodiversity damage (continued)
 - Definition also includes, at option of Member States, species and natural habitats protected under equivalent national legislation
 - Excludes “previously identified adverse effects” specifically permitted under articles 6(3), 6(4) and 16 of the Habitats Directive and article 9 of the Birds Directive
 - Scope is not commensurate with Birds and Habitats Directives
 - Does not apply to damage to all species of naturally occurring wild birds in the EU

ELD: biodiversity damage

- Biodiversity damage (continued)
 - “conservation status” of a protected species or a natural habitat is determined by assessing factors that may affect its long-term survival within
 - “the European territory of the Member States to which the Treaty applies or
 - the territory of a Member State or
 - the natural range of [the species or habitat]”

ELD: biodiversity damage

■ Biodiversity damage (continued)

- Does environmental damage occur if a species is destroyed in a Member State but the destruction does not affect its favourable conservation status in the entire EU or its “natural range”?
- Or does environmental damage occur if the favourable conservation status is affected at any one of the three areas?
- Also, neither the ELD nor the Habitats Directive indicate the scale of “natural range”, which can change rapidly

ELD: biodiversity damage

- Biodiversity damage (continued)
 - Transposing legislation in many Member States is also unclear as to threshold for biodiversity damage
 - Plus, difficult interface between grant of funding for management agreements under Habitats Directive and liability for damaging species or natural habitat under ELD

ECD: focus and objectives

■ Focus

- “To protect the environment more effectively” by providing “more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to
 - the air, including the stratosphere, to
 - soil,
 - water,
 - animals or plants, including to
 - the conservation of species”
- Liability not limited to damage caused by an operator

ECD: focus and objectives

- Objective

- To strengthen “availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”

ECD: criminal offences

- Categories of criminal offences

- “Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence”
 - Nine categories of conduct

ECD: criminal offences

■ Categories of criminal offences (continued)

- Four categories contain term “causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants”
 - Discharges and emissions of quantity of materials or ionising radiation into air, water or soil
 - Waste collection, transport, recovery and disposal, including management and supervision
 - Operation of plants involving dangerous activities and substances
 - Production, processing, handling, use, holding, storage, transport, import, export and disposal of nuclear materials or other radioactive substances

ECD: criminal offences

- Categories of criminal offences (continued)
 - Two categories require conduct to cause more than “a negligible quantity of such specimen and [to have more than] a negligible impact on the conservation of the species”
 - Killing, destruction, possession or taking of specimens of “protected wild fauna and flora species”
 - Defined by reference to Annex IV to Habitats Directive and Annex I to Birds Directive

ECD: criminal offences

- Categories of criminal offences (continued)
 - Trade in specimens of “protected wild fauna or flora species”
 - Defined by reference to Annex A or B of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (Basic Regulation)

ECD: criminal offences

- Categories of criminal offences (continued)
 - Category for
 - “Any conduct which causes the significant deterioration of a habitat within a [special protection area under the Birds Directive or a special conservation area under the Habitats Directive (Natura 2000 site)]”
 - Other categories
 - Shipments of waste
 - Production, importation, exportation, placing on the market or use of ozone-depleting substances

ECD: soil damage

- “Soil” damage
 - Not defined
 - Reference to various Directives, especially those protecting soil from agricultural practices and disposal of waste

ECD: soil damage

- “Soil” damage (continued)
 - Does not require harm to human health
 - Separate criterion for “death or serious injury to any person”
 - Damage to soil must be “substantial”
 - Explanatory memorandum to Commission’s proposal states that each Member State should interpret “substantial” in view of its traditions and legal system
 - Query: does ECD apply if
 - Disposed waste damages sub-soil or bedrock?
 - Discharge contaminates sediment in river or lake bed?

ECD: water damage

- “Water” damage
 - Not defined
 - “Substantial damage” to quality of water
 - References to various Directives protecting quality of surface and ground water from agricultural practices, discharges of specified substances into waters, etc; includes WFD
 - Explanatory memorandum to Commission’s proposal states that each Member State should interpret “substantial” in view of its traditions and legal system

ECD: water damage

- “Water” damage (continued)
 - See also Directive 2009/123/EC on ship-source pollution, as amended by Directive 2005/35/EC
 - “Illicit ship-source discharges of polluting substances should be regarded as a criminal offence as long as they have been committed with intent, recklessly or with serious negligence and result in deterioration in the quality of water”

ECD: water damage

- “Water” damage (continued)
 - Directive on ship-source pollution refers to discharges of polluting substances in
 - Internal waters, including ports, provided Marpol regime applies
 - Territorial sea
 - Straits used for international navigation, subject to jurisdiction of a Member State
 - Exclusive economic zone or equivalent zone
 - High seas

ECD: biodiversity damage

■ “Biodiversity” damage

- “Substantial damage” caused by specified conduct to “animals or plants”
- Explanatory memorandum to Commission’s proposal states that each Member State should interpret “substantial” in view of its traditions and legal system
- Killing, destruction, possession, taking, and trade in “protected wild fauna or flora species”
- Significant deterioration of a habitat within a Natura 2000 site

ELD and ECD: comparison

- Application of ELD and ECD in Member State national law
 - ELD has a significance / severity threshold
 - Assumes existence of national liability systems to prevent and remedy environmental damage below threshold?
 - Land damage: liability exists in most Member States
 - Water damage: liability exists in most Member States
 - Biodiversity damage
 - Virtually all existing legislation imposes liability only when there has been an unlawful act, and is limited to primary liability except for complementary liability in Germany

ELD and ECD: comparison

- Application of ELD and ECD in Member State national law (continued)
 - ECD complements / supplements administrative / civil sanction regimes for environmental damage
 - Administrative / civil sanction regimes exist for
 - Land (soil) damage (generally waste regimes)
 - Water damage
 - But substantially less for biodiversity damage

ELD and ECD: comparison

- Does term “significant” in respect of environmental damage in ELD equate to “substantial” damage in ECD?
 - Probably not; both terms refer to result of an activity or conduct but
 - “Significant” in definition of land damage in ELD refers to human health; ECD uses term “death or serious injury” not “substantial” in respect of human health
 - ELD includes criteria to determine whether biodiversity damage is significant; no criteria in ECD but, instead, references to specific environmental legislation

ELD and ECD: comparison

- Differences: scope of land (soil) damage
 - ELD and ECD: term “land” in ELD does not equate with term “soil” in ECD
 - ELD: will rarely apply to agricultural land due to requirement for negligence
 - ECD: specifically applies to agricultural land
 - Legislation in Annex A includes legislation on plant protection products (now Regulation (EC) No 1107/2009)), use of sewage sludge in agriculture (Council Directive 86/278/EEC) and nitrates Directive (Council Directive 91/676/EEC)

ELD and ECD: comparison

- Differences: scope of land (soil) damage
 - ELD
 - Risk to human health
 - ECD
 - Substantial damage to quality of soil itself
 - ELD and ECD: may not apply to wetlands and sediments
 - Potential for no human presence under ELD means that there may not be “land damage”
 - Definition of “soil” in ECD means that there may not be “soil”

ELD and ECD: comparison

- Differences: scope of water damage
 - ELD
 - Severe limitations on liability for water damage in some Member States due to requirement for damage to a “water body” not “waters”
 - ECD
 - Wider application to waters than ELD

ELD and ECD: comparison

- Differences: scope of biodiversity damage
 - ELD
 - Does not include “animals” and “plants”
 - Limited to species and habitats protected under Birds and Habitats Directive and, at option of Member States, equivalent national legislation
 - ECD
 - Includes animals and plants as well as species and habitats protected under the Birds and Habitats Directives
 - Provides more protection in Natura 2000 sites than outside them due to reference to any conduct causing significant deterioration of them

Conclusions

- ELD and ECD have been referred to by commentators as
 - Sister Directives
 - Complementing each other
 - BUT
 - More differences than similarities exist between their scope and application
 - “Land” in ELD differs from “soil” in ECD
 - “Waters” in ELD differs from “waters” in ECD
 - “Biodiversity” in ELD differs from “biodiversity” in ECD